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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

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By A. C. FREEMAN.

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(15)

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

HARE v. SHAW.

[84 Ark. 32, 104 S. W. 931.]

GUARDIAN AND WARD—Collateral Attack upon Guardianship.—In an action by the guardian of a person of unsound mind in the name and for the benefit of his ward, such ward cannot by next friend appear and challenge the appointment of the guardian, when such appointment and the letters of guardianship are prima facie regular. (p. 19.)

JURISDICTION.—The Probate Courts of Arkansas are superior courts with limited jurisdiction, and judgments rendered in the exercise of such jurisdiction cannot be called into question collaterally. (p. 19.)

JURISDICTION Presumed in the Appointment of a Guardian. Where the record of the court is silent upon the subject, it must be presumed, in support of the appointment of the guardian of a person of unsound mind, that the court inquired into the condition of the alleged imbecile and found him to be of unsound mind, and took all necessary steps to acquire jurisdiction of his person. (p. 20.)

APPEAL AND ERROR—New Trial, Motion for, When not Necessary.—A motion for a new trial is not necessary in a case where an action is commenced by a guardian and dismissed because of his want of authority to bring it, if the evidence upon which the dismissal rested was brought up by a bill of exceptions. (p. 20.)

Winchester & Martin, for the appellant.

Ira D. Oglesby, for the appellee.

²² McCULLOCH, J. A. A. McDonald, as guardian of the person and estate of Ella Hare, a person of unsound mind, instituted in the circuit court of Sebastian county on behalf of his said ward an action against Tillman Shaw, to recover possession of certain tracts or lots of real estate situated in the city of Fort Smith alleged to be the property of said ward and wrongfully in the possession of said defendant. He also instituted five similar actions against

certain other persons to recover from them other tr or lots of real estate alleged to be the property of Ella Hare.

A short time before the commencement of these ac William L. Euper, as next friend of said Ella Hare, a ing that she was a person of unsound mind, instituted arate action against Shaw and the other defendants t cover the same real estate.

Said Euper, as next friend, filed a motion to dismiss action and also filed similar motions in the other action stituted ³³ by said guardian, on the ground that said g ian had not been legally appointed as such, and he authority to maintain the action on behalf of said Hare. The alleged ground of attack upon the ap ment of McDonald by the probate court is that the made the appointment and issued the letters of guardia without first having caused Ella Hare to be brought l the court, and without having first adjudged her to unsound mind. McDonald, as guardian, thereupon t motion in each of the actions instituted by Euper a friend to dismiss them on the ground that he (McD had been duly appointed by the probate court of Sel county guardian of said Ella Hare, and that the i had been improperly brought by the next friend. T torneys representing McDonald in the actions institu him, and the attorney of Euper in the actions wh had instituted, filed a written stipulation to the effe the decision upon the motion in this case should the disposition of the other cases.

On the hearing of the motion the defendant Shaw in the motion to dismiss the case, and the court su the motion and dismissed the action on the grou McDonald had not been legally appointed guardian Hare, and that another action against the defend the same land had been instituted for Ella Hare by as next friend.

McDonald thereupon prayed an appeal to this co his ward, which was granted.

³⁴ The questions presented are whether, in ar instituted by the guardian of a person of unsour in the name and for the benefit of his ward, suc can appear by next friend and challenge the legalit appointment as guardian and letters of guardianshi

they are prima facie regular; and, next, whether the guardian's appointment and letters in this case are legally sufficient to withstand a collateral attack upon them.

The first question can be readily answered in the negative. Probate courts are, under the constitution and laws of this ²⁵ state, superior courts within the limited jurisdiction assigned to them, and judgments rendered in the exercise of such jurisdiction cannot be called in question collaterally: *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 214; *Montgomery v. Johnson*, 31 Ark. 74; *Adams v. Thomas*, 44 Ark. 267; *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183, 12 S. W. 703; *Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 464; *Blevins v. Case*, 66 Ark. 416, 51 S. W. 65; *Jackson v. Gorman*, 70 Ark. 88, 66 S. W. 346.

Under the constitution, exclusive jurisdiction is vested in the courts of probate in "matters relative to the probate of wills, the estate of deceased person, executors, administrators, guardians and persons of unsound mind and their estates": Const. 1874, art. 7, sec. 34. The records of the probate court relative to appointment of a guardian of the said Ella Hare, introduced in evidence in the court below on the hearing of this motion, show that in October, 1894, one Matthew Grey presented to the probate court of Sebastian county his petition for appointment as guardian of Ella Hare. The court entered a judgment granting the prayer of the petition and ordering the issuance of letters of guardianship, which was done, upon the execution and approval of the bond. In January, 1904, another guardian was appointed in the place of Grey, and in May, 1905, on presentation of a petition alleging that Ella Hare was a person of unsound mind a judgment was rendered appointing McDonald as her guardian, and letters of guardianship in due and regular form were issued to him after the execution and approval of his bond.

It must be conceded that the order of court making the appointment and the letters of guardianship are regular as far as they go, but it is contended that the probate court had no jurisdiction to appoint a guardian until a formal order had been rendered adjudging said Ella Hare to be a person of unsound mind, and that such adjudication must have been made upon notice to the person alleged to be of unsound mind or after she had been brought before the court.

In *Arrington v. Arrington*, 32 Ark. 674, it was held that the court exercising probate jurisdiction should not render a judgment declaring a person to be insane and appoint a guardian without notice to such person or without bringing him to be brought before the court or jury of inquiry. In that case, however, ²⁸ the validity of the appointment was directly called in question on writ of error to this court bringing up the whole proceedings for review, whereas in the case at bar the question of the validity of the appointment arises collaterally. We must presume, the record of the probate court being silent on the subject, that the court first inquired into the condition of the alleged imbecile and found her to be of unsound mind, and we must presume, too, where the record is silent, that the court took the necessary steps to acquire jurisdiction of the person of the imbecile: *Blevins v. Case*, 66 Ark. 416, 51 S. W. 65; *Johnson v. Gorman*, 70 Ark. 88, 66 S. W. 346.

We are clearly of the opinion, therefore, that the appointment of McDonald as guardian was valid, as far as it can be questioned in this case, and that the court erred in dismissing the action instituted by him in the name of his wife to recover possession of her property.

It is further contended by learned counsel for appellee that the questions involved cannot be reviewed here because no motion for new trial was filed below. The evidence, both written and oral, introduced at the hearing below was brought upon the record by bill of exceptions, but no motion for a new trial was filed. None was necessary. This was no trial of the merits of the case, but merely a preliminary motion to determine whether or not the action had been properly instituted. It is true that the hearing of the motion resulted in a decision which disposed of the case and was appealable, but it was not such a trial of the case upon its merits as required a motion for a new trial. There was no trial at all in that sense. The statute defines a motion for new trial to be a "re-examination in the same court of an issue of fact, after a verdict by a jury or decision by the court," and provides that "the former verdict or decision may be vacated and a new trial granted": Kirby's Digest, sec. 6215. Now, this provision manifestly has no reference to an inquiry and decision of the court upon a motion testing the power of the plaintiff or his legal representative to maintain that action, even though the action be dis-

continued as a result of the decision: 2 Thompson on Trials, sec. 2716.

³⁷ It is unnecessary for us to determine in this case whether or not the guardian had the right to take an appeal in the name of his ward from the decision of the court refusing to dismiss the actions instituted in her name by Euper as next friend. This, it would seem, is a matter about which only the several defendants in those suits have grounds of complaint because they are improperly sued, and sued twice for the same subject matter. Inasmuch, however, as this case is to be remanded, we should add that the court should either dismiss the actions brought by the next friend, or dismiss those brought by the guardian and substitute the guardian for the next friend, in the actions previously brought by the latter: Kirby's Digest, secs. 6021, 6026. Either course is authorized by the statute, and either would work out orderly proceedings for the protection of the rights of the ward.

The judgment dismissing the action is reversed, with directions to reinstate the action and for further proceedings not inconsistent with this opinion.

The Judgments and Proceedings of Probate Courts are usually accorded the same favorable presumptions and immunity from collateral attack as those of courts of general jurisdiction: Robbins v. Boulware, 190 Mo. 33, 109 Am. St. Rep. 746; Stucky v. Watkins, 112 Ga. 268, 81 Am. St. Rep. 47; J. B. Watkins Land Co. v. Mullen, 62 Kan. 1, 84 Am. St. Rep. 372.

Where an *Order Appointing a Special Guardian* is made on the same day that the petition for the appointment was filed, and recites that it was made "on reading and filing the petition," it cannot be presumed, in support of the jurisdiction of the court that the statutory notice was given, if the record is silent in regard thereto: Devereaux v. Jance, 141 Mich. 265, 113 Am. St. Rep. 523.

EL DORADO v. RITCHIE GROCERY COMPANY

[84 Ark. 52, 104 S. W. 549.]

MUNICIPAL CORPORATIONS—Public Streets, Loss of by Prescription.—Where land dedicated as a public street is in possession of, and subject to acts of ownership by, a stranger to the municipality, such possession is presumed to be adverse, and may be acquired into title by prescription as against the municipality in which the street is situated. (p. 23.)

Bunn & Paterson, for the appellant.

Smead & Powell, for the appellee.

58 BATTLE, J. The property in controversy in this suit is a certain strip of land, sixty feet wide, in the incorporated town of El Dorado, in this state, and is claimed by that town as a street. On the thirteenth day of October, 1892, C. W. Smith, T. J. Moore and his wife, S. E. Moore, being the owners thereof, donated it to the incorporated town of El Dorado for street purposes. A condition of this donation was as follows: "This property was donated to the town on condition solely that it was to be surveyed, laid out as streets, opened and put in good condition as streets, and kept up and worked as such; and when the town failed or refused to keep them up as such, they are to revert to the present owners and their assigns or successors." The town failing to lay out or open it as a street for about two years, C. W. Smith, T. J. Moore and Mrs. S. E. Moore conveyed other lands, on the eighth day of March, 1894, to J. H. Faulkner, who on the seventeenth day of February, 1895, conveyed one-half of it to W. M. Green, who and his wife, on the fourth day of May, 1903, conveyed to Brown and John C. Ritchie, who in 1903 conveyed to Ritchie Grocery Company. The last grantee and under whom it holds have held actual, open, continuous, exclusive, adverse possession of it for more than twenty years, building and constructing lasting, permanent and valuable improvements on the same. By this means they have acquired title to the property.

The town of El Dorado insists that it is entitled to the property under *Little Rock v. Wright*, 58 Ark. 23 S. W. 876. In that case this court held: "When

has accepted the dedication of a public street, subsequent continued possession by the dedicator will not be presumed adverse to the city, nor the city's right lost by delay for more than seven years in opening up the street for public use in the absence of proof of adverse holding."

In *Ft. Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19, it was held that "municipal corporations are bound, as individuals are, by the ⁵⁴ statute of limitations, and adverse possession of an alley in a city for the statutory period will give title to the occupant and bar the city." In *Helena v. Horner*, 58 Ark. 151, 23 S. W. 966, this ruling was approved and followed. In *Graham v. St. Louis etc. R. Co.*, 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344, the distinction between cases like *Little Rock v. Wright*, 58 Ark. 142, 23 S. W. 876, and cases like this is pointed out as follows: "The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are, in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas, if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed; it not being supposed, from mere acts of possession and ownership not inconsistent with the rights of the vendee, that the vendor intends to deny the title he has conveyed."

In this case the possession was held by strangers.

Decree affirmed.

Title to Public Streets cannot, according to the overwhelming weight of authority, be acquired by adverse possession: See the notes to *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 775; *Schneider v. Hutchinson*, 76 Am. St. Rep. 479; *Bannock County v. Bell*, 101 Am. St. Rep. 144.

BUCKLEY v. WILLIAMS.

[84 Ark. 187, 105 S. W. 95.]

COSTS.—A Judgment for Costs is not a Debt created, express or implied, but is a liability created by statute.

EXEMPTION Against Judgment for Costs.—Under exempting specified classes of personal property from seizure, attachment, or sale on execution, or other process from any court for the collection of any debt by contract, no exemption exists as to a judgment for costs. (p. 25.)

The appellant, pro se.

¹⁸⁸ WOOD, J. Appellant brought suit to test the validity of a will, and was cast in his suit, judgment rendered against him for costs.

Execution was issued by the clerk to collect the costs adjudged, and certain personal property of appellant was levied upon, which appellant claims was exempt from execution under our constitution and statutes: Const., art. 9, sec. 1; Ark. Digest sec. 3904. Section 1, article 9 of the constitution provides: "That personal property of any resident of this state who is not married or the head of a family, and the value of such articles to be selected by such resident, not exceeding in value the sum of two hundred dollars in addition to the value of his or her wearing apparel, shall be exempt from seizure by attachment or sale on execution, or other process of any court issued for the collection of any debt by contract."

A judgment for costs is not a debt by contract, express or implied. It is a liability created by statute, and, in the absence of the statute allowing such judgment, there could be no judgment rendered in favor of a plaintiff against a plaintiff, where the latter fails in his suit. Ark. Digest, sec. 965.

There are no contractual relations between a plaintiff and defendant as to the costs of a suit.

¹⁸⁹ There are two distinct lines of authority on this subject. The supreme court of Indiana, under circumstances similar to ours, holds there can be no exemption from an execution for costs: *Donaldson v. Banta* (Ind. E. 362. See, also, *Schouton v. Kilmer*, 8 How. P. 100).

The supreme court of Pennsylvania takes the opposite view: *Lane v. Baker*, 2 Grant Cas. 424.

We prefer the doctrine announced by the supreme court of Indiana, in *Donaldson v. Banta* (Ind.), 29 N. E. 362: "Where costs are recovered independent of any other judgment, they do not constitute a debt founded upon contract. There is no contract, express or implied, that an unsuccessful plaintiff will indemnify the defendant for the costs occasioned by the litigation; but the right to recover costs is purely statutory, and, in the absence of statute authorizing it, they could not be recovered as such by the prevailing party."

This is not a suit based upon section 3528, Kirby's Digest, allowing officers to issue fee bills for costs against the party at whose instance the services were rendered, and we express no opinion on that question.

Judgment affirmed.

Costs are statutory allowances to a party to an action for his expenses incurred therein: *Bennett v. Kroth*, 37 Kan. 235, 1 Am. St. Rep. 248. Homesteads are not subject to execution to satisfy a judgment for a fine or costs in a criminal prosecution: *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28.

LAND v. STATE.

[84 Ark. 199, 105 S. W. 90.]

BASTARDY Proceedings are of a Civil, and not of a criminal, nature. (p. 26.)

CONSTITUTIONAL LAW—Bastardy Proceedings, Power of the Court to Commit Father to Jail—Imprisonment for Debt.—Though a proceeding in bastardy is not criminal, but civil in its nature, yet the court may be authorized to enter judgment against the father for the lying-in expenses of the mother and for the maintenance of the child, and to enforce such judgment by his commitment to jail. This is a proper exercise of the police power of the state. (p. 27.)

EVIDENCE—Exhibition of a Child to the Jury.—In bastardy proceedings, the court may allow the child to be exhibited to the jury. The weight to be given such evidence is for the jury. (pp. 27, 28.)

Hunt & Toney, for the appellant.

Byron Herring, for the appellee.

²⁰⁰ **McCULLOCH, J.** Appellant, James Land, was adjudged at the trial below to be the father of a bastard child, and appeals from that judgment.

The trial jury, in addition to finding that appellant father of the child, assessed the lying-in expenses of the mother and a monthly sum for the maintenance of the child, and the court rendered judgment against the defendant for the amounts, in accordance with the provision of the statute, which is to the effect that, unless the defendant in a bastardy case shall pay the judgment for lying-in expenses together with the costs of the case, "then the court shall have the power to commit the accused person to jail, and the same shall be paid," and that if he shall refuse to give bond for payment of the monthly sum allowed for maintenance of the child the court shall commit him to the jail of the county, there to remain until he shall comply with such order or until he shall be otherwise discharged according to law": Act March 1884, Kirby's Digest, secs. 486, 487. The appellant appeals from the judgment committing him to jail, and now asks that it be set aside.

Counsel for appellant contend that the statute authorizing the court in bastardy cases to commit the defendant to jail for failure to comply with the order of the court is void. They say that, inasmuch as committing to affiliate a bastard child is of a civil nature, the effect of the order committing the defendant to jail is imprisonment for debt, which the constitution prohibits.

It is true that the court has held proceedings in bastardy to be of civil and not criminal nature: *Pearce v. State*, 18 Ark. 387, 18 S. W. 380; *Chambers v. State*, 18 Ark. 387, 18 S. W. 380; *Chambers v. State*, 18 Ark. 387, 18 S. W. 380. But it does not follow²⁰¹ from this that the court cannot empower the court trying the case to commit the defendant to jail by judgment by committal to jail. On the contrary, authority may be given, according to the great weight of the adjudged cases, as a proper exercise of the power of the state, as a regulation for the good of the public order: *Bell v. State*, 124 Ala. 77, 27 S. E. 96, 6 Pac. 276; *Ex parte J. C. H.*, 17 Fla. 362, 17 Fla. 362; *Bridgeforth*, 77 Miss. 418, 78 Am. St. Rep. 532, 78 Am. St. Rep. 532; *State v. Brewer*, 38 S. C. 263, 37 Am. St. Rep. 1001, 19 L. R. A. 362; *State v. Giles*, 391, 9 S. E. 433; *Musser v. Stewart*, 21 Ohio St. 1, 21 Ohio St. 1; *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174.

"The statute," says the Ohio court, "is in the nature of a police regulation. Its main object is to furnish maintenance for the child and indemnity to the public against liability for its support. The act of the putative father is regarded as an offense against the peace and good order of society, and the penalty which the law imposed for his transgression is to enforce upon him the duty of making provision for the maintenance of his illegitimate offspring": *Musser v. Stewart*, 21 Ohio St. 353. The obligation of the father does not arise out of contract, express or implied, but payment or security for payment is exacted of him by operation of law as indemnity to the public against the burden of supporting the child. The power to require indemnity implies adequate power to enforce the requirement, and the only way in which the court can enforce its order is to imprison the accused until the order is complied with.

But it is said that where the accused is unable to comply with the order the result is to imprison him for an indefinite length of time, perhaps for life. This, of course, depends on his ability or inability to comply with the order of the court. We have no such question before us in this record, as no effort was made by the appellant to show that he was unable to pay the lying-in expense and cost, or to give bond for payment of the monthly allowance. The statute clearly gives the court power to discharge the defendant from custody when it is made to appear to the satisfaction of the court that he cannot comply with the order.

Imprisonment under this statute may be likened to that for failure in a divorce case to comply with an order of the court with respect to alimony. This court said, in a case of that kind, ²⁰² "that imprisonment in such a case is justified on the ground of willful disobedience to the orders of the court; and, so soon as it is made to appear that the defendant is unable to comply with the orders of the court, he should be discharged": *Ex parte Caple*, 81 Ark. 504, 99 S. W. 830.

The orders of the court in the present case followed closely the language of the statute, and there is nothing in the record to show that it was not properly made.

It is next contended that the court erred in permitting an exhibition to the trial jury of the bastard child. While

the record does not specifically disclose the purpose of the prosecution in making the exhibition to the jury. It is necessarily inferred that an opportunity was sought to enable the jury to observe whether or not the child bore a resemblance to the putative father. There is some dissent in the authorities on this question, but the following cases, properly considered, establish the rule that it is proper to allow the child to be exhibited to the jury: *Jordon*, 49 Ohio St. 655, 32 N. E. 750; *State v. Ham*, 67 N. C. 89; *Gilmanton v. Ham*, 38 N. H. 108; *State v. Jones*, 50 N. J. L. 490, 14 Atl. 600; *Scott v. Deane*, 100 Mass. 378, 26 N. E. 871; *Jones v. Jones*, 45 Md. 108.

The cases that hold to the contrary base the rule upon the inherent weakness of such testimony.

We think, however, that the weight to be given to the testimony is for the jury, and its weakness or unreliability affords no reason for excluding it.

The youth of the child and the relative inexperience of a child of that age having any perceptible resemblance to its parent goes to the weight of the evidence rather than to the question of its admissibility.

No other grounds for reversal of the judgment have been suggested by counsel. The evidence as to the identity of the child was conflicting, but it was sufficient to warrant the verdict.

Affirmed.

Bastardy Proceedings are said to be civil and not criminal in nature: *State v. Tiernan*, 32 Wash. 294, 98 Am. St. Rep. 742; *Johnson v. Walker*, 109 Am. St. Rep. 742. See, further, *Weatherford v. Weatherford*, 56 Am. Dec. 213; *State v. Jones*, 100 Am. St. Rep. 762. The child whose paternity is disputed is exhibited to the jury to show a resemblance between it and the father: *Shailer v. Bullock*, 78 Conn. 65, 112 Am. St. Rep. 752. Cases cited in the cross-reference note thereto.

A judgment in *Bastardy Proceedings* that the father is guilty of adultery and in default thereof be committed to jail does not constitute a constitutional inhibition against imprisonment for debt: *Bridgforth*, 77 Miss. 418, 78 Am. St. Rep. 532; *State v. Jones*, 100 Am. St. Rep. 752, and note.

WASHINGTON v. MOORE.

[84 Ark. 220, 105 S. W. 253.]

LANDLORD AND TENANT—Unlawful Detainer.—An action of unlawful detainer does not lie to determine the rights of the parties in the property sued for. (p. 32.)

LANDLORD AND TENANT—Unlawful Detainer—Disputed Title.—A tenant cannot dispute the title of his landlord so long as he remains in possession under him. He cannot acquire possession under the lease and then dispute the title. (p. 32.)

LANDLORD AND TENANT—Unlawful Detainer—Purchase of the Property by the Tenant.—In an action of unlawful detainer, the plea by the tenant that he has purchased the property of the plaintiff and received a bond for the title, and has paid of the purchase price all except a sum designated, which sum the tenant pleads that he is willing to pay if the plaintiff will accept it, may be struck out on motion of the plaintiff. (p. 32.)

John N. Cook, for the appellant.

Moore & Moore, for the appellee.

221 BATTLE, J. Henry Moore brought an action of unlawful detainer against Frank Washington. He alleged in his complaint "that he is the owner of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of section 6, township 15 S., range 26 W., and the improvements thereon; that on or about January 7, 1905, he rented same to appellant for 1905 for fifty dollars, for which on said day appellant gave his note, due October 1, 1905, with interest at ten per cent per annum from maturity until paid; that appellant entered upon the lands under said rental terms as tenant of appellee, and has been in possession thereof ever since up to the time of the commencement of this action; and that defendant has refused to pay the rent on the lands, as he agreed to do, and now holds and retains the same willfully and unlawfully after lawful demand therefor by plaintiff in writing. Plaintiff further states that he is lawfully entitled to the immediate possession of the lands and the houses situated on same. He asked that writ of possession issue and the possession of the lands and premises be delivered to him without delay; that defendant be summoned to answer his complaint; and that plaintiff have judgment against defendant for fifty dollars, with interest from October 1, 1905, as damages for detention of the lands."

222 To the above complaint defendant filed the following answer:

"He denies that plaintiff is the owner of the land complaint described. He denies that he rented or the buildings thereon from the plaintiff for 1905, or that he entered upon the lands as the plaintiff. He denies that he holds or retains the land lawfully, or that plaintiff is lawfully entitled to possession thereof.

"Defendant, further answering, says that it is that plaintiff is the owner of the lands or entitled to possession thereof, but he alleges the facts to be that on or about the — day of —, 1893, plaintiff executed and delivered to him a bond for title, whereby he bound himself to convey the lands and the east half of west quarter and . . . , all in section 6, town range 26 west, upon the payment by defendant the sum of six hundred dollars and that under the bond for title the defendant was put into possession and entered upon the lands on or about the — day of —, 1893, by peaceable and uninterrupted possession of the lands in the complaint described for the period of — years last past, occupying same as his home and claiming to be the owner thereof under the bond. He paid all of the purchase money except about — dollars, which he is ready to pay if plaintiff will accept same. The bond was destroyed by fire about 1904, and defendant cannot file the same or a copy with his answer.

"For further answer, defendant admits the execution of the note in the complaint mentioned, but he says he was induced to sign the same upon the express understanding and agreement with the plaintiff that the same would be for the balance of the purchase money due by defendant on the lands, and that when the same was paid the plaintiff would execute to defendant a good and valid deed under the terms of the bond. He says that the bond was procured from him by plaintiff with the fraudulent intent of plaintiff to cheat and defraud him out of the lands.

"For further answer, the defendant says that he ought not to have and maintain this suit against the plaintiff because he says he has been in the peaceable and uninterrupted possession of the ²²³ lands for three years immediately preceding the filing of the complaint.

"For further answer to the complaint defendant says that, if it should be held that he is the tenant of plaintiff, the notice served upon him by the plaintiff to quit was not sufficient under the law, but that he should have been (given) six months' notice, instead of ten days,' as alleged in the complaint:

"Prayer that plaintiff take nothing by his suit, that he be adjudged entitled to the possession of the lands, and for costs and other relief."

Plaintiff filed a motion to strike from the answer the following parts, to wit:

"Defendant, further answering, says that it is not true that plaintiff is the owner of the lands or entitled to the possession thereof, but he alleges the facts to be that on or about the — day of —, 1893, plaintiff executed and delivered to him a bond for title, whereby he obligated himself to convey the lands and east half of the southwest quarter and . . . all in section 6, township 15 south, range 26 west, upon the payment by defendant to him of the sum of six hundred dollars, and that under the bond for title the defendant entered upon the lands, and has held peaceable and uninterrupted possession of the lands in the complaint described for the period of thirteen years last past, occupying the same as a homestead, and claiming to be the owner thereof under the bond."

Also that part contained in the following words:

"But he says he was induced to sign the same upon the express understanding and agreement with plaintiff that the same represented the balance of the purchase money due by defendant to plaintiff on the land, and that when the same was paid plaintiff would execute to defendant a good and sufficient deed under the terms of the bond."

Also that part contained in the following words:

"For further answer to the complaint the defendant says that if it should be held that he is the tenant of plaintiff the notice served upon him by the plaintiff to quit was not sufficient under the law, but that he should have been given six months' notice, instead of ten days,' as alleged in the complaint."

The court sustained the motion, and struck the parts of ²²⁴ appellant's answer mentioned therein from it, and the appellant excepted and saved proper exceptions.

In the trial which followed the plaintiff sustained the allegations in his complaint. The offered to prove the allegations stricken from 1 and the court refused to allow him to do so.

The court instructed the jury to return a verdict of the plaintiff, which they did, and defendant.

The action of unlawful detainer does not lie to the rights of parties in the property sued for, but who shall have the present possession. A tenant cannot dispute the title of his landlord so long as he remains in possession under him. He cannot acquire possession of the property from the landlord by lease and then dispute his title. By the lease and acquiring possession he is estopped from doing. To do this he must first surrender possession to the landlord, and then bring his action: *Thorn v. Re* 480; *Miller v. Turney*, 13 Ark. 385; *Simmons v.* 27 Ark. 50; *Hershey v. Clark*, 27 Ark. 527; *James v.* 33 Ark. 536; *Littell v. Grady*, 38 Ark. 584; *Young v.* 39 Ark. 135; *Clemm v. Wilcox*, 15 Ark. 10; *Watt v.* 28 Ark. 153; *Johnson v. West*, 41 Ark. 1; *Winburn v.* 43 Ark. 28; *Hoskins v. Byler*, 53 Ark. 864; *Logan v. Lee*, 53 Ark. 94, 13 S. W. 422; *Miles v.* 54 Ark. 460, 16 S. W. 195.

We find no prejudicial error in the proceedings of the court.

Judgment affirmed.

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We propose in this note to treat of unlawful detainer, excluding all questions of pleading and practice. The subject is purely statutory, but the necessity of legislation respecting it has been generally, if not universally, recognized and met, and resulting statutes, though of course differing in their details, are nevertheless so nearly alike respecting the substantial elements of the proceeding, that decisions under any of them are generally applicable in other states as well as in that in which they were rendered. Unlawful detainer, forcible entry, and forcible entry and detainer are, in the statutes, as well as elsewhere, often treated together. There is not, however, any necessary connection between them, and we shall here consider the former only.

Sometimes forcible detainer is by statute made of its pendent offense or cause of action. Of course, a detain unlawful may also be forcible, but generally this circumstance is wholly immaterial. It may by statute be made a special action, entitling plaintiff to some additional or different remedy. An unlawful detainer which we shall here consider includes cases in which the defendant, having come lawfully into title of real property either under a lease or some other grant thereof for a definite or indefinite period, continues to hold after his lease or right to hold, either from lapse of time or other cause, terminates, and with it, his right to remain in possession, and where the landlord or other person entitled to possess has not expressly or impliedly consent to its being detained from him.

Some of the statutes define what they style a forcible detainer without including in the definitions given any element which is within the power of the legislature to declare what is a forcible detainer, and to so define these terms as to omit all elements which are not within the power of the legislature. *Mecham v. McKay*, 37 Cal. 154. In several of the states the legislature has thought proper to do this, and to declare that a person shall be deemed guilty of forcible detainer on the doing of certain enumerated acts, no one of which amounts either to a forcible entry or a threat or intent to use force should it prove to be impossible to hold possession: Cal. Code Civ. Proc., sec. 1160, subd. 1; *Schickner*, 29 Ky. Law Rep. 87, 92 S. W. 949. Hence a person might at one time and under special circumstances have a remedy at law for the defendant to have at least intended to have a remedy for any attempt to dispossess him (*Harrington v. Watson*, 143, 50 Am. Rep. 465, 3 Pac. 173), it is doubtful whether the remedy is ever true, and certainly at the present time the offense of forcible detainer is complete, though the person unlawfully remaining in possession has not employed, or intended to employ, force to prevent any entry that might be attempted by the person entitled to possession. The place of force is taken by the mere continuation of possession after the expiration of the time when the defendant is to have the right so to do: *Brawley v. Bisdon Iron Works*, 676; *Mason v. Finch*, 2 Ill. 495; *Wheeler v. Reitz*, 92 Ind. 495; *Bowling*, 2 A. K. Marsh. 35; *Haase v. Schickner*, 29 Ky. Law Rep. 87, 92 S. W. 949; *Clapp v. Paine*, 18 Me. 264; *Gluck v. Minneapolis*, 80, 30 N. W. 446; *Hislop v. Moldenhauer*, 21 Or. 1052; *Trousdale v. Darnell*, 6 Yerg. 431; *Steele v. Steele*, 30 Cal. Civ. Ct. App., sec. 345; *Ela v. Bankes*, 32 Wis. 635. It is not that the defendant does not refuse to surrender possession. As a matter of fact, he remains in possession after a demand for possession. *Floyd v. Ricks*, 11 Ark. 451. The terms "forcible detainer" already suggested, in some of the statutes, employed to describe a class of cases having in them no element of the acts which constitute either a forcible entry or an unlawful detainer. Thus, if one is guilty thereof who either "by force or by menaces

of violence unlawfully holds and keeps possession of any real property, whether the same was acquired peaceably or otherwise, or who, in the night-time or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof for the period of five days, refuses to surrender the same to such former occupant": Cal. Code Civ. Proc., sec. 1160. We shall not here undertake to treat the subject of forcible detainer as thus defined, or otherwise.

II. Necessity of the Relation of Lessor and Lessee.

We have already shown that one of the great differences between unlawful detainer and forcible entry and detainer or forcible detainer only is, that to sustain the proceeding for unlawful detainer, it is not necessary that any force, or intent to employ force, be established. Another vital difference consists in the fact that in the proceeding where force is charged, it is not essential, nor even usual, that there be any letting of the property, or that the relation of landlord and tenant exist or ever have existed with respect to it, or that the possession of the defendant has been at any time lawful. Unlawful detainer, on the other hand, presupposes that the possession held by the defendant was not originally acquired by any sort of wrong. It must have been rightful, and therefore have commenced in a tenancy on the part of the defendant or his predecessors in interest under the plaintiff or his predecessors. There are, indeed, decisions from which without a proper examination, the conclusion might be drawn that this rule did not prevail in all of the states (*Spear v. Lomax*, 42 Ala. 576; *Hightower v. Fitzpatrick's Heirs*, 42 Ala. 597; *Dunning v. Finson*, 46 Me. 546), but they refer to the question which we shall have occasion to consider hereafter, whether it is indispensable that the conventional relation of landlord and tenant existed between the plaintiff and the defendant when the former sought, and the latter refused, possession. That a tenancy must have existed at some time is nowhere denied and everywhere asserted: *Hightower v. Fitzpatrick's Heirs*, 42 Ala. 597; *Bradley v. Hume*, 18 Ark. 284; *Dortch v. Robinson*, 31 Ark. 296; *Mason v. Delancy*, 44 Ark. 444; *Steinback v. Krone*, 36 Cal. 303; *Pico v. Cuyas*, 48 Cal. 639; *Watson v. Toliver*, 103 Ga. 123, 29 S. E. 614; *Smith v. Killeck*, 10 Ill. 293; *Dunne v. Trustees of Schools*, 39 Ill. 578; *Colored H. & B. Assn. v. Harvey*, 23 Ky. Law Rep. 1009, 64 S. W. 676; *Woodman v. Ranger*, 30 Me. 180; *Dunning v. Finson*, 46 Me. 546; *Gies v. Storz B. Co. (Neb.)*, 106 N. W. 775; *Benjamin v. Benjamin*, 5 N. Y. 383; *People v. Howlett*, 76 N. Y. 574, 13 Hun. 138; *Sims v. Humphrey*, 4 Denio, 185; *Doerl v. Damrauer*, 27 Misc. Rep. 555, 58 N. Y. Supp. 297; *Schlaich v. Blum*, 42 Misc. Rep. 225, 85 N. Y. Supp. 335; *Gulledge v. White*, 73 Tex. 498, 11 S. W. 527; *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666, 917; *Buel v. Buel*, 76 Wis. 413, 45 N. W. 324; *Hunter v. Maanum*, 78 Wis. 656, 48 N. W. 51; *Willis v. Eastern T. & B. Co.*, 169 U. S. 295, 18 Sup. Ct. Rep. 347, 42 L. ed. 752. Hence,

however clearly it may appear that the defendant is in possession and ought to surrender it to the plaintiff, the recovery if the possession did not result from a leasing. If the possession was taken under a contract of purchase, and the mortgagor has made default and thereby forfeited his rights under the mortgage, including the right to be in possession of the property, the mortgagor must seek some remedy other than by proceeding in a writ of replevin. *Griffith v. Collins*, 116 Ga. 420, 42 S. E. 743; *Dickinson v. Cushman*, 8 Cush. 33; *Lyon v. Cunningham*, 136 Mass. 532; *Kiernan v. O'Brien*, 151 Mass. 543, 24 N. E. 907. So by his default a mortgagor may lose his right thereto, which may pass to his heirs, and nevertheless, as their relation is not that of landlord and tenant, the possession cannot be recovered by the mortgagee by a writ of replevin in unlawful detainer: *Willis v. Eastern T. & B. R.*, 295, 18 Sup. Ct. Rep. 347, 42 L. ed. 752. In a few of the states the statutory remedy has been enlarged so as to extend to any person against whom the possession of land is wrongfully withheld after the expiration of the defendant's right by contract to surrender: *Clark v. Bourgeois*, 86 Miss. 1, 38 South. 187.

- III. Who may Maintain the Proceeding for Unlawful Detainer.

a. *The Original Landlord.*—From what we have said of the necessity for there having been a lease and the taking of possession under, it follows that the right to maintain the proceeding to recover possession of real property on account of its unlawful detention cannot be maintained except by one who is the original landlord, or one who, claiming under him, has acquired his right to the possession of the property because of its unlawful detention. That the original landlord is the proper person to maintain the proceeding, there is no doubt, unless his right to do so has terminated either by the death of his estate or right to another, or by some new agreement which gives the party in possession the right to continue therein. The original landlord may cease to be entitled to the possession, but this occurs on the granting by him of a new lease to his tenant, which commences at some date after the termination of the original lease: *Lor v. Terry*, 71 Cal. 46, 11 Pac. 813), nor by his being made a party to a suit to foreclose a mortgage against the property: *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860. The landlord may enter into a contract with the tenant for the purchase of the leased property, but this will not constitute a bar to an action for unlawful detainer, if the tenant has made default in the performance of his contract: *Norton v. Sturla*, 83 Cal. 527. The landlord may part with his right of possession by conveying or by executing a lease of the property to another, and then the question is likely to arise whether such a conveyance or lease may be urged by the tenant who does not claim under the landlord as a defense to any proceeding to dispossess him for unlawfully detaining the property. Where a conveyance is made, it is pro-

the landlord cannot maintain a suit for subsequent unlawful detainer, even though his conveyance reserves to him the right of so doing: *Purdy v. Bakestraw*, 13 Ill. App. 480; *Holliday v. Chism*, 25 Ind. App. 1, 57 U. S. 563; *L'Hussier v. Zallee*, 24 Mo. 13; though the contrary is the rule in Missouri: *Tucker v. McClennay*, 103 Mo. App. 318, 77 S. W. 151. In the case of a leasing the rule may be otherwise. It is said that, notwithstanding the execution of a lease, the landlord retains an interest in the property and in the right to its possession, and is subject to the duty of placing his lessee in possession, and hence, for the purpose of discharging his duty, that he may maintain the proceeding against the original lessee: *Davidson v. Hammerstein*, 28 Misc. Rep. 529, 59 N. Y. Supp. 563; *Schreiner v. Stanton*, 26 Wash. 563, 67 Pac. 219. Contra, *Dudley v. Lee*, 39 Ill. 339; *Allen v. Webster*, 56 Ill. 393. If the plaintiff in the proceeding was entitled to maintain it when commenced, his transfer during its pendency does not defeat his right, and judgment in his favor may be entered as in the case of other transfers pendente lite: *Blish v. Harlow*, 15 Gray, 316.

b. Persons Succeeding to the Interests of the Original Lessor.

1. Purchasers and Lessees.—The landlord may convey or lease the property to a person other than the tenant in possession, in which event the grantee or lessee becomes entitled to the possession on the termination of the lease, and yet the premises may remain in possession of the tenant, who, though he is no longer entitled thereto, may seek to retain such possession on the ground that no one but the original lessor can maintain the proceeding, especially when there has been no attornment to the grantee or the new lessee. Independently of any statute making special provision for this subject, the general rule is, that the proceeding can be maintained only in favor of the original landlord, and not in favor of his successor in interest to whom the tenant has not attorned, and hence that the purchaser or lessee from the original landlord cannot maintain the proceeding in unlawful detainer: *Dwine v. Brown*, 35 Ala. 596; *Reay v. Cotter*, 29 Cal. 168; *Martel v. Meehan*, 63 Cal. 47; *Cummings v. Kilpatrick*, 23 Miss. 106; *Harrison v. Middleton*, 11 Gratt. 527; though perhaps it may be maintained in the name of the original lessor for the benefit of his successor in interest: *Cooper v. Gambill*, 146 Ala. 184, 40 South. 827. This defect in the law has generally, if not universally, been cured by statutes extending the right of recovery to all persons succeeding to the interest of the original lessor: *Cooper v. Gambill*, 146 Ala. 184, 40 South. 827; *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861; *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794; *Fisher v. Smith*, 48 Ill. 184; *Drew v. Mosbarger*, 104 Ill. App. 635; *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432; *Herndon v. Bascom*, 3 Dana, 113; *Mason v. Bascom*, 3 B. Mon. 269; *Benedict v. Morse*, 51 Mass. 223; *Hayden v. Ahearn*, 9 Gray, 438; *Alworth v. Gordon*, 81

Minn. 445, 84 N. W. 454; Walker v. Harper, 33 Mo. 59; v. Voelker, 40 Mo. 129; Kaulleen v. Tillman, 69 Mo. 51; Compton, 49 Mo. App. 304; Logan v. Woolwine, 56 Mo. Winkelmeier v. Katselburger, 77 Mo. App. 117; Tuck Clenney, 103 Mo. App. 318, 77 S. W. 151; Barada-Ghio v. Heidbrink, 112 Mo. App. 429, 86 S. W. 1109; Ray v. 120 Mo. App. 497, 97 S. W. 212; Russo v. Yuzolino, 19 28, 42 N. Y. Supp. 482; Barton v. Learned, 26 Vt. 192; Ca v. Crosbie, 22 Wash. 269, 60 Pac. 652; Harris v. Halverson, 779, 63 Pac. 549; Loring v. Bartlett, 4 App. D. C. 1. 1 it is essential that the purchaser have a formal and pr cuted conveyance and not sufficient that he have a bon and be under it entitled to the possession of the propert Compton, 49 Mo. App. 304. The purchaser can, under stances, maintain the proceeding where his grantor would to do so had no conveyance been made: Unger v. Bamber 11, 2 S. W. 498. Therefore, if, prior to the conveyance been some breach of condition on account of which t might have terminated the lease, but of which he chose advantage, it is not available to his grantee: Small v Me. 304, 54 Atl. 758.

2. Assignees of the Lease or of the Right to Receive t

The grantee of the leased property is unquestionably a will be entitled to its possession on the termination of t any surrender of the lessee's rights, whether voluntary or i but this cannot always be affirmed of one to whom the assigned the lease or the right to receive the rents to ac under, and there is doubt whether the assignee, having the reversion, can maintain the proceeding of unlawfu Markin v. Whitaker, 26 Ind. App. 211, 58 N. E. 542. T has not been considered with much care nor by cou authority, but, so far as considered, the conclusion reac majority has been in favor of the assignee, though he dummy, or the assignment to him has been as collateral the performance of some obligation: Wetterer v. So Misc. Rep. 739, 49 N. Y. Supp. 1043; Goodnow v. Pop Rep. 475, 64 N. Y. Supp. 394.

3. Heirs and devisees.

—Where an heir or devisee has in possession of the property, and the tenant has never him, he cannot maintain this proceeding against the te ancestor or testator: Picot v. Masterson, 12 Mo. 303. E in the case of the grantees of the lessor, the tendency c utes, and of the courts construing and applying them, is summary and effectual remedy against the tenant in pos guilty of an unlawful detainer, and of extending the rig of all persons who have succeeded to the estate and r lessor: Kellum v. Balkum, 93 Ala. 317, 9 South. 463 Foster, 2 A. K. Marsh. 204.

4. **Reversioners.**—In Mississippi, if the lessor, being a tenant for life, dies, it is held that his lessee is not subject to the proceeding in unlawful detainer brought by the reversioner who, upon such death, became entitled to the possession of the property, unless there had been an attornment to him by the tenant: *Wolfe v. Angevine*, 57 Miss. 767. Probably this is no longer the rule even in that state, for by section 4461 of its code (edition of 1892) the remedy is extended to any landlord, vendor or other person against whom the possession of land is withheld after the expiration of the defendant's right by contract to hold such possession: *Clark v. Bourgeois*, 86 Miss. 1, 38 South. 187.

5. **Executors and Administrators.**—In the United States executors and administrators are by statute often given the right to the possession of the real property of their decedents during the administration, or where necessary for the purposes thereof, with a right to collect the rents and profits, and, under permission of the court, authority to make leases. If a lease is made by a personal representative, and the lessee, notwithstanding its termination or forfeiture, refuses or neglects to surrender possession, there can be no doubt of the right of such personal representative to maintain a proceeding for unlawful detainer, for, between him and the lessee, the conventional relation of landlord and tenant exists: *Lass v. Eialeton*, 50 Mo. 1222. The same rule must generally be applicable, though the lease was granted by the decedent, instead of the personal representative. Such representative, being entitled to the rents and profits and also to the possession of the property in case the right of a tenant has terminated, may maintain an action to recover possession from the tenant guilty of an unlawful detainer: *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111; *Scott v. Lloyd*, 16 Fla. 151; *Moody v. Ronaldson*, 38 Ga. 652.

6. **Other Successors in Interest.**—Where a defendant has entered under a lease, and is therefore under obligation to surrender possession when it terminates, and the right to receive such possession has passed from the original lessor, it is not very material what were the means by which his rights were divested and were vested in another, for the latter being entitled to the possession, the continued holding by the tenant is unlawful, and he may be dispossessed by proceedings for unlawful detainer, as where the title and rights of the original landlord were divested by execution or judicial sale: *May v. Luckett*, 54 Mo. 437; *Sexton v. Hull*, 45 Mo. App. 339; *Equity B. & L. Assn. v. Murphy*, 75 Mo. App. 57. A receiver, who has, as such, let premises and is authorized to collect the rents, may doubtless maintain an action of unlawful detainer (*King v. Cutts*, 24 Wis. 627), and we see no reason why he may not also be entitled to a like remedy where the letting was made before his appointment, if thereby he became entitled to the rents and profits and to the possession of the leased property in the event of the termination of the lessee's right of possession for any cause. Many of the

statutes extend the right to complain of an unlawful detainer to the successor in interest of the original landlord, without distinction respecting the different means by which such right might have been brought about. Thus, in California, real property is guilty of unlawful detainer when he is in possession after the expiration of the term for which he was let or after default in the payment of rent, "with or without the permission of his landlord or the successor in estate of his landlord": Cal. Code Civ. Proc., sec. 1161, subds. 1, 2. In Massachusetts, if a tenant has lost his right, he may be evicted by any person entitled to the possession: Howard v. Cushman, 563; Hildreth v. Conant, 10 Met. 298; Hart v. Mass. 440, 25 N. E. 714. This is substantially the rule in the statutes now in force in Mississippi: Clark v. Bourgeois, 38 South. 187. In Washington, it is sufficient that there is a person entitled to rent: State v. Pittinger, 37 Wash. 942. In New York, application for summary proceedings may be made by the landlord or lessor of the demised premises; or upon an execution or foreclosure sale; the person forced out; the person with whom, as owner, the agreement was made, or the owner of property occupied under an agreement to cultivate the property upon shares, or for a share of the crop; a person lawfully entitled to the possession of the property in or squatted upon, as the case requires; or by the representative, agent, or assignee of the landlord, purchaser, or person, so entitled to apply": N. Y. Code Civ. Proc., § 1612.

IV. What Makes the Detainer Unlawful.

a. Holding After the Expiration of the Lease.

1. When It is for a Definite Term.—If a lease is for a definite term, the tenant and those coming into possession under the lease are chargeable with notice of its expiration, and their continued possession after that time, unless by permission of the person entitled to the possession, is necessarily unlawful. It is no question that the action of unlawful detainer lies against a tenant who demands for the possession, the tenant refuses or neglects to surrender it: Kower v. Gluck, 33 Cal. 401; Brandenburg v. J. Colo. 323, 3 Pac. 577; Wheeler v. Cowan, 25 Ma. 283. If the tenant remains in possession must be deemed an unlawful detainer, whether any demand for the possession is made upon him or not. The proceeding is, however, purely statutory, and therefore the statutes upon the subject may require a demand for the possession and for such time as the legislature may deem proper. It appears to have been assumed that the tenant has a right to hold over after the termination of the lease unless it is otherwise indicated a wish that he should do so, and therefore the tenant's possession was lawful, notwithstanding the expiration of the term.

his term, until the landlord had given a notice to quit: *Bonsall v. McKay*, 1 Houst. 520; *Thomas v. Black*, 8 Houst. 507, 18 Atl. 771. We believe, however, that this assumption is unjustifiable, and that the tenant, if he wishes to remain in possession, must obtain the permission of his landlord, and that a proceeding in unlawful detainer is at once maintainable against him without any demand for possession or notice to quit, if he without such permission continues in possession for any time, however short, after the lease warrants him in so doing: *Stoppelkamp v. Mangeot*, 42 Cal. 316; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Kuhn v. Smith*, 125 Cal. 615, 63 Am. St. Rep. 79, 58 Pac. 204; *Earl O. Co. v. Fava*, 138 Cal. 76, 70 Pac. 1073; *Craig v. Gray*, 1 Cal. App. 598, 82 Pac. 699; *Reithman v. Brandenburg*, 7 Colo. 480, 4 Pac. 788; *Walker v. Ellis*, 12 Ill. 470; *Secor v. Pestana*, 37 Ill. 525; *Fort v. McGrath*, 7 Ill. App. 302; *Frank v. Taubman*, 31 Ill. App. 592; *Layman v. Throp*, 11 Ind. 352; *McClure v. McClure*, 74 Ind. 108; *Alcorn v. Morgan*, 77 Ind. 184; *Blocker v. McLendon*, 6 Ind. Ter. 481, 98 S. W. 166; *Waller v. Vermitt*, 97 Iowa, 518, 66 S. W. 763; *Harrison v. Marshall*, 4 Bibb. 524; *Hamit v. Laurence*, 2 A. K. Marsh. 366; *Eichart v. Bargas*, 12 B. Mon. 462; *Andrews v. Erwin*, 25 Ky. Law Rep. 1791, 78 S. W. 902; *Preble v. Hay*, 32 Me. 456; *Dorrell v. Johnson*, 17 Pick. 263; *Caley v. Rogers*, 72 Minn. 100, 75 N. W. 114; *Young v. Smith*, 28 Mo. 65, 75 Am. Dec. 109; *Hulett v. Nugent*, 71 Mo. 131; *Witte v. Quinn*, 38 Mo. App. 681; *Anderson v. McClure*, 57 Mo. App. 93; *Leahy v. Lubman*, 67 Mo. App. 191; *Laummier v. Steel*, 77 Mo. App. 456; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445; *Barada-Ghio B. E. Co. v. Heidbrink*, 112 Mo. App. 429, 86 S. W. 1109; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 412; *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *Allen v. Jaquish*, 24 Wend. 628; *Cox v. Sammis*, 57 App. Div. 173, 68 N. Y. Supp. 203; *Adams v. City of Cohoes*, 53 Hun, 260, 6 N. Y. Supp. 617; *Stedman v. McIntosh*, 4 Ired. 291, 42 Am. Dec. 122; *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724, 54 N. E. 473; *Logan v. Herron*, 8 Serg. & R. 459; *Hendrick v. Cannon*, 5 Tex. 248; *Stanford L. Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178; *Morris v. Healy L. Co.*, 33 Wash. 451, 74 Pac. 662. There is no doubt of the propriety of applying this rule when the lease by its term expires at a date specified and from its inspection there can be no controversy respecting its termination. It may, however, be made terminable on the happening of some specified fact, and where the existence of the contingency on which it is to end may well be the subject of controversy and its establishment be dependent on extrinsic evidence. In such a case, if the fact is one of the existence of which the tenant has, or is chargeable with, knowledge, it is probable that no notice need be given, as where the lease is to expire on his failure to pay rent or perform some other act within a time specified: *Eichart v. Bargas*, 12 B. Mon. 462; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Cobb v. Stokes*, 8 East, 359, 9 R. R. 464; *Messenger v. Armstrong*,

1 Term Rep. 54, 1 R. R. 148. This view does not meet with unqualified concurrence, and we are inclined to doubt its correctness: *Gleason v. Gleason*, 8 Cush. 32; *Elliott v. Stone*, 1 Gray, 571.

2. **When the Holding Over is by a Tenant at Sufferance.**—Tenants at sufferance, being those who lawfully come into possession of property, but whose right to possession has terminated, can hardly be regarded as trespassers until notified to abandon possession, and hence they have sometimes been spoken of as though they were entitled to some notice before any action could be sustained against them. These cases will, on examination, generally be found to be cases merely declaring that the notice actually given was sufficient: *Eichengreen v. Appel*, 44 Ill. App. 19; *Pratt v. Farra*, 10 Allen, 519; *Livingston v. Tanner*, 12 Barb. 481. There are, indeed, states whose statutes expressly provide for notice to tenants of this class: *Tarlotting v. Bokern*, 95 Mo. 541, 8 S. W. 547; *Rosenblat v. Perkins*, 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257; *Johnson v. Donaldson*, 17 R. I. 107, 20 Atl. 242; *Minard v. Burtis*, 83 Wis. 267, 53 N. W. 509. In the absence of such statutes no notice is required, and tenants at sufferance are subject to the action without any demand or notice: *Hauxhurst v. Lobree*, 38 Cal. 563; *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593, 28 Pac. 45; *Reed v. Reed*, 48 Me. 388; *Hollis v. Pool*, 3 Met. 350; *Evans v. Reed*, 5 Gray, 308; *Moore v. Smith*, 56 N. J. L. 446, 29 Atl. 159; *Jackson v. Parkhurst*, 5 Johns. 128; *Jackson v. McLeod*, 12 Johns. 182. This is manifest from what has been said in the preceding section respecting the right to proceed against persons remaining in possession of the property after the expiration of a lease to them for a definite term, for such persons are tenants at sufferance, and if tenants at sufferance are entitled to notice to quit, then it will be impossible to conceive of a proceeding in unlawful detainer maintainable in the absence of such a notice.

3. **When the Holding is by a Tenancy at Will.**—There are cases making the general statement that a tenant at will is not entitled to notice to quit (*Herrell v. Sizeland*, 81 Ill. 457; *Jackson v. Bradt*, 2 Caines, 169), and in some instances by repealing statutes requiring the giving of such notices or by legislation speaking more directly on the subject, they have been made clearly unnecessary: *Gordon v. Gilman*, 48 Me. 473. Until the will of the person under whom the tenancy exists has been manifested in some way, it is difficult to conceive how the tenancy can be regarded as terminated, or the person holding under it as wrongfully in possession. In the absence of a statute to the contrary, it is probable that the mere making known to the tenant of the wish to terminate the tenancy is sufficient. Without now stopping to consider what the character of the notice must be, it is sufficient for our present purpose to state that there is probably no state in the Union in which a tenant at will can be adjudged to have been guilty of an unlawful detainer unless he has had something which is equivalent to notice that his estate

has been terminated, and that the person under whom he holds it desires possession: *Frisbie v. Price*, 27 Cal. 253; *Coomler v. Heffner*, 86 Ind. 108; *Thomas v. Sanford S. S. Co.*, 71 Me. 548; *Ellis v. Paige*, 1 Pick. 43; *Gleason v. Gleason*, 8 Cush. 32; *Woodrow v. Michael*, 13 Mich. 187; *Shaw v. Hoffman*, 25 Mich. 162; *Allen v. Mansfield*, 82 Mo. 688; *Tarlotting v. Bokern*, 95 Mo. 541, 8 S. W. 547; *Jackson v. Miller*, 7 Cow. 747; *Clark v. Smith*, 25 Pa. 137; *Payton v. Sherburne*, 15 R. I. 213, 2 Atl. 300; *Blanchard v. Bowers*, 67 Vt. 403, 31 Atl. 848. In the absence of any statute fixing the time and manner of giving notice, any notice will be sufficient which the court deems reasonable (*Blum v. Robertson*, 24 Cal. 127; *Ellis v. Paige*, 1 Pick. 43; *Shaw v. Hoffman*, 25 Mich. 162; *Payton v. Sherburne*, 15 R. I. 213, 2 Atl. 300; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615; *Blanchard v. Bowers*, 67 Vt. 403, 31 Atl. 848), but it will not be deemed reasonable if it does not give the tenant an opportunity to take away his emblements, furniture, and other property: *Ellis v. Paige*, 1 Pick. 43. The notice to be given is, however, often designated by statute. The length of time which is more frequently specified than any other is thirty days: *King v. Connolly*, 51 Cal. 181; *Munson v. Plummer*, 59 Idaho, 120, 12 N. W. 806; *Kuhn v. Kuhn*, 70 Iowa, 682, 28 N. W. 541; *Sherburne v. Jones*, 20 Me. 70; *Smith v. Rowe*, 31 Me. 212; *Dutton v. Colby*, 35 Me. 505; *Haines v. Beach*, 90 Mich. 563, 51 N. W. 644; *Corby v. McSpadden*, 63 Mo. App. 648; *Davis v. Brocklebank*, 9 N. H. 73; *Larned v. Hudson*, 60 N. Y. 102; *Peer v. O'Leary*, 8 Misc. Rep. 350, 28 N. Y. Supp. 687; but in Massachusetts, if the cause be the nonpayment of rent, it need be for fourteen days only: *Johnson v. Stewart*, 11 Gray, 181. The notice in North Carolina must be three weeks: *Love v. Edmonston*, 23 N. C. 152. In Georgia, two months: Ga. Code, ed. 1895, sec. 3133. In Delaware, Michigan, and Oregon, three months: *Bonsall v. McKay*, 1 Houst. 520; *Knight v. Hartman*, 81 Mich. 462, 45 N. W. 1008; *Rosenblat v. Perkins*, 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257. In Kentucky and New Jersey, half a year: *Squires v. Huff*, 3 A. K. Marsh. 17; *Hankinson v. Blair*, 15 N. J. L. 81. If, under a tenancy at will, the rent is payable monthly, the notice must, in Massachusetts, be for one month: *Sanford v. Harvey*, 11 Cush. 93. A statute providing for notice in the case of a tenancy by the month or for any term less than a year does not apply to a tenancy at will: *Dunne v. Trustees of Schools*, 39 Ill. 578. In many of the states the notice to quit is not of itself sufficient to support the proceeding for unlawful detainer. It merely terminates the estate, and must, after such termination, be supplemented by a demand for possession or a notice showing the landlord's intention to insist upon and enforce the forfeiture: *King v. Connolly*, 51 Cal. 181; *Martin v. Splivalo*, 56 Cal. 128; *Chadwick v. Parker*, 44 Ill. 326; *Smith v. Rowe*, 31 Me. 212; *Dutton v. Colby*, 35 Me. 505.

4. When the Holding is by Tenancy from Month to Month.—If the tenant is in possession under a lease from month to month, it is

evident that this holding of the property cannot amount to an unlawful detainer until after his estate therein has been in some manner terminated, and further, that any notice or other act served or done for the purpose of effecting such termination ought not to be operative until the tenant has a reasonable time to remove himself and his dependents and property from the premises. Hence the statutes have required a notice from the landlord or other person entitled to the possession showing his intention to terminate the tenancy, and that such notice be served a considerable time in advance of the date fixed for ending the tenancy, such time usually being not less than one month: *McDevitt v. Lambert*, 80 Ala. 536, 2 South. 438; *Seem v. McLees*, 24 Ill. 192; *Eberlein v. Abel*, 10 Ill. App. 626; *Kinsey v. Minnick*, 43 Md. 112; *Valle v. Kramer*, 4 Mo. App. 570; *Gruenewald v. Schaales*, 17 Mo. App. 324; *Steffens v. Earl*, 40 N. J. L. 128, 29 Am. Rep. 214; *Hungerford v. Wagoner*, 5 App. Div. 590, 39 N. Y. Supp. 369; *Klingenstein v. Goldwasser*, 27 Misc. Rep. 536, 58 N. Y. Supp. 342; *Hislop v. Moldenhauer*, 23 Or. 119, 31 Pac. 252; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379; but in New York it is now only five days: *Hoffman v. Van Allen*, 3 Misc. Rep. 99, 22 N. Y. Supp. 369; *Simpson v. Masson*, 11 Misc. Rep. 351, 32 N. Y. Supp. 136; *Hedden v. Nedersburg*, 25 Misc. Rep. 722, 55 N. Y. Supp. 613.

The notice to quit cannot change the monthly tenancy so as to make it commence or end at a new date. Thus, if the tenancy began on the tenth day of a month, it cannot, by a notice to quit, be made to end on some other day, though thereby the tenant is given more than a month's time in which to vacate the premises. If the month began on the 10th of October, and the notice to quit was served on the 12th, this cannot support a demand for possession made, and an action brought, on some day in November, though subsequent to the twelfth. The notice, whatsoever time it be given in any current month, can operate only as if given on the last day of that month, and then only for the purpose of discontinuing the tenancy on the last day of the month following. Thus the notice of which we have been speaking having been given in October, during a month ending with November 9th, became operative on that day to end the tenancy December 9th, and entitled the landlord to possession December 10th. In other words, the tenant may lawfully continue in possession to the end of the month in which notice is served on him and for one month thereafter: *Pritchett v. Ritter*, 16 Ill. 96; *Baker v. Adams*, 5 Cush. 99; *Prescott v. Elm*, 7 Cush. 346; *Hart v. Lindley*, 50 Mich. 20, 14 N. W. 682; *Gunn v. Sinclair*, 52 Mo. 327. The notice may require the possession to be surrendered either on the last day of the current month (*Petsch v. Biggs*, 31 Minn. 392, 18 N. W. 101), or on the first day of the month following: *Walker v. Sharp*, 14 Allen, 43; *Drey v. Doyle*, 28 Mo. App. 249; *Steffens v. Earl*, 40 N. J. L. 128, 29 Am. Rep. 214; *Waters v. Young*, 11 R. I. 1, 23 Am. Rep. 409. It is not material on what day of the current month the notice is given, pro-

vided it will permit the tenant to hold during the whole of that month and for one month thereafter, and not require him to surrender possession on some day which does not correspond with that ending his monthly term: *Drey v. Doyle*, 28 Mo. App. 249; *Snyder v. Parker*, 75 Mo. App. 529.

5. **When the Holding is by a Tenancy from Year to Year.**—The remarks made in the preceding subdivision about the necessity of some notice to terminate the tenancy are equally applicable to a tenancy from year to year: *Coomler v. Hefner*, 86 Ind. 108; *Moshier v. Reeling*, 12 Me. 478; *Grant v. White*, 42 Mo. 285; *Jackson v. Salmon*, 4 Wend. 327; *Williams v. Ackerman*, 8 Or. 405; *Rich v. Keyser*, 51 Pa. 86. The authorities there cited will also show that the notice given cannot operate to change the date of the term. In other words, it must end the tenancy with its current year, and cannot allow a holding over for a part of a year and then require a surrender of possession at some time before the end of that year: *Usher v. Moss*, 50 Miss. 208; *Prouty v. Prouty*, 5 How. Pr. 81; *Dunn v. Rothermel*, 112 Pa. 272, 3 Atl. 800; *Godard's Exrs. v. South Carolina R. Co.*, 2 Rich. 346; *Lesley v. Randolph*, 4 Rawle, 123; *Floyd v. Floyd*, 4 Rich. 23. The length of time for which such notice may be given may, of course, be prescribed by statute, and as so prescribed, varies greatly. Three months is the period most frequently designated: *Tobin v. Young (Ind.)*, 17 N. E. 625; *Elliot v. Stone City Bank*, 4 Ind. App. 155, 30 N. E. 537; *Wheat v. Brown*, 3 Kan. App. 431, 43 Pac. 807; *Young v. Young*, 36 Me. 133; *Hunter v. Frost*, 47 Minn. 1, 49 N. W. 327; *Snowhill v. Snowhill*, 23 N. J. L. 447; *Vincent v. Corbin*, 85 N. C. 108; *McDowell v. Simpson*, 3 Watts, 129, 27 Am. Dec. 338; *Dunn v. Rothermel*, 112 Pa. 272, 3 Atl. 800; *Borough of Phoenixville v. Walters*, 147 Pa. 501, 23 Atl. 776; *Thurber v. Dwyer*, 10 B. L. 355; *Godard's Exrs. v. South Carolina R. Co.*, 2 Rich. 346; though in some states six months are required: *Spalding v. Hall*, 6 D. C. 123; *Hunt v. Morton*, 18 Ill. 75; *Morehead v. Watkyns*, 5 B. Mon. 223; *Hall v. Myers*, 43 Md. 446; *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. 687; *Brady v. Flint*, 23 Neb. 785, 37 N. W. 647; *Leavitt v. Leavitt*, 47 N. H. 329; *Hankinson v. Blair*, 15 N. J. L. 181; *Stedman v. McIntosh*, 4 Ired. 291, 42 Am. Dec. 122; *Jones v. Willis*, 53 N. C. 430; *Hachet v. Whitney*, 1 Vt. 311; *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523; in others sixty days: *Larkin v. Avery*, 23 Conn. 304; *Streit v. Fay*, 230 Ill. 319, post, p. 304, 82 N. E. 648; *Tanton v. Van Alstine*, 24 Ill. App. 405; and in New York one month: *Prouty v. Prouty*, 5 How. Pr. 81.

b. Notice to Quit.

1. **By Whom Should be Given.**—When a notice is given to terminate the lease, it must be given by and in the name of the person entitled to possession. Hence if the original lessor has conveyed, he is not the proper person to thereafter give a notice to quit: *Griffin v. Barton*, 22 Misc. Rep. 228, 49 N. Y. Supp. 1021; contra, *Com-*

stock v. Cavanagh, 17 R. I. 233, 21 Atl. 498. The person giving notice may act by his agent: Reed v. Hawley, 45 Ill. 40; Gilmore v. Baker Co., 12 Wash. 468, 41 Pac. 124; and, unless some statute requires it, the authority of the agent need not be conferred in writing: Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750. Perhaps the person acting as agent need not have precedent authorization if his action is subsequently ratified by his principal: Goodlittle v. Woodward, 3 Barn. & Ald. 689; Doe v. Sybourn, 2 Esp. 677; but we incline to the view that a notice not effective when made because not then authorized cannot be made operative by subsequent ratification, except from the time of such ratification: Pickard v. Perley, 45 N. H. 188, 86 Am. Dec. 153; Doe v. Goodwin, 1 Gale & Dav. 463, 2 Q. B. 143, 10 L. J. Q. B. 275; Doe v. Walters, 10 Barn. & C. 626, 5 Man. & R. 357, 8 L. J. K. B., O. S. 297. If there are two or more persons entitled to the possession, all must join in the notice: King v. Dickerman, 11 Gray, 480; Right v. Curlett, 5 East, 491, 2 Marsh. 83, 5 Esp. 149, 7 R. R. 754; contra where the lessors are partners in trade, Doe v. Hulme, 2 Man. & R. 483, 6 L. J. K. B., O. S., 345; or joint tenants: Doe v. Hughes, 7 Mees. & W. 139, 10 L. J. Ex. 185; Doe v. Chaplin, 3 Taunt. 120, 12 R. R. 615. If a mortgage is made by the lessor, and has the effect of entitling the mortgagee to the possession and rents, the latter may give a notice to quit (Burton v. Dickenson, 17 L. T., N. S., 264), or he may give general authority to his mortgagor to determine tenancies, in which event the latter may act in his own name (Stackpole v. Parkinson, 1 R. 8 C. L. 561), but the latter, though remaining in possession after default and permitted to collect rents, cannot, without previous authority from the mortgagee, terminate a lease by a notice to quit: Miles v. Murphy, 1 R. 5 C. L. 382.

2. To Whom must be Given.—It is sufficient that the notice to quit be given to the lessee, or to one of several lessees: Walker v. Sharpe, 103 Mass. 154; Doe v. Crick, 5 Esp. 196, 8 R. R. 848. Such notice undoubtedly is effective against all persons subsequently acquiring any interest under the original lessee: Schilling v. Holmes, 23 Cal. 227; Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; and probably also against prior sublessees and others receiving possession from the original lessee: Jackson v. Baker, 10 Johns. 270; Decker v. Sexton, 19 Misc. Rep. 59, 43 N. Y. Supp. 167; Roe v. Wiggs, 2 Bos. & P. (N. R.), 330. Of cases necessarily in point on this subject the reports are barren. Mere trespassers and intruders are not entitled to any notice to quit: Godwin v. Stebbins, 2 Cal. 103; Meeker v. Doe, 7 Blackf. 169; Lewis' Heirs v. Ringo, 3 A. K. Marsh. 247; Doe v. Bell, 8 Jones, 294; Worthington v. Etcheson, 5 Cranch C. C. 302. In Jackson v. Salmon, 4 Wend. 327, it was held that one coming in under a tenant was entitled to the same notice as the tenant. In this case there is nothing in the report indicating that any notice was served on anyone. Hence it is not

authority for the position that the service of notice on the original lessee may not bind subtenants and others acquiring under him.

3. **By Whom may be Served.**—The notice to quit may be served by the landlord or by anyone authorized by him: *Weeks v. Sly*, 61 N. H. 89.

4. **How, When, and on Whom must be Served.**—The notice should be personally served on the lessee in possession of the property, but where there are two or more such lessees holding as cotenants of the term, it seems not to be necessary to serve more than one: *Grundy v. Martin*, 143 Mass. 279, 9 N. E. 647; *Doe v. Irick*, 5 Esp. 196, 8 R. R. 828. But this has been denied unless the lessees were also partners: *Adler v. Lowenstein*, 52 Misc. Rep. 556, 102 N. Y. Supp. 492. If the lessee is not to be found on the premises, notice may be left there for him with anyone who may be deemed his representative, as, for instance, his wife: *Bell v. Bruhn*, 30 Ill. App. 300; *Blish v. Harlow*, 15 Gray, 316; *Clark v. Keliher*, 107 Mass. 406; *Steele v. Johnson*, 168 Mass. 17, 46 N. E. 431; *Beiler v. Devoll*, 40 Mo. App. 251; *Gerhart R. Co. v. Weiter*, 108 Mo. App. 248, 83 S. W. 278; *Cadwalader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 66, 917; *Smith v. Clark*, 9 D. P. C. 202, 1 W. P. C. 44; *Pulteney v. Shelton*, 5 Ves. 261n; or a son or daughter of mature age: *Tanham v. Nicholson*, L. R. 5 H. L. 561, L. R. 6 C. L. 188; *Liddy v. Kennedy*, L. R. 5 H. L. 134, 20 Week. Rep. 150; or a servant: *Doe v. Dunbar*, M. & M. 10; *Liddy v. Kennedy*, L. R. 5 H. L. 134, 30 Week. Rep. 150; or other agent: *Farnham v. Hohman*, 90 Ill. 312; *Walker v. Sharpe*, 103 Mass. 154; *Hogsett v. Ellis*, 17 Miss. 351; *Prendergast v. Searle*, 81 Minn. 291, 84 N. W. 107. It must be admitted, however, that the safer course is to serve the lessee personally if he can be found: *Van Studdiford v. Kohn*, 46 Mo. App. 436. Though a service upon a servant or other agent is sufficient if he has authority to represent his master or principal in the matter, and though it will generally be presumed that he gave the notice to his principal (*Tanham v. Nicholson*, L. R. 5 H. L. 561, L. R. 6 C. L. 188), and it makes little or no difference how the service is made if the notice reaches the principal: *Farnham v. Hohman*, 90 Ill. 312; *Langan v. Schlieff*, 55 Mo. App. 213; *Ewing v. O'Malley*, 108 Mo. App. 117, 82 S. W. 1087; *Alford v. Vickery*, Car. & M. 280; yet there have been cases refusing to sustain a service because the agent on whom it was made did not exercise an authority warranting him in being regarded as the representative of his principal in respect to terminating the tenancy in question (*Van Studdiford v. Kohn*, 46 Mo. App. 436), and other cases indicating that it ought to appear that the notice had been explained to the servant or had come to the knowledge of his principal: *Doe v. Lucas*, 5 Esp. 153, 8 R. R. 842; *Doe v. Milhill*, 1 Jur. 795. The material question is, Did the notice reach the tenant? If it did, the object is accomplished regardless of the person with whom the notice was left: *Farnham v. Hohman*, 90 Ill. 312; *Langan v. Schlieff*, 55 Mo.

App. 213; *Ewing v. O'Malley*, 108 Mo. App. 117, 82 S. W. 1087; *Alford v. Vickery*, Car. & M. 280. Hence it may probably be served by mail: *Candler v. Mitchell*, 119 Mich. 464, 78 N. W. 551; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Papillin v. Brunton*, 5 Hurl. & N. 518, 29 L. J. Ex. 265; and sometimes statutory provision is made for service by posting on the premises: *Consolidated C. Co. v. Schaefer*, 31 Ill. App. 364, 135 Ill. 210, 25 N. E. 788. If the statute requires a notice in writing, it cannot be satisfied by reading the writing to the person on whom service is made without also leaving a copy with him: *Seem v. McLees*, 24 Ill. 192; *Jenkins v. Jenkins*, 63 Ind. 415, 30 Am. Rep. 229; *Langan v. Schlieff*, 55 Mo. App. 213. If the tenant is dead and no personal representative has been appointed, the notice may be served on his widow who remains in possession: *Sweeny v. Sweeny*, I. R. 10 C. L. 375. In England the notice may be served on Sunday: *Sangster v. Noy*, 16 L. T. 157. If the notice is left with a servant, agent or other person for the tenant, it must be done on the leased premises, but service on him personally may be made wherever he may be found: *Epstein v. Greer*, 78 Ind. 348. The time of service may be on any date which will allow the tenant the time to which he is entitled before terminating his tenancy, and may hence be after as well as before the expiration of his term: *Drain v. Jacks*, 77 Iowa, 629, 42 N. W. 460; *McLain v. Calkins*, 77 Iowa, 468, 42 N. W. 373; *Hawley v. Robeson*, 14 Neb. 435, 16 N. W. 438; *Leutzey v. Herchelrode*, 20 Ohio St. 334.

5. **The Proof of Service.**—Whenever any issue arises respecting the fact of the service of a notice to quit, such service may be established by any competent evidence, as by the return of an officer (*Moller v. Barrett*, 49 Ill. App. 519), or the admissions of the tenant (*Doe v. Hall*, 5 Man. & G. 795), or the testimony of any person who served it, or saw it served or in the possession of the tenant: *Chung Yow v. Hop Chong*, 11 Or. 220, 4 Pac. 326; *Alford v. Vickery*, Car. & M. 280.

6. **The Form of.**—The notice to quit, unless some statute prescribes to the contrary, may be oral: *Timmins v. Rawlinson*, 3 Burr. 1603, 1 W. Black. 533; *Doe v. Crick*, 5 Esp. 196, 8 R. R. 848; *Doe v. Pierce*, 2 Camp. 96, 11 R. R. 673; but the usual and safer practice is to serve a notice in writing. Like other legal documents, it is sufficient if it purports to be on behalf of the person entitled to execute it, and informs the person to whom it is given of its purpose, and such purpose is one which the giver has the right to accomplish. No particular form is required: *Hooten v. Holt*, 139 Mass. 54, 29 N. E. 221. It cannot, as we have already shown, change the term so as to make it expire at a different date of the month or year from that designated in the lease as the end of the tenant's term: Ante, subdivision IV, a, 4. "A notice to quit, which breaks into the quarter, month or week, is not a good notice": *Baker v. Adams*, 5 Cush. 99; *Prescott v. Elm*, 7 Cush. 346; *Doe v. Donovan*, 1 Taunt. 555; *Doe v. Green*, 9 Ad. & E. 658. The time when the property is

to be surrendered must be clearly stated: *Steward v. Harding*, 2 Gray, 335; *Finkelstein v. Herson*, 55 N. J. L. 217, 26 Atl. 688; *Wright v. Mosher*, 16 How. Pr. 454; *People v. Gedney*, 15 Hun, 475; *Hanchet v. Whitney*, 1 Vt. 311; and as so stated must permit the tenant to occupy to the end of his term, and must allow him the number of days or months' notice exacted by the statute. It is not sufficient that it notify the tenant to remove as soon as practicable: *People v. Gedney*, 15 Hun, 475. It may, however, describe the date when the tenant must quit, without naming the day or month, as where he is informed that he must quit at the expiration of the present or current year of his tenancy: *Doe v. Timothy*, 2 Car. & K. 351; *Doe v. Butler*, 2 Esp. 589, 5 R. R. 756. If the notice is to quit on Michaelmas or Lady-day, and there is an old and new Michaelmas or an old and new Lady-day, the notice is good for whichever day the term expires upon, if the time given is sufficient: *Doe v. Knightley*, 7 Term Rep. 63, 1 Chit. 11, 4 R. R. 375; *Doe v. Wrightman*, 4 Esp. 5, 6 R. R. 834; *Denn v. Walker*, Peake Ad. C. 194; *Doe v. Perrin*, 9 Car. & P. 467. The notices need not be to quit absolutely, for it may give the tenant the option of continuing his lease on new or different conditions (*Candler v. Mitchell*, 119 Mich. 464, 78 N. W. 551), and hence may declare that he must quit or the landlord will insist on double rent: *Doe v. Jackson*, 1 Doug. 175; *Doe v. Goldwin*, 1 Gale & Dav. 463, 2 Q. B. 143, 10 L. J. Q. B. 275. Though it is said that notice to quit a house is not notice to quit land (*Kuhn v. Kuhn*, 70 Iowa, 682, 28 N. W. 541), and that a simple demand for possession is not a notice to quit (*McLean v. Spratt*, 19 Fla. 97), yet it is evident that notices to quit are construed so as to make them effective if their language will permit, and are held good if the tenant reading them must have known their purpose therefrom: *Douglas v. Anderson*, 32 Kan. 350, 4 Pac. 257; *Preble v. Hay*, 32 Me. 456; *Cook v. Creswell*, 44 Md. 581; *Townly v. Rutan*, 20 N. J. L. 604; though the tenant's name is incorrectly stated (*Clark v. Keliher*, 107 Mass. 406); or the property incorrectly described (*King v. Connolly*, 44 Cal. 236; *Farnam v. Hohman*, 90 Ill. 312), or they include more than is occupied by the tenant (*Dimmett v. Appleton*, 20 Neb. 208, 29 N. W. 474), especially when the notice on its face shows that it relates to property occupied of the person giving it by the person to whom it is given: *Epstein v. Greer*, 78 Ind. 348; *Whipple v. Shewalter*, 91 Ind. 114; *Cummings v. Winters*, 19 Neb. 719, 23 N. W. 302. Where the person giving the notice has power to terminate the lease for some particular purpose only, the notice must disclose that purpose (*Sloan v. Cantrell*, 5 Cold. 571); but where, as is usually the case, the person giving the notice has power to require the tenant to quit without assigning or having any special reason therefor, the notice need not attempt to state any cause for giving it: *Currier v. Barker*, 2 Gray, 224; *Granger v. Brown*, 11 Cush. 191.

7. *Waiver of.*—There is no question that the giving of the notice to quit may be waived by the tenant or other person entitled thereto:

Torrans v. Stricklin, 52 N. C. 50; *Wolfer v. Hurst*, 47 Or. 156, 80 Pac. 419, 82 Pac. 20; *Lucas v. Brooks*, 18 Wall. 436, 21 L. ed. 779. This waiver may be incorporated in the lease or in any other writing, in which event no notice need be given (*Belinski v. Brand*, 76 Ill. App. 404; *Equity B. & L. Assn. v. Murphy*, 75 Mo. App. 57); or there may be an agreement between the landlord and tenant that the latter will vacate the premises at a specified future day: *Engle v. Mitchell*, 30 Minn. 122, 14 N. W. 510. A like result follows when the lessee refuses to accept a renewal: *Eldred v. Sherman*, 81 Wis. 182, 51 N. W. 441.

The disclaimer by the tenant of the landlord's title and of any holding thereunder, whether made in express terms or inferable as a conclusion of law from acts done, usually, at the election of the landlord, amounts to a termination of the tenancy. Such disclaimer on the part of the tenant, either express or implied, is a waiver by him of notice to quit, and entitles the landlord, except perhaps in *Colorado* (*Doss v. Craig*, 1 Colo. 177), to regard the future detainer as unlawful: *Petty v. Graham*, 13 Ala. 568; *Buckner v. Warren*, 41 Ark. 532; *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Horseys Lessee v. Horsey*, 4 Harr. (Del.) 517; *Williams v. Cash*, 27 Ga. 507, 73 Am. Dec. 739; *Fusselman v. Worthington*, 14 Ill. 135; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258; *Herrell v. Sizeland*, 81 Ill. 457; *Tobin v. Young*, 124 Ind. 507, 24 N. E. 121; *Goodman v. Malcolm*, 5 Kan. App. 285, 48 Pac. 439; *Harrison v. Marshall*, 4 Bibb, 524; *Bates v. Austin*, 2 A. K. Marsh. 270, 12 Am. Dec. 395; *Fogle v. Chaney*, 12 B. Mon. 138; *Hoskins v. Helm*, 4 Litt. 309, 14 Am. Dec. 133; *Kunzie v. Wixom*, 39 Mich. 384; *Cook v. Penrod*, 111 Mo. App. 128, 85 S. W. 676; *Den v. Blair*, 15 N. J. L. 181; *Jackson v. Wheeler*, 6 Johns. 272; *Sharpe v. Kelly*, 5 Denio, 431; *Den v. Edmondson*, 1 Ired. 152; *Springs v. Schenck*, 99 N. C. 551, 6 Am. St. Rep. 552, 6 S. E. 405; *Clark v. Everly*, 8 Watts & S. 226; *Wadsworthville School v. Meetze*, 4 Rich. 50; *State v. Stuart*, 5 Strob. 29; *Duke v. Harper*, 6 Yerg. 280, 27 Am. Dec. 462; *Chamberlin v. Donahue*, 45 Vt. 50; *Emerick v. Tavenor*, 9 Gratt. 220, 58 Am. Dec. 217; *Harrison v. Middleton*, 11 Gratt. 527; *Wallace v. Grace C. M. A.* 148 Fed. 672, 78 C. C. A. 406; *Doe v. Grubb*, 10 Barn. & C. 816, 8 L. J. K. B., O. S., 321; *Doe v. Pasquali*, 1 Peake, 259, 3 R. R. 688; *Doe v. Creed*, 2 Moore & P. 648; *Doe v. Long*, 9 Car. & P. 773.

c. The Holding Over After a Cause of Forfeiture.

1. **For Default in the Payment of Rent.**—Independently of any statute upon the subject, the nonpayment of rent is not a cause for the termination or forfeiture of a lease, unless it so provides: *Buckner v. Warren*, 41 Ark. 532; *Brown's Admrs. v. Bragg*, 22 Ind. 122; *Beal v. Bass*, 86 Me. 325, 29 Atl. 1088; *Barlett v. Greenleaf*, 11 Gray, 98; *Hodgkins v. Price*, 137 Mass. 13; *Meroney v. Wright*, 81 N. C. 390; *Simmons v. Jarman*, 122 N. C. 195, 29 S. E. 332; *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235; *Gale v. Oil R. P. Co.*, 6 W. Va. 200.

Nor does a forfeiture result from the nonpayment of any other sum for which payment is stipulated to be made in the lease: *Sipp v. Reich*, 88 N. Y. Supp. 960. And this is true of every other breach of a covenant in a lease irrespective of its character. Hence it is not forfeited by the breach of the covenant against assigning or subletting: *Eldredge v. Bell*, 64 Iowa, 125, 19 N. W. 879; *Burnes v. McCubbin*, 3 Kan. 221, 87 Am. Dec. 468; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391; *In re Pennewell*, 119 Fed. 139, 55 C. C. A. 571; *Doe v. Godwin*, 4 Moore & S. 265, 16 R. R. 463; or to pay taxes: *Heiple v. Reed* (Iowa), 65 N. W. 331; or to make repairs: *Doe v. Stevens*, 3 Barn. & Adol. 402, 1 L. J. K. B. 154. The lessor wishing a forfeiture to result from any breach of covenant must so provide in his lease unless some statute exists making such provision unnecessary. With respect to the nonpayment of rent, there are statutes making it, ipso facto, a forfeiture (Ga. Code 1895, sec. 3124; *Huff v. Markham*, 70 Ga. 284), but in most of the states the statutes provide for a demand to be made for the payment of past due rent or for possession of the property, and that if payment is not made within the number of days specified in the statute, that the tenant shall be guilty of an unlawful detainer, and such statutes are operative though the lease contains no reservation of the right of forfeiture or of re-entry: *Mans. St. Ark.*, sec. 3348; *Parker v. Geary*, 57 Ark. 301, 21 S. W. 472; *Geary v. Parker*, 65 Ark. 521, 47 S. W. 238, 53 S. W. 567; *Cal. Civ. Code*, sec. 1161, subds. 1, 2; *Chadwick v. Parker*, 44 Ill. 326; *Hodgkins v. Price*, 137 Mass. 13; *Neb. Code*, sec. 1021; *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *Pollock v. Whipple*, 33 Neb. 752, 51 N. W. 130; *N. Y. Code Civ. Proc.*, sec. 2231, subd. 2; *Lyons v. Gavin*, 43 Misc. Rep. 659, 88 N. Y. Supp. 252; *Poterie G. Co. v. Poteria*, 179 Pa. 68, 36 Atl. 232; *Dakota Hot Springs Co. v. Young*, 9 S. Dak. 577, 70 N. W. 842.

2. For Other Causes of Forfeiture.—Some of the state statutes enlarge the causes of forfeiture so as to include all breaches of covenants or conditions in the lease. Thus subdivision 3 of section 1161, Code of Civil Procedure of California, makes a tenant of real property for a term less than life guilty of unlawful detainer "when he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent," etc. (*Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316), and subdivision 4 declares, "any tenant or subtenant assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his lease, thereby terminates the lease, and the landlord or his successor in estate shall, upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises." We doubt whether any other statute is so comprehensive as this. At least one of them makes a tenant guilty of unlawful detainer who has taken

the benefit of an insolvent act during his term, or has been adjudicated a bankrupt under the laws of the United States, or when any part of the demised premises has been used for "a bawdy-house, or house of assignation for lewd persons, or for any illegal trade or manufacture, or other illegal business": N. Y. Code Civ. Proc., sec. 2231. Before any forfeiture can be asserted for any breach of a covenant or condition some statute must be found declaring such forfeiture (*Bauer v. Knoble*, 51 Minn. 358, 53 N. W. 805; *Ocean Grove C. M. Assn. v. Sanders*, 68 N. J. L. 631, 54 Atl. 448; *Hedley v. Havens*, 24 Vt. 520), or it must be sustained by some express reservation or stipulation in the lease: *Walker v. Dowling*, 24 Ky. Law Rep. 179, 68 S. W. 135; *Preston v. Stover*, 70 Neb. 632, 97 N. W. 812; *Hand v. Suravitz*, 148 Pa. 202, 23 Atl. 1117. We shall not undertake to consider in detail the several statutes declaring a detainer to be unlawful for acts or for breaches of condition other than for the payment of rent. It answers our present purpose to state that there are state statutes making a detainer unlawful after the breach of a covenant to pay taxes: *Crosby v. Jarvis*, 92 N. Y. Supp. 229; or not to sublet or assign: *Bernero v. Allen*, 68 Cal. 505, 9 Pac. 429; *Marvin v. Hartz*, 130 Mich. 26, 89 N. W. 557; *Wray-Austin M. Co. v. Flower*, 140 Mich. 452, 103 N. W. 873; *Markowitz v. Greenwall T. C. Co.* (Tex. Civ. App.), 75 S. W. 317.

3. The Demand When There is Default in the Payment of Rent.—Where the lessee or other person in possession fails to pay rent when it falls due, the landlord or other person entitled thereto must, under a majority of the statutes, in writing demand such payment or the surrender of the possession: *McDevitt v. Lambert*, 80 Ala. 536, 2 South. 438; Code Civ. Proc., sec. 1161, subd. 2; *Sullivan v. Cary*, 17 Cal. 80; *Cone v. Woodward*, 65 Ill. 477; *Woodward v. Cone*, 73 Ill. 241; *Espen v. Hinchliffe*, 131 Ill. 468, 123 N. E. 592; *Lane v. Brooks*, 120 Ill. App. 501; *Durie v. McLish*, 2 Ind. Ter. 610, 63 S. W. 437; *Welch v. Ashby*, 88 Mo. App. 400; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445; *Hoopes v. Meyer*, 1 Nev. 433; N. Y. Code Civ. Proc., sec. 2231, subd. 2; *Parks v. Hays*, 92 Tenn. 161, 22 S. W. 3; *Johnston v. Hargrove*, 81 Va. 118; *Bowyer v. Seymour*, 13 W. Va. 12. In some of the states no demand need be made if the rent is payable in advance: *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695; *Ingalls v. Bissot*, 25 Ind. App. 130, 57 N. E. 723; *Horan v. Thomas*, 60 Vt. 325, 13 Atl. 567. In New York the demand may be omitted when six months' rent is due: *Church v. Hempstead*, 27 App. Div. 412, 50 N. Y. Supp. 325. In Minnesota no demand is required in any case: *Spooner v. French*, 22 Minn. 37. In Indiana the statute seems to require a ten days' notice to quit, without including in it any demand: *Cheek v. Preston*, 34 Ind. App. 343, 72 N. E. 1048. Where the statute requires a demand, it has been held that the necessity therefor cannot be obviated by any stipulation in the lease purporting to dispense with it or to give the lessor an immediate right to judgment without such demand: *French v. Miller*, 126 Ill. 611, 9 Am.

St. Rep. 651, 18 N. E. 811, 2 L. R. A. 717. At the common law, to create a forfeiture for the nonpayment of rent, it was essential that a demand for the exact sum be made on the day it fell due and upon the most notorious place on the demised premises (24 Cyc. 1355), but this rule apparently does not prevail in Nebraska: *Cochran v. Philadelphia M. & T. Co.*, 70 Neb. 100, 96 N. W. 1051. We believe that the statutes relating to unlawful detainer dispense with all these conditions except that of stating the amount due. This amount must be stated except in Florida (*McLean v. Spratt*, 20 Fla. 515), and Washington (*Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760), but see *Byrnett v. Gardner*, 35 Wash. 668, 77 Pac. 1048, either in express terms or so that the lessee can ascertain from the demand how much the lessor claims to be due: *Byrnett v. Gardner*, 35 Wash. 668, 77 Pac. 1048. A demand for a sum less than that due is not fatal when the lessee has made no offer to pay the amount demanded: *Moore v. Martin*, 99 Mo. 94, 12 S. W. 522; *Sheldon v. Testera*, 21 Misc. Rep. 477, 47 N. Y. Supp. 653. If the demand is partly for rent and partly for something else, it cannot be sustained though the lessee owed all that was demanded, for the lease cannot be forfeited for failure to pay a debt not arising thereunder: *Welch v. Ashby*, 88 Mo. App. 400. Where the statute requires a demand for the payment of rent or the surrender of possession, both may be united in the same paper: *Brummagim v. Spencer*, 29 Cal. 661; *Lacrabere v. Wise* (Cal.), 71 Pac. 175; *Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434; *Brauchle v. Nothhelfer*, 107 Wis. 457, 83 N. W. 653. The time within which the rent must be paid after demand made is by statute usually fixed at three days (Cal. Code Civ. Proc., sec. 1161; N. Y. Code Civ. Proc., sec. 2231), and the statutes usually require the demand or notice to state the time within which the payment must be made or the possession surrendered. It is not sufficient to make the demand for payment either requiring it to be forthwith or not specifying any time, though the person making the demand awaits the full time allowed by law before commencing any proceeding to recover possession: *Oakes v. Munroe*, 8 Cush. 282; *Elliott v. Stone*, 12 Cush. 174; *Connell v. Chambers*, 22 Neb. 302, 34 N. W. 636. It is no objection to the notice that it gives the defendant more time than need be given him in which to quit possession: *Olds v. Conger*, 1 Okla. 232, 32 Pac. 337. But it must allow the full time, and if the last day is a holiday, it must be excluded from the computation: *Bristed v. Harrell*, 20 Misc. Rep. 348, 45 N. Y. Supp. 918. If twenty days' notice are required, a demand made on the eleventh day of the month to pay the rent or surrender possession on the thirty-first is sustainable: *McGinnis v. Genss*, 25 Wash. 490, 65 Pac. 755.

4. **The Demand Where the Cause of Forfeiture is Other than the Nonpayment of Rent.**—In New York, if the cause of forfeiture is a breach of covenant to pay taxes, the lessee must first be for sixty days in default, after which the notice may require, in the alternative, the payment of taxes and of any interest or penalty thereon, or the

possession of the premises. In California the lessor must serve a "three days' notice in writing requiring the performance of any condition or covenant or the possession of the property." If the covenant is one which can no longer be performed, no demand for its performance need be made: *Kelly v. Teague*, 63 Cal. 68; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88; but a demand for possession is still indispensable: *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449. The demand must point out wherein the tenant has failed to perform the covenants of his lease. It is not sufficient in the notice to set out the several covenants of the lease and state to the tenant "you are hereby notified to keep and perform each and all of the agreements and covenants contained in said written lease": *Byrkett v. Gardner*, 35 Wash. 668, 77 Pac. 1048.

5. *The Giving and Serving of Demands.*—The remarks made concerning notices to quit respecting the persons who may give and serve them, and on whom service must be made, as well as the mode of service, must be equally applicable to demands for unpaid rent, or for the performance of some covenant or condition, or the surrender of the property, except in so far as some statute has provided otherwise. Thus the demand may be made by the landlord or other person entitled to possession acting personally or by his agent: *Earl O. Co. v. Fava*, 138 Cal. 76, 70 Pac. 1073; *Neiner v. Altemeyer*, 68 Mo. App. 243; *Powers v. De O*, 64 App. Div. 373, 72 N. Y. Supp. 103; and if the person making the demand does so as a purchaser of the property, it is said he need not exhibit his deed: *Tucker v. McClenney*, 103 Mo. App. 318, 77 S. W. 151. So the service may be made by the landlord or anyone whom he may authorize to act for him in making service: *Nixon v. Noble*, 70 Ill. 32. In California the demand or notice may be served by delivering a copy to the tenant personally, or when he is absent from his place of residence and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence, or if the place of residence and of business cannot be ascertained, or a person of suitable age or discretion cannot be found at either place, then by affixing a copy in a conspicuous place on the property, and delivering a copy to a person there residing if such can be found, and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service on a subtenant may be made in the same manner: Cal. Code Civ. Proc., sec. 1162. The provisions of the code of New York on the subject are very similar: Code Civ. Proc., secs. 2231, 2240; *Zinsser v. Hermann*, 23 Misc. Rep. 645, 52 N. Y. Supp. 107; *Beach v. McGovern*, 41 App. Div. 381, 53 N. Y. Supp. 493. If there are two or more tenants, service upon one seems not to affect the other. In other words, service should be on all the parties to be removed: *Hill v. Stocking*, 6 Hill, 314; *Sims v. Humphrey*, 4 Denio, 185; *Hamilton L. & B. Assn. v. Patton*, 105 Tenn. 407, 58 S. W. 482.

6. **Use of Premises for an Illegal Purpose.**—Where the use of the premises for some specified illegal purpose is by statute made a ground of forfeiture and converts the tenant's holding into an unlawful detainer, no doubt the proceeding provided by statute is maintainable: *People v. McCarty*, 62 How. Pr. 152; *People v. Bennett*, 14 Hun, 63; *Conforti v. Romano*, 50 Misc. Rep. 148, 98 N. Y. Supp. 194; *Justice v. Lowe*, 26 Ohio St. 372; *McGarvey v. Puckett*, 27 Ohio St. 669. It seems the discontinuance of the illegal use of the property before any proceeding is commenced to dispossess the tenant is a sufficient defense thereto: *Shaw v. McCarty*, 63 How. Pr. 286, 11 Daly, 150, 2 Civ. Pro. R. 23; unless the discontinuance was not involuntary, but due to the fear of a criminal prosecution: *Stearns v. Hemmens*, 14 Daly, 501. In none of the statutes have we found any requirement that the tenant making an unlawful use of the premises be requested to desist therefrom, or that he be given any notice to quit, and we believe that no notice or request of any character is required, at least where the tenant has knowingly been guilty of the illegal use of the property: *Prescott v. Kyle*, 103 Mass. 381.

V. Who can be Proceeded Against Because of.

We have already shown that a leasing is indispensable to the sustaining of a proceeding in unlawful detainer. From this it follows that such a proceeding can be maintained against every person who has acknowledged himself to be a tenant (*Chapin v. Billings*, 91 Ill. 539) guilty of an unlawful detainer and all persons acquiring possession under him. Hence his subtenants are proper parties defendant: *Pardee v. Gray*, 66 Cal. 524, 6 Pac. 389; *Reed v. Hawley*, 45 Ill. 40; *Patchell v. Johnson*, 64 Ill. 305; *Bird v. Fannon*, 3 Head, 12; *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123; and indispensable if it be intended to remove them under the judgment: *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. Rep. 194, 40 N. E. 952; *Bagley v. Sternberg*, 34 Minn. 470, 26 N. W. 602; and they and the original lessee may be joined: *Fletcher v. Fletcher*, 123 Ga. 470, 51 S. E. 418. While an assignee is doubtless a proper and necessary defendant if he continues in possession, he may, by his assignment to another, terminate his relation to the property and make himself no longer subject to the proceeding: *Ben Lomond W. Co. v. Sladky*, 141 Cal. 619, 75 Pac. 332. The recovery against a subtenant can be only for that part of the property which he has leased: *Taylor v. White*, 86 Mo. App. 526. Persons claiming as heirs or as members of the family of a deceased tenant may be guilty of an unlawful detainer and proceeded against therefor: *Collins v. Mountain*, 53 Ala. 201; *Brubaker v. Poage*, 1 T. B. Mon. 123; *Fogle v. Chaney*, 12 B. Mon. 138. We should think the same rule applicable to an executor but for *Martel v. Meehan*, 63 Cal. 47, holding the action not maintainable against an executor because of his default in the payment of rent. This decision was controlled by the consideration that, in the event of a

recovery, the estate of the decedent must be held liable under the statute for three times the amount of rent due.

One entering under an adverse title is not subject to the proceeding (*Watson v. Toliver*, 103 Ga. 123, 29 S. E. 614), but if he obtained possession from the tenant during the lease, he is subject to the proceeding though he claims under a distinct and hostile title: *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432. The theory of the law is, that a landlord parting with possession under a lease is entitled to be restored thereto, and that any detention of the property is unlawful, in the absence of such restoration, whether it be by the original tenant, or by a subtenant, or by anyone acquiring possession from, under, or in collusion with, the original tenant: *Snoddy v. Watt*, 9 Ala. 609; *McCartney v. Hunt*, 16 Ill. 76; *Willi v. Peters*, 11 Mo. 395; *Saunders v. Doake*, 3 Tex. 143; *Emerick v. Tavenor*, 9 Gratt. 220, 58 Am. Dec. 217.

The joinder of the original tenant with his sublessees is proper: *Middlebury College v. Lawton*, 23 Vt. 688; *Emerick v. Tavenor*, 9 Gratt. 220, 58 Am. Dec. 217; though they have possession of the entire property: *Espen v. Hinchliffe*, 131 Ill. 468, 23 N. E. 592. But after his lease has terminated, the tenant is probably not liable for unlawful detainer in which he does not join, though a person placed by him in possession of the property is guilty thereof: *St. Louis B. Assn. v. Neiderluecke*, 102 Mo. App. 303, 76 S. W. 645. Persons other than the tenant and his subtenants cannot be made parties defendant on the ground that the tenant also claims under them: *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291. In New York an answer may be filed by the person to whom the precept is directed "or his landlord, or any person in possession or claiming possession of the premises, or a part thereof": N. Y. Code Civ. Proc., sec. 2244. Therefore anyone claiming to be in possession as an under-tenant may intervene and answer: *Kiernan v. Cashin*, 92 N. Y. Supp. 255.

VI. Defenses.

a. Presenting Issues as to Title.

1. **The General Rule.**—As a general rule, a tenant, or a person acquiring possession under a tenant, is, until possession is restored to the landlord, absolutely estopped to deny or question his title or right of possession: *Terry v. Ferguson*, 8 Port. 500; *Barlow v. Dahm*, 97 Ala. 414, 38 Am. St. Rep. 192, 12 South. 293; *Tewksbury v. Magraff*, 33 Cal. 237; *Mauldin v. Cox*, 67 Cal. 387, 7 Pac. 804; *Peterson v. Kinkead*, 92 Cal. 372, 29 Pac. 568; *Newton v. Roe*, 33 Ga. 163; *Lowe v. Emerson*, 48 Ill. 160; *Gable v. Wetherholt*, 116 Ill. 313, 56 Am. St. Rep. 774, 6 N. E. 453; *Kinney v. Laman*, 8 Blackf. 350; *Metoyer v. Larendiere*, 6 Rob. 139; *Moshier v. Beding*, 12 Me. 478; *Millay v. Millay*, 18 Me. 387; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Despard v. Walbridge*, 15 N. Y. 374; *Farmer v. Pickens*, 83 N. C. 549; *Henning v. Warner*, 109 N. C. 406, 14 S. E. 317; *Milhouse v. Patrick*,

6 Rich. 350; *Wilson v. Smith*, 5 Yerg. 379; *Lyles v. Murphy*, 38 Tex. 75; *Hoskins v. Bigham*, 1 White & W., Civ. Cas. Ct. App., sec. 1027; and the attornment to a stranger is void and does not prevent the application of the rule: *Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Simmons v. Robertson*, 27 Ark. 50; *Chambers v. Pleak*, 6 Dana, 426, 32 Am. Dec. 78; *Hughes v. Watt*, 28 Ark. 153; *Trabue v. Ramage*, 80 Ky. 323; *Wells v. Hickman*, 6 Rob. 1; *Byrne v. Beeson*, 1 Doug. 179; *Bertram v. Cook*, 32 Mich. 518; *Fuller v. Sweet*, 30 Mich. 237, 18 Am. Rep. 122; *McNamee v. Belf*, 52 Miss. 426; *Schultz v. Arnot*, 33 Mo. 172; *Leach v. Koenig*, 55 Mo. 451; *Kenada v. Gardner*, 3 Barb. 589; *Freeman v. Ogden*, 40 N. Y. 105; *Jackson v. Miller*, 6 Wend. 228, 21 Am. Dec. 316; *State v. Howell*, 107 N. C. 835, 12 S. E. 569; *Rankin v. Tenbrook*, 5 Watts, 386; *Camden Orphan Soc. v. Lockhart*, 2 McMull. 84; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *United States v. Sliney*, 21 Fed. 894; note to *Davis v. Williams*, 89 Am. St. Rep. 101. Furthermore, the proceeding in unlawful detainer is sometimes by statute declared not to involve or permit any issue of title, and whether such declaration is so made or not, this must be the general rule: *Abrams v. Watson*, 59 Ala. 524; *Nicrosi v. Phillippi*, 91 Ala. 299, 8 South. 561; *Pugh v. Davis*, 103 Ala. 316, 49 Am. St. Rep. 30, 18 South. 8; *Davis v. Pou*, 108 Ala. 443, 19 South. 362; *Patterson v. Folmar*, 125 Ala. 130, 28 South. 450; *Barkman v. Barkman*, 107 Ill. App. 332; *Hill v. Watkins*, 4 Ind. Ter. 170, 69 S. W. 837; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787; *Silvey v. Sumner*, 61 Mo. 253; *Stover v. Davis*, 57 W. Va. 196, 49 S. E. 1023; note to *Davis v. Williams*, 89 Am. St. Rep. 71-75; and exception to, or relaxation of, it must be due to the terms of some statute, or to the necessity of giving effect to conveyances made or acts done by the lessor or by operation of law under which, conceding him to have been the owner and entitled to the possession of the property when the lease was made, it appears that he is no longer such owner nor entitled to such possession.

A tenant is not estopped to urge that the property was, at the inception of the lease, vacant public land, not subject to lease by a private person, when to maintain an estoppel against the tenant in such a case would conflict with public policy respecting the use and disposition of government lands: *Welder v. McComb*, 10 Tex. Civ. App. 85, 30 S. W. 822; *Dupas v. Wassell*, 1 Dill. 213, Fed. Cas. No. 4182. But when public policy is not infringed, the estoppel exists with respect to such lands and prevents the tenant from avoiding the obligation of his lease, including that of surrendering possession, by urging that title is in the state or United States: *Denniston v. Walton*, 8 Rob. (La.) 211; *Cunning v. Tittabawassee B. Co.*, 88 Mich. 237, 50 N. W. 141; *St. Anthony F. W. P. Co. v. Morrison*, 12 Minn. 249; *Hall et al. Co. v. Wilbur*, 4 Wash. 644, 30 Pac. 665.

Under the code of New York the defendant may set forth "a statement of any new matter constituting a legal or equitable defense or counterclaim": N. Y. Code Civ. Proc., sec. 2244. We see noth-

ing in this language changing the general rules hereinbefore stated. It has, nevertheless, been held by one of the subordinate courts of the state that it was proper for a defendant to show "that he entered into an alleged lease with one who had no title, and who had no right of possession, while at the same time he had title with others, and he had a right of possession against the petitioner, and was paying rent for his own property": *In re McCormick*, 30 Misc. Rep. 285, 63 N. Y. Supp. 492.

2. **The Acquisition of Adverse Title.**—The better view, and the one which we think should be maintained without exception, is that a tenant obtaining possession under a lease cannot avoid surrendering such possession by acquiring a title adverse to that of his landlord, though paramount thereto: *Clemm v. Wilcox*, 15 Ark. 102; *Hughes v. Watt*, 28 Ark. 153; *Burgess v. Rice*, 74 Cal. 590, 16 Pac. 496; *Arnold v. Woodard*, 4 Colo. 249; *Stout v. Merrill*, 35 Iowa, 47; *Norton v. Sanders*, 1 Dana, 14; *Chambers v. Pleak*, 6 Dana 426, 32 Am. Dec. 78; *Drane v. Gregory's Heirs*, 3 B. Mon. 619; *Bertram v. Cook*, 32 Mich. 518; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Rowan v. Lyttle*, 11 Wend. 616; *Sharpe v. Kelley*, 5 Denio, 431; *Clapp v. Coble*, 21 N. C. 177; *Heyer v. Beatty*, 76 N. C. 28; *Galloway's Lessee v. Ogle*, 2 Binn. 468; *Russell v. Titus*, 3 Grant Cas. 295; *Wilson v. Smith*, 5 Yerg. 379; *Tondro v. Cushman*, 5 Wis. 279; *Peyton v. Stith*, 5 Pet. 485, 8 L. ed. 200; note to *Davis v. Williams*, 88 Am. St. Rep. 79-81.

The relation of landlord and tenant may be terminated by the latter's eviction under title paramount, as by a judgment against him by which the landlord is bound: *Douglas v. Fulda*, 45 Cal. 592; note to *Davis v. Williams*, 89 Am. St. Rep. 99; and when such a judgment has been rendered, the tenant need not actually be dispossessed, but may acquire the title or a right to the possession from the successful plaintiff, and by means thereof resist a recovery by his landlord: *Wheclock v. Warschauer*, 21 Cal. 309; 34 Cal. 265; *Steinback v. Krone*, 36 Cal. 303; *Lowe v. Emerson*, 48 Ill. 160; *Lunsford v. Turney*, 5 J. J. Marsh. 104, 20 Am. Dec. 248; *Gore v. Stevens*, 1 Dana, 201, 25 Am. Dec. 141; *Smith v. Shepard*, 15 Pick. 147, 25 Am. Dec. 432; *Morse v. Goddard*, 13 Met. 177, 46 Am. Dec. 728; *George v. Putney*, 4 Cush. 351, 50 Am. Dec. 788; *Clapp v. Coble*, 21 N. C. 177; *Ross v. Dysart*, 33 Pa. 452. It has even been held that if a landlord is guilty of fraud in making the lease, and, being insolvent, is unable to indemnify his tenant for rents exacted, the latter, acting in good faith and from a well-grounded fear of eviction, may purchase and enforce the superior title and thereby successfully resist a proceeding to recover rent and possession: *Gallagher v. Bennett's Heirs*, 38 Tex. 291; note to *Davis v. Williams*, 89 Am. St. Rep. 95.

3. **The Acquisition of the Landlord's Title.**—The tenant may show that he has acquired his landlord's title by purchase of and conveyance from him: *Swan v. Wilson*, 1 A. K. Marsh. 99; *Hodges v. Shields*, 18 B. Mon. 828; *Silvey v. Sumner*, 61 Mo. 253; or has entered into

some new agreement or relation with him under which he remains entitled to the possession, and that his detainer, therefore, is not unlawful: *Uridias v. Morrell*, 25 Cal. 31; *Pico v. Cuyas*, 47 Cal. 180; *Schweikert v. Seavey*, 130 Cal. xviii, 62 Pac. 600; *Casey v. Gregory*, 13 B. Mon. 505, 56 Am. Dec. 581; *Silvey v. Sumner*, 61 Mo. 253; *Aurand v. Wilt*, 9 Pa. 54; as that he has been given the privilege of renewal and has done whatsoever was requisite to avail himself of that privilege: *Bard v. Jones*, 96 Ill. App. 370; *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965; *Holt v. Nixon*, 141 Fed. 952, 73 C. C. A. 268. Contra, *Elliott v. Abell*, 39 Mo. App. 346. If anything in the principal case is inconsistent with these views, it must be deemed unsupported by the weight of authority. Of course, no contract with which the tenant on his part has failed to comply can be urged with success as a defense: *Colored H. & B. Assn. v. Harvey*, 23 Ky. Law Rep. 1009, 64 S. W. 676.

In Alabama, the tenant cannot show that he has acquired the landlord's title at a foreclosure sale: *Howard v. Jones*, 123 Ala. 488, 26 South. 129. This, in our judgment, is contrary to reason and the decided weight of authority. A tenant is, under ordinary circumstances, no more estopped from acquiring his landlord's title at an execution or judicial sale, than by voluntary transfer; and there is no reason why the acquisition of the title by involuntary transfer does not terminate the relation of landlord and tenant, and enable the latter to successfully resist proceedings for unlawful detainer: *Tewksbury v. Magraff*, 33 Cal. 237; *Tilghman v. Little*, 13 Ill. 239; *Casey v. Gregory*, 13 B. Mon. 505, 56 Am. Dec. 581; *Walker v. Fisher*, 117 Mich. 72, 75 N. W. 144; *Higgins v. Turner*, 61 Mo. 249; *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358; *Elliott v. Smith*, 23 Pa. 131; *Camley v. Stanfield*, 10 Tex. 546, 60 Am. Dec. 219; *Franklin v. Hurlbert*, 1 White & W. Civ. Cas. Ct., sec. 816; *Nightingale v. Barena*, 47 Wis. 389, 2 N. W. 767. There may, however, be circumstances in which it would be inequitable to permit a tenant to purchase and assert a title dependent on an execution sale. Among the cases so holding are *Lausman v. Drahos*, 10 Neb. 172, 35 Am. Rep. 468, 4 N. W. 956; *Matthews' Appeal*, 104 Pa. 444; *Scott v. Levy*, 6 Lea, 662.

If a tenant has agreed to pay the taxes on the demised premises, of course he cannot, by disregarding his agreement and thus causing a delinquency, acquire title at a tax sale: *Busch v. Huston*, 75 Ill. 313; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334; *Carithers v. Weaver*, 7 Kan. 110; *Haskell v. Putnam*, 42 Me. 244; *Bertram v. Cook*, 32 Mich. 518; *Lyebrook v. Hall*, 73 Miss. 509; 19 South. 348; *Williamson v. Russell*, 18 W. Va. 612; *Shepardson v. Elmore*, 19 Wis. 424; note to *Davis v. Williams*, 89 Am. St. Rep. 84. In many states he is not permitted to assert title acquired by such a sale, irrespective of his agreement to pay taxes: *Bayley's Admr. v. Campbell*, 82 Ala. 342, 2 South. 646; *Jackson v. King*, 82 Ala. 432, 3 South. 232; *Morris v. Aperson*, 11 Ky. Law Rep. 838, 13 S. W. 441; *Williams v. Towl*, 65 Mich. 204, 31 N. W. 835; *Lyebrook v. Hall*, 83 Miss. 509, 19 South. 348;

Sharpe v. Kelley, 5 Denio, 431; but where his acquisition of title by this note is permissible, he may assert it as a defense in unlawful detainer: Ferguson v. Etter, 21 Ark. 160, 76 Am. Dec. 361; Waggener v. McLaughlin, 33 Ark. 195; Weichselbaum v. Curlett, 20 Kan. 709, 27 Am. Rep. 204; Higgins v. Turner, 61 Mo. 249; Silvey v. Sumner, 61 Mo. 253; Hilton v. Bender, 4 Thomp. & C. 270.

4. **The Termination of the Landlord's Title.**—There appears to be no dissent from the proposition that the tenant may, even in proceedings for unlawful detainer, plead and prove that the title of the landlord has expired by lapse of time, or has from any other cause ceased, so that it has become the duty of the tenant to make payment or deliver possession to some other person in whom the right to rents and possession has vested: Randolph v. Carlton, 8 Ala. 606; Farris v. Houston, 74 Ala. 162; McDevitt v. Sullivan, 8 Cal. 592; Winn v. Strickland, 34 Fla. 160, 16 South. 606; Wells v. Mason, 4 Scam. 84; St. John v. Quitzow, 71 Ill. 334; Kinney v. Laman, 8 Blackf. 350; Giles v. Ebsworth, 10 Md. 333; Lamson v. Clarkson, 113 Mass. 348, 18 Am. Rep. 498; Niles v. Ransford, 1 Mich. 338, 51 Am. Dec. 95; Chaffin v. Brockmeyer, 33 Mo. App. 92; Robinson v. Troup M. Co., 55 Mo. App. 662; Russell v. Allard, 18 N. H. 222; Hoag v. Hoag, 35 N. Y. 469; Hilton v. Biner, 4 Thomp. & C. 270; Heckart v. McKee, 5 Watts, 385; Newell v. Gibbs, 1 Watts & S. 496; Harvey v. Harvey, 26 S. C. 608, 2 S. E. 3; Bowser v. Bowser, 10 Humph. 49. This rule applies when the title of the landlord has passed from him by voluntary transfer: Robertson v. Biddell, 32 Fla. 304, 13 South. 358; Gregory's Heirs v. Crab's Heirs, 2 B. Mon. 234; McGuffie v. Carter, 42 Mich. 497, 4 N. W. 211; Pentz v. Kuester, 41 Mo. 447; Horner v. Leeds, 25 N. J. L. 106; Boyd v. Sametz, 17 Misc. Rep. 728, 40 N. Y. Supp. 1070; West Shore M. Co. v. Edwards, 24 Or. 475, 33 Pac. 987; or by execution or judicial sale: McGuffie v. Carter, 42 Mich. 497, 4 N. W. 211; Walker v. Fisher, 117 Mich. 72, 75 N. W. 114; Wolf v. Johnson, 39 Miss. 513; Rhyne v. Guevara, 67 Miss. 139, 6 South. 736; Lancashire v. Mason, 75 N. C. 455; Smith v. Crosland, 106 Pa. 413; though it has not vested in the tenant, for by the transfer, whether voluntary or involuntary, the tenant became obligated to hold as such under the transferee. There is no reason for not applying the same rule to the extinction or transfer of the landlord's title after the commencement of the tenancy by a tax sale: Keys v. Forrest, 90 Md. 132, 45 Atl. 22; Jenkinson v. Winans, 109 Mich. 524, 67 N. W. 549; but this is not so universally conceded: Chase v. Dearborn, 21 Wis. 57. It has been denied that the tenant may successfully defend by showing that the landlord's title has escheated or reverted to the state: Bishop v. Lalouette's Heirs, 67 Ala. 197; Young v. Severy, 5 Okla. 630, 49 Pac. 1024.

5. **Outstanding Title.**—It follows from what we have already said that the defense of title or right of possession in a third person is good or bad according to the time when such title is claimed to have arisen.

If the title resulted from a transfer by or from the landlord, whether voluntary or involuntary, after the making of the lease, as a result of which his right to the possession and to the rents has passed to and remains outstanding in a third person, then such outstanding title is available to the tenant: *Ante*, subdivision VI, a, 4. If, on the other hand, the alleged outstanding title existed prior to the commencement of the tenancy, the tenant is estopped from asserting it: *Shelton v. Eslava*, 6 Ala. 230; *Pope v. Harkins*, 16 Ala. 321; *Yosemite Valley etc. Commrs. v. Barnard*, 98 Cal. 199, 32 Pac. 982; *Vatuone v. Cannobios*, 4 Cal. App. 422, 88 Pac. 374; *Chambers v. Pleak*, 6 Dana, 426, 32 Am. Dec. 78; *Connelly's Heirs v. Chiles*, 2 A. K. Marsh. 242; *Binney v. Chapman*, 5 Pick. 124; *Hawes v. Shaw*, 100 Mass. 187; *Gage v. Campbell*, 131 Mass. 566; *Winston v. Franklin Academy*, 28 Miss. 118, 61 Am. Dec. 540; *Howell v. Ashmore*, 22 N. J. L. 261; *Jackson v. Harper*, 5 Wend. 246; *Hamer v. McCall*, 121 N. C. 196, 23 S. E. 297; *Cooper v. Smith*, 8 Watts, 536; *Syme v. Sanders*, 4 Strob. 196; note to *Davis v. Williams*, 89 Am. St. Rep. 73.

b. *Implied from Matters Already Considered.*—From what we have already stated it is apparent that the defense may be made that there has been no letting of the property and the relation of landlord and tenant has never existed (*ante*, subdivision II), that the plaintiff is not a person entitled to maintain the proceeding (*ante*, subdivision III, a, b, 6), that the detainer is not unlawful, either because the lease has not expired by its own terms or there has been no sufficient notice to quit (*ante*, subdivision IV), or no demand has been made or notice given when required to consummate a forfeiture (*ante*, subdivision IV, c, 1-6), or that the person sued does not sustain such a relation to the plaintiff or the property as to be subject to the proceeding (*ante*, subdivision V).

c. *The Validity of the Lease.*—If the defendant, or those under whom he claims, came into the possession of the property under a lease the defense in unlawful detainer cannot be made out by any attack upon the validity of the lease (*Brubaker v. Poage*, 1 T. B. Mon. 123), as that it was executed by one assuming to act as an agent, but without authority (*Sittel v. Wright*, 122 Fed. 434, 58 C. C. A. 416), or by a person incompetent to grant a lease (*Helmes v. Stewart*, 26 Mo. 529); or was made for an unlawful purpose (*Toby v. Schultz*, 51 Ill. App. 487); or not supported by a sufficient consideration: *Housiere-Latreille O. Co. v. Jennings-Heywood O. Syndicate*, 115 La. 107, 38 South. 932. Whether fraud whereby the tenant was induced to accept a lease may constitute a defense in unlawful detainer is by no means well or harmoniously settled. If he acquired possession under it, doubtless he must surrender such possession: *Simons v. Marshall*, 3 G. Greene, 502; *Crockett v. Althouse*, 35 Mo. App. 404; *Higgins v. Turner*, 61 Mo. 249; *Kiernan v. Terry*, 26 Or. 494, 38 Pac. 671; but if he was already in possession, and especially if his possession was under a paramount right, he may, in a majority of the states, show,

as a sufficient defense, fraud whereby he was induced to accept the lease: *Miller v. Bonsadon*, 9 Ala. 317; *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111; *Young v. Heffernan*, 67 Ill. App. 354; *Ball v. Lively*, 2 J. J. Marsh. 181; *Michigan C. R. R. v. Bullard*, 120 Mich. 416, 79 N. W. 635; *Higgins v. Turner*, 61 Mo. 249; *Hall v. Benner*, 1 P. & W. 402, 21 Am. Dec. 394; *Evans v. Bidwell*, 76 Pa. 497; *Givens v. Mullineax*, 4 Rich. 590, 55 Am. Dec. 706; *Shultz v. Elliott*, 11 Humph. 183; *Hammons v. McClure*, 85 Tenn. 65, 2 S. W. 37; *Alderson v. Miller*, 15 Gratt. 279.

d. Acts or Omissions of the Landlord.

1. **Breach of Covenant or Duty.**—The necessity that the landlord or other person entitled to possession give the requisite notices and make the proper demands to terminate the tenant's estate has already been considered. What is the effect of breaches of express or implied covenants on the part of the landlord is not so well established as might reasonably be anticipated. There are several decisions refusing to consider breaches of covenants or of duty on the part of the landlord, though his performance of his covenant must have entitled the tenant to remain in possession: *Platt v. Cutler*, 75 Conn. 183, 52 Atl. 819; *Finney v. Cist*, 34 Mo. 303, 84 Am. Dec. 82; *People v. Kelsey*, 38 Barb. 269, 14 Abb. Pr. 372; or have made his obligation to pay rent for the nonpayment of which a forfeiture is sought, clear and unassailable: *Peterson v. Kruger*, 67 Minn. 449, 70 N. W. 567; *Durant L. I. Co. v. East River E. L. Co.*, 15 Daly, 337, 6 N. Y. Supp. 659, 17 N. Y. Civ. Pro. 224; *Liebman's Sons B. Co. v. De Nicolo*, 46 Misc. Rep. 268, 91 N. Y. Supp. 791; *Jefferson R. E. Co. v. Hiller*, 39 Misc. Rep. 784, 81 N. Y. Supp. 374; *Phillips v. Port Townsend Lodge etc.*, 8 Wash. 529, 36 Pac. 476; *Malick v. Kellogg*, 118 Wis. 405, 95 N. W. 372. From these we must respectfully dissent. Where the nonperformance of some duty, or the breach of some covenant, makes the value of the premises substantially less to the tenant, and therefore amounts to a partial eviction, it exonerates him from the obligation to pay rent, and he cannot be held in default for not paying it, nor compelled to yield possession because he does not, and this may be used as a defense though the proceeding is in unlawful detainer: *Wilcoxon v. Hybarger*, 1 Ind. Ter. 138, 38 S. W. 669; *Witte v. Quinn*, 38 Mo. App. 681; *Sirey v. Braems*, 65 App. Div. 472, 72 N. Y. Supp. 1044; *Hamilton v. Graybill*, 19 Misc. Rep. 521, 43 N. Y. Supp. 1079; 26 N. Y. Civ. Pro. 184. It is said that the continued occupancy of the premises by a former defendant is not a defense, because it is the duty of the lessee, rather than of the landlord, to dispossess one not lawfully in possession: *Dodd v. Hart*, 30 Misc. Rep. 459, 62 N. Y. Supp. 484. Whether this be a good reason or not, the defense seems sufficient to us, on the ground that it shows that the person sued has not been guilty of detaining the property.

2. **Failure to Pay Demands Due to Tenant.**—A sum due by the landlord to the tenant cannot be asserted by the latter by way of cross-

complaint or counterclaim for the purpose of recovering judgment thereon nor of diminishing the amount of the plaintiff's recovery: *Abrams v. Watson*, 59 Ala. 524; *Van Every v. Ogg*, 59 Cal. 563; *Kelly v. Teague*, 63 Cal. 68; *Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434; *Barker v. Walbridge*, 14 Minn. 469; *Ward v. Stakelum*, 47 La. Ann. 1546, 18 South. 508; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Carmack v. Dunn*, 27 Wash. 382, 67 Pac. 808; nor to excuse the defendant for not paying the rent due by the terms of the lease: *Case v. Porterfield*, 54 App. Div. 109, 66 N. Y. Supp. 337. The tenant may have placed improvements on the premises under an agreement entitling him to payment therefor, in which case it may be regarded as inequitable to compel him to surrender the premises leaving the improvements thereon, to seek to compel payment only by action against his landlord, and a few decisions indicate that this cannot be done: *Brockway v. Thomas*, 36 Ark. 518; *Jones v. Overton*, 4 Bibb. 334; *Franklin L. etc. Co. v. Card*, 82 Me. 528, 24 Atl. 960; *Smith v. Cooley*, 5 Daly, 401; *Holsman v. Abrams*, 2 Duer, 435. We apprehend, however, that they are not sustainable, and that however clearly the landlord may owe the tenant for improvements made, this debt will not excuse the nonpayment of rent, nor, under any circumstances, prevent the maintenance of a proceeding in unlawful detainer, the facts being otherwise adequate to support it: *Douglass v. Anderson*, 23 Kan. 262; *Bresler v. Darmstaetter*, 57 Mich. 311, 23 N. W. 825; *Speers v. Flack*, 34 Mo. 101, 84 Am. Dec. 74; *Tallman v. Coffin*, 4 N. Y. 134; *Manigault v. Carroll*, 1 McCord, 91; *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808; *Fraer v. Washington*, 125 Fed. 280, 60 C. C. A. 194. Section 3244 of the Code of Civil Procedure of New York expressly allows the interposition of a counterclaim in summary proceedings to recover possession, but what may be asserted as a counterclaim and the relief which may be granted upon it are by no means settled by the few cases applying the section: *Durant L. I. Co. v. East River E. L. Co.*, 15 Daly, 337, 6 N. Y. Supp. 659, 17 N. Y. Civ. Pro. 224; *Pearson v. Germond*, 83 Hun, 88, 31 N. Y. Supp. 318; *Burrell v. Do Sim*, 10 Misc. Rep. 745, 31 N. Y. Supp. 804; *Wulff v. Cilento*, 28 Misc. Rep. 551, 59 N. Y. Supp. 525; *Sage v. Crosby*, 33 Misc. Rep. 117, 67 N. Y. Supp. 139; *Jefferson E. E. Co. v. Hiller*, 81 N. Y. Supp. 374.

3. **Waiver.**—Of course, the landlord may waive his right to maintain the proceeding either in express terms, or by acts which are inconsistent with its prosecution. Having given a notice, he may annul it by telling the defendant that he may continue in possession under the lease: *Tuttle v. Bean*, 13 Met. 275. The waiver of a forfeiture may be by parol and also by conduct inducing the tenant to believe, and to act upon the belief, that the landlord does not intend to enforce the forfeiture: *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. Rep. 194, 40 N. E. 952. Any recognition of the tenancy as subsisting, after the right to terminate it accrues, by a landlord having knowledge of such right, waives the forfeiture: *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486, 34 N. E. 476, 21 L. R. A. 489;

note to *Moses v. Loomis*, 47 Am. St. Rep. 197. As to the acceptance of rents, a distinction must be kept in mind respecting those accruing after the cause of forfeiture and those accruing subsequently. As to the former, the landlord's right to receive them having been perfected before is not terminated thereby, and their subsequent receipt thereby neither affirms the continuance of the lease, nor an intent not to urge the forfeiture: *Cleve v. Mazzoni*, 19 Ky. Law Rep. 2001, 45 S. W. 88; *Carter P. Co. v. Dennett*, 11 S. Dak. 486, 78 N. W. 956; *Carraher v. Bell*, 7 Wash. 81, 34 Pac. 469; *Byrne v. Morrison*, 25 App. D. C. 72. But when a cause of forfeiture is brought home to the knowledge of the landlord, his duty is not to take any equivocal position with respect thereto, and still more not to impliedly affirm the continuance of the lease if he wishes to enforce its forfeiture. The receipt of rent accruing after a known cause of forfeiture is an implied waiver thereof: *McGlynn v. Moore*, 25 Cal. 384; *Conger v. Duryee*, 90 N. Y. 594; note to *Moses v. Loomis*, 47 Am. St. Rep. 198; but does not preclude the landlord from asserting causes of forfeiture subsequently accruing: *McGlynn v. Moore*, 25 Cal. 384; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027; *Alexander v. Hodges*, 41 Mich. 691, 3 N. W. 187; *Gluck v. Elkan*, 36 Minn. 80, 30 N. W. 446. Any attempt to collect rent by commencing an action therefor has the same effect as its actual receipt as a waiver of pre-existing causes of forfeiture: *Rich v. Rose*, 30 Ky. Law Rep. 925, 99 S. W. 953; *Nagel v. League*, 70 Mo. App. 487; *Clark v. Jones*, 1 Denio, 516, 43 Am. Dec. 706. After a landlord has parted with his right of possession, as by leasing to another, he cannot waive a forfeiture: *Guffy v. Hukill*, 34 W. Va. 49, 26 Am. St. Rep. 901, 11 S. E. 754, 8 L. R. A. 759.

e. **Acts of the Defendant.**—The defendant may show that he has performed any covenant or done any act the nonperformance or not doing of which is relied upon as a cause of forfeiture. If he is proceeded against for default in the payment of rent, he may show that he paid or tendered the amount due within the time allowed by the statute: *Dakota Hot Springs Co. v. Young*, 9 S. Dak. 577, 70 N. W. 842. Under some of the statutes, if the landlord does not accept the rent when tendered, it is the duty of the defendant to deposit the money in court (*Wilcoxon v. Hybarger*, 1 Ind. Ter. 138, 38 S. W. 669), but unless the statute clearly affirms this rule, we apprehend it must be sufficient for the tenant to tender the amount to the landlord within the time prescribed and to plead such tender as the basis of his claim to be restored to his rights: *Bien v. Bixby*, 18 Misc. Rep. 415, 41 N. Y. Supp. 433. A tender after the expiration of the time allowed by law is unavailing (*Roussel v. Kelly*, 41 Cal. 360), unless, as in many of the states, the statute allows payment at a later date if accompanied with the costs of suit: *Johnson v. Douglass*, 73 Mo. 168. If the right of the landlord to receive rents has passed to another, or been temporarily suspended, the defendant may plead this in defense, as that he did not pay because he had been garnished under process against the landlord, where the statute suspends the right to recover

on a garnished demand until the termination of the garnishment proceedings: *O'Connor v. White*, 124 Mich. 22, 82 N. W. 664.

The tenant may also defend on the ground that, after the expiration of his term, he surrendered possession of the property to his landlord, who accepted it and remained for some days in possession, nor is this defense weakened by evidence tending to show that the tenant subsequently re-entered upon the possession and probably intended to do so when he quit: *Walls v. Preston*, 28 Cal. 224.

f. Equitable Defenses.—The general tendency is to declare that an equitable defense cannot be urged, nor an equitable title asserted, against a proceeding in unlawful detainer: *Washington v. Moore*, 84 Ark. 220, ante, p. 29, 105 S. W. 253; *Cottrell v. Moran*, 138 Mich. 410, 101 N. W. 561; *Norton v. Beckman*, 53 Minn. 456, 55 N. W. 603; *Elliott v. Abell*, 39 Mo. App. 346; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97. Hence the defendant was not allowed to present the issue that the relation between himself and the plaintiff was equitably that of mortgagor and mortgagee (*Cottrell v. Moran*, 138 Mich. 410, 101 N. W. 561), nor that he was holding possession under a covenant to purchase: *Washington v. Moore*, 84 Ark. 220, ante, p. 29, 105 S. W. 253; *Elliott v. Abell*, 39 Mo. App. 346; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97. We cannot assent to this view: *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 Pac. 761; *Gray v. Maier & Zobelein Brewery*, 2 Cal. App. 653, 84 Pac. 280; *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965; *Turner v. Lowe*, 66 N. C. 413; *Forsyth v. Bullock*, 74 N. C. 135; ante, subdivision VI, a, 3; especially when the matter pleaded, while it may constitute a good cause for proceeding in equity, also shows that the detention is permissive and lawful, as where it is to the effect that a conveyance to the plaintiff, absolute in form, was intended as a mortgage and not to interfere with defendant's right of possession (*Forsyth v. Bullock*, 74 N. C. 135), or that the landlord covenanted to renew the lease and the defendant accepted the privilege of renewal and is holding under it: *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965. If the court in which the proceeding is brought also has jurisdiction in equity, the defendant may seek any relief germane to the proceeding and founded on the fraud of the lessor (*Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 Pac. 761), and may secure a reformation of the lease where such relief must properly follow from the presentation of the same facts and equities in an independent suit: *Gray v. Maier & Zobelein Brewery*, 2 Cal. App. 653, 84 Pac. 280. Equitable defenses are expressly declared to be permissible under the Code of Civil Procedure of New York: *Woods v. Garcewich*, 67 App. Div. 53, 73 N. Y. Supp. 472; *Schlauch v. Blum*, 42 Misc. Rep. 225, 85 N. Y. Supp. 335; and in those states where not allowed may be made the grounds for independent suits in equity and the issuing of injunction to protect the tenant's possession: *Cyc.*, p. 1435.

g. Limitations and Prescription.—Many of the statutes conferring the right to maintain proceedings in unlawful detainer also limit the right to proceedings instituted at a time much less than that required to bar the plaintiff's title by prescription. Perhaps the most extreme of these statutes is that of Iowa, making the possession of the property with the knowledge of the landlord for thirty days after the cause of action accrues a bar to any proceeding subsequently commenced: *Heiple v. Reinhart*, 100 Iowa, 525, 69 N. W. 871; *McClelland v. Wiggins*, 109 Iowa, 673, 81 N. W. 156. In California, the defendant may show that "he or his ancestors or those whose interest in the premises he claims, have been in the quiet possession thereof for the space of one whole year, together next before the commencement of the proceedings, and that his interest therein is not ended or determined," and such showing is a bar to the proceedings: Cal. Code Civ. Proc., sec. 1172. The period of limitations in Kansas is two years (*Townsdin v. Townsdin*, 5 Kan. App. 336, 48 Pac. 601); in Minnesota, three years (*Brown v. Brackett*, 26 Minn. 292, 3 N. W. 705; *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454). The statute cannot operate before the cause of action accrues (*Clark v. Tukey L. Co.* (Neb.), 106 N. W. 328), nor while the possession is permissive: *Donahoe v. Mitchem*, 13 Okla. 383, 74 Pac. 903. In Georgia the proceeding may be maintained as long as the relation of landlord and tenant continues: *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794. The tenant may, in exceptional circumstances, acquire title by prescription (note to *Davis v. Williams*, 89 Am. St. Rep. 90-92), and where such has been the case he may doubtless resist with success any proceeding in unlawful detainer, for his defense implies that he does not hold as a tenant, and further, that he ceased to hold so long ago and under such circumstances that his landlord had notice of the termination of the tenancy and of the subsequent adverse holding maintained for the time requisite to divest the title by prescription.

VII. Redemption, or Relief from the Judgment.

In several states statutes have been enacted whose purpose is, on terms deemed equitable, to relieve a tenant from the loss of his estate. Thus in California the court may, within five days after the entry of judgment, permit any party interested to pay the rent, damages and costs, and thereafter satisfy the judgment and restore the tenant to his estate (Cal. Code Civ. Proc., sec. 1174), and "the court may relieve a tenant against the forfeiture of a lease, and restore him to his former estate, in case of hardship, where the application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court. . . . In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, is made": Cal. Code Civ. Proc., sec. 1179; *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449. In Minnesota at any

time before the expiration of six months after possession obtained by the plaintiff, the lessee or his successor in interest, as to the whole or part of the property, may pay the plaintiff the amount of rent then in arrear, with interest and the costs of the action, and perform the other covenants on the part of the lessee, and be then restored to possession and hold the property according to the terms of the original lease: *Wacholz v. Griesgraber*, 70 Minn. 220, 73 N. W. 7. The provisions of the code of New York on the subject are quite elaborate and detailed. They in the first place provide a proceeding to stay any warrant on the judgment and also for staying an execution for costs, by paying at any time before the warrant issues the rent and other sums due or giving an undertaking for such payment within ten days: Code Civ. Proc. 2254, construed in *Witty v. Acton*, 58 Hun, 552, 12 N. Y. Supp. 757; *Bien v. Bixby*, 18 Misc. Rep. 415, 41 N. Y. Supp. 433, 22 Misc. Rep. 126, 48 N. Y. Supp. 810; *Pursell v. New York L. I. Co.*, 42 N. Y. Supp. 383; *Flewellin v. Lent*, 91 App. Div. 430, 86 N. Y. Supp. 919. If the judgment has been entered because the lessee has taken the benefit of an insolvent act, or been adjudged a bankrupt, he may effect a stay by paying the costs of the special proceeding and giving an undertaking in a sum and with sureties approved by the judge, that he will pay the rent as it has become or will thereafter become due. If the unexpired term of the lease exceeds five years when the warrant is issued, the lessee, his executor, administrator or assignee may, within one year after the execution of the warrant, pay the landlord or his successor in interest all the rent in arrear, with interest and costs and charges, and thereupon the person making or tendering payment becomes entitled to the possession of the demised premises under the lease, and may hold and enjoy them subject to its terms: N. Y. Code Civ. Proc., sec. 2256. Other sections extend the remedy existing in favor of the lessee to his judgment creditors or mortgagees, and specify the steps they must take to obtain the right given: N. Y. Code Civ. Proc., secs. 2258-2260.

NEFF v. ELDER.

[84 Ark. 277, 105 S. W. 260.]

JUDICIAL SALE, Mistake in Notice of.—The naming of the date of sale in the notice thereof as June 1, 1093, instead of 1903, is a trivial irregularity which could mislead no one, and is cured by the confirmation of the sale. (p. 70.)

LIS PENDENS.—Parties Who, After the Commencement of the Suit, acquire title to real property, are charged with notice of such commencement. (p. 71.)

LIS PENDENS—Prior Purchasers and Assignees.—A mortgagee and his assignees are not affected by a suit brought after the execution of the mortgage to which they are not parties. (p. 71.)

MORTGAGE, Rights of Assignee.—If a mortgage is enforceable by the original mortgagee, his assignees are protected, though, before the assignment to them, suit was pending involving the right to enforce the mortgage. (p. 71.)

A VENDOR'S LIEN not Expressed in the Conveyance is not enforceable against subsequent purchasers without notice. (p. 71.)

SUBROGATION to the Rights of a Mortgagee.—A purchaser of real property whose money is used to discharge a valid lien thereon is, upon the failure of his title, subrogated to the lien so discharged. (p. 71.)

MERGER.—The Doctrine of the Merger of the Mortgage Lien with the Legal Title, when they are united in the same person, does not apply where the principles of equity require that the lien and title be treated as separate. (p. 72.)

EQUITY PRACTICE—Exhibits, Effect of.—Written exhibits attached to a bill in equity are presumed to have been introduced in evidence. (p. 72.)

EVIDENCE—Admission of Without Objection.—Though the method employed of proving the existence of a mortgage is not proper, yet if no objection is made to it, the competency of the evidence cannot be questioned on appeal. (p. 73.)

TENANTS IN COMMON—Notice to One of Several.—When persons are jointly pursuing a common purpose of acquiring title to land by purchase as tenants in common, notice to one concerning the condition of the title is notice to all. (p. 73.)

LIMITATION OF ACTIONS—Subrogation.—When one becomes entitled to be subrogated to a mortgage, his suit to enforce the right of subrogation need not be brought within the time originally allowable to foreclose a mortgage. A person entitled to subrogation may bring his suit within a reasonable time after notice of the defect in his title, though the time within which the original mortgagee might have maintained such suit to foreclose his mortgage has passed. (pp. 73, 74.)

C. E. Elmore, P. H. Crenshaw and Campbell & Stevenson, for the appellant.

Sam H. Davidson and R. B. Maxey, for the appellees.

278 McCULLOCH, J. This is an appeal from a decree of the Fulton chancery court, dismissing for want of equity the complaint of J. T. Neff filed against B. F. Elder, J. E. Ford and H. H. Simon. The prayer of the complaint is to set aside a certain conveyance to the defendants by a commissioner in chancery or to have the plaintiff subrogated to the lien of a mortgage on the real estate in controversy, which mortgage the plaintiff alleges that he paid off.

On October 4, 1898, G. W. Lane and wife, being the owners of certain lots in the town of Mammoth Spring, Arkansas (the lots in controversy being of the number), conveyed the same to one Frank Curtis by warranty deed reciting a cash consideration of one thousand dollars paid. The evi-

dence shows that the real consideration for the conveyance was a conveyance by Curtis to Lane and his wife of certain lands in Illinois owned by Curtis.

On July 13, 1899, Curtis and his wife executed to one A. L. Pixley a mortgage on the lots in controversy to secure the payment of a note for the sum of eight hundred and ten dollars and thirty-four cents due and payable on October 13 1899, with interest. This mortgage was duly acknowledged, and was filed for record the day succeeding its execution. The note secured by the mortgage was assigned, so the complaint alleges, by the mortgagee, A. L. Pixley, to one A. J. Robinson who in turn assigned it, as collateral security, to defendant Simons.

On February 9, 1900, Curtis and wife executed to said Robinson a deed conveying to the latter their equity or redemption in the lots in controversy; and on September 13, 1901, Robinson conveyed the lots to plaintiff, J. T. Neff, for a consideration ²⁷⁹ of two thousand dollars paid at the time. Robinson informed Neff at the time of the negotiation for the conveyance that he held the Pixley mortgage on the lots for eight hundred and ten dollars and thirty-four cents, and would satisfy the same out of the money paid him for the lots, which he subsequently did and sent the note and mortgage to Neff marked satisfied. He also indorsed satisfaction on the record of the mortgage. The mortgage was at that time held by a bank as collateral security. Possession was taken by Neff pursuant to his deed of conveyance.

On August 7, 1899, Lane and wife commenced suit in the chancery court of Fulton county against Curtis and wife to recover the amount of two hundred and twenty-four dollars and nineteen cents and interest thereon alleged to have been paid by those plaintiffs (Lane and wife) in discharging a certain lien for taxes and other things on the Illinois property conveyed by them to Curtis. They alleged in their complaint that Curtis had agreed, as a part of the consideration of the conveyance from Lane and wife to him of the Arkansas property, to discharge these liens on the Illinois property, and they asserted a vendor's lien on the Arkansas property as a part of such consideration.

Neither the mortgagee, nor the assignee of the mortgage debt, nor the subsequent purchaser Robinson, nor Neff, were made parties to that suit. A decree was duly rendered in that suit at the February term, 1903, in favor of the plain-

tiffs therein, Lane and his wife, against Curtis for recovery of three hundred and twenty-six dollars and a lien was declared on the real estate described in the conveyance from Lane to Curtis, and the commissioner of the court was ordered to make sale thereof to satisfy the decree.

The two lots in controversy were sold by the commissioner at public outcry to defendants, Elder, Ford and Simons, on May 7, 1903, for the sum of three hundred and twenty-eight dollars, and at the next term of the court the sale was confirmed. They subsequently took possession of the property from Neff's tenant, he being absent from the state.

The complaint alleges that the sale by the commissioner was irregular and void on account of an irregularity in the advertisement, and that the defendants conspired together to purchase the property at the reduced price of three hundred and twenty-eight dollars, when it was worth three thousand dollars.

Defendants Elder and Ford filed their joint answer, denying ²⁸⁰ all the allegations of the complaint; and defendant Simons filed a separate answer, disclaiming any interest in the subject matter of the litigation and alleging that he had conveyed his interest in the lots to his codefendants, Elder and Ford.

The plaintiff at a subsequent term presented his petition to be allowed to file a bill of review against the decree of the court in the Lane suit confirming the sale to defendants, and the court refused to allow the bill of review to be filed. The bill of review set forth in attack upon the commissioner's sale the same matter as that alleged in the main action.

²⁸¹ 1. The chancellor was right in refusing to allow the bill of review to be filed or to decree a cancellation of the sale to appellees, Elder, Ford and Simons. No grounds were shown for such relief. The only irregularity shown in the sale was a mistake in the commissioner's advertisement of sale wherein the date was given as June 1, 1093, instead of 1903. This was a trivial irregularity in the notice, and no one could have been misled by the mistake. ²⁸² It was cured by the confirmation of the court. No proof was adduced tending to show collusion between the purchasers at the sale to stifle competition.

The suit was commenced by Lane and wife before the alienation of the property by Curtis (except his mortgage to Pixley, which will be hereafter discussed in this opinion),

and subsequent purchasers from him were charged with the notice of the pendency of the suit.

2. Is the appellant Neff entitled to subrogation to the lien of the Curtis mortgage? This mortgage was executed prior to the commencement of the Lane suit against Curtis, and neither the mortgagee, Pixley, nor the assignee thereof, was chargeable with notice of the pendency of that suit. The mortgage being good as to Pixley, his assignees are protected, even though the suit was pending at the time of the several transfers of the debt and mortgage.

The alleged vendor's lien of Lane and wife which was not expressed in the face of their deed, if it can be held that they had lien at all, even against the grantor Curtis, was not available against subsequent purchasers without actual notice: *Scott v. Orbison*, 21 Ark. 202; *Holman v. Patterson's Heirs*, 29 Ark. 357.

The evidence shows that appellant purchased this property from Robinson, and paid the price of two thousand dollars for it without any notice of the pendency of the Lane suit, or of the assertion by the Lanes of any lien on the land. It was agreed between appellant and Robinson that the Curtis mortgage should be satisfied out of the purchase price paid by appellant. This was done, and the mortgage and note were delivered to appellant. The mortgage was then a valid and subsisting lien in the bank, which held it as collateral security by assignment either from Simons or Robinson, and appellant's money was used in discharging the lien. He is, we think, entitled to be subrogated to the mortgage lien: 2 Story's Equity Jurisprudence, sec. 1237; *Sheldon on Subrogation*, sec. 30; *Chaffe v. Oliver*, 39 Ark. 531; *Goldsmith v. Stewart*, 45 Ark. 149; *Neel v. Carson*, 47 Ark. 421, 2 S. W. 107; *Meher v. Cole*, 50 Ark. 361, 7 Am. St. Rep. 101, 7 S. W. 451; *Wyman v. Johnson*, 68 Ark. 369, 59 S. W. 250; *Union Mort. B. & T. Co. v. Peters*, 72 Miss. 1058, 18 South, 497, 30 L. R. A. 829.

One of the earliest applications of the principle in this country was made by Judge Story in the case of *Bright v. Boyd*, ²⁸³ 1 Story, 478, Fed. Cas. No. 1875, and the language of that learned judge is peculiarly applicable here. "There is," he said, "still another broad principle of the Roman law which is applicable to the present case. It is that where a bona fide possessor or purchaser of real estate pays money to discharge any existing encumbrance or charge upon the

estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him."

Applications of this doctrine bearing close analogy to the facts of the present case are found in *Chaffe v. Oliver*, 39 Ark. 531, and *Wyman v. Johnson*, 68 Ark. 369, 59 S. W. 250, where lenders of money on defective mortgages for the purpose of discharging prior valid mortgages upon the property, for which purpose the money was used, were held to be entitled to subrogation to the right of the prior mortgagees. In one of those cases the last mortgage was defective by reason of an informal certificate to the wife's acknowledgment, and in the other case the mortgagors had no title to the premises nor authority to execute the mortgage.

The doctrine of merger of the mortgage lien with the legal title when they are united in the same person has no application in a case of this kind when the principles of equity demand that they be treated as separate: *Cohn v. Hoffman*, 45 Ark. 376; *Bemis v. First Nat. Bank*, 63 Ark. 625, 40 S. W. 127; *Smith v. Roberts*, 91 N. Y. 470.

"It is a general rule that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee, so as to prevent his setting up his mortgage to defeat an intermediate title, unless such appears to have been the intention of the parties and justice requires it; and such intention will not be presumed where the mortgagee's interest requires that the mortgage should remain in force": 1 *Jones on Mortgages*, sec. 870.

Learned counsel for the appellees contend that there is no evidence in the record of the existence of the mortgage or the terms thereof, but in this they are mistaken. A copy of the mortgage was exhibited with the complaint and referred to therein. The decree does not recite that it was read in evidence, but as it was exhibited with the complaint the chancellor is presumed to have considered it with the complaint. While written ²⁸⁴ instruments exhibited with the complaint in cases at law are not presumed to have been introduced in evidence, a different rule prevails in equity cases where the whole record is before the chancellor. The plaintiff testified concerning the existence of the mortgage, and in his deposition referred to the copy exhibited with his complaint. Witness Robinson, whose deposition was introduced by the defendants, also testified concerning the mort-

gage, and stated that he indorsed satisfaction thereon and delivered it to the plaintiff. This method of proving the existence of the mortgage was not proper, but no objection was raised to it at the time, and it is too late now to question the competency of the evidence.

Counsel also contend that plaintiff is not entitled to subrogation because satisfaction of the mortgage was indorsed on the record before the purchase by the defendant at the commissioner's sale. The defendants had notice of the facts concerning the purchase by plaintiff, and cannot claim innocence of knowledge concerning the plaintiff's rights. The plaintiff testified that at the time of his purchase he talked to Simons, one of the defendants, concerning it, and that the latter knew of the existence of the mortgage, and claimed to be the holder of it. He must have known that plaintiff's money, paid to Robinson, was used in discharging the mortgage debt. The knowledge of Simon is chargeable to his co-purchasers. It is unnecessary to say whether, ordinarily, the notice to one tenant in common is notice to all; but when persons are jointly pursuing the common purpose of acquiring title to land by purchase as tenants in common, notice to one concerning the condition of the title is notice to all: *Steele v. Robertson*, 75 Ark. 228, 87 S. W. 117.

3. The only question remaining to be determined is whether or not appellant's rights are barred by the statute of limitation, which is pleaded by the defendants. The note secured by the mortgage fell due on October 13, 1899, and the amended complaint praying for subrogation under the mortgage was filed on April 5, 1905, more than five years thereafter.

The statute provides that "in suits to foreclose or enforce mortgages or deeds of trust it shall be sufficient defense that ²⁸⁵ they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given": Kirby's Digest, sec. 5399.

This statute does not apply to a suit of this kind brought to enforce the right of subrogation under the mortgage, when the mortgage debt was not barred at the time the payment which is the basis of the claim of subrogation was made. Under such circumstances the person entitled to subrogation may bring his action within a reasonable time after notice of the defect in his title. The situation of one en-

titled, under those circumstances, to subrogation may be likened to that of one who has suffered a wrong by fraud, the enforcement of whose rights would, but for the fraud, have been barred by limitation. Under such circumstances the enforcement of the right must be brought within a reasonable time after the discovery of the fraud.

The decree is reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff declaring a lien on the lots in controversy for the amount paid in discharge of the mortgage executed by Curtis and wife to Pixley.

The Doctrine of Subrogation is the subject of a note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 474.

The Law of Lis Pendens is the subject of a note to *Stout v. Phillipi Mfg. etc. Co.*, 56 Am. St. Rep. 853.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. DUPREE.

[84 Ark. 377, 105 S. W. 878.]

MASTER AND SERVANT—Fellow-servants, Who are not.—An inspector of railway cars and an engine foreman, in charge of an engine, switching, making up, and breaking up trains, are not fellow-servants, where they are working in different departments of the service and not together for a common purpose. (p. 75.)

MASTER AND SERVANT—Negligence in Violating a Rule.—If the master promulgates a rule for the safety of his servants, and one of them is injured while violating that rule and on account of its violation, he is guilty of contributory negligence as a matter of law. (p. 76.)

MASTER AND SERVANT—Rules, Habit of Violating.—If a rule promulgated by a master for the safety of his servants is habitually violated, and this violation is known to and acquiesced in by him, evidence of such violation is admissible to repel the inference which would otherwise be drawn that the violation amounted to contributory negligence by the person injured thereby. (p. 76.)

MASTER AND SERVANT—Liability to Person Injured When not Known to be in Place of Danger.—A master is not answerable to a servant injured because he placed himself in a position of danger, when such injury is due to the act of another servant, who, on his part, did not know that the one injured was in such place of danger, or that it was a part of his duty to be there. (pp. 76, 77.)

APPEAL AND ERROR—Jury Trial.—If the court gives only general instructions when special should also have been given, this is not a ground for reversal at the instance of a party, who did not

object to the action of the court when taken, nor make a request for additional instructions. (p. 77.)

APPEAL AND ERROR—Partly Incompetent Answers to Questions.—If the answer of a witness to a proper question is partly incompetent and partly competent, it does not require a reversal, unless the incompetent matter is prejudicial and was duly objected to. (pp. 77, 78.)

T. M. Mehaffy and J. E. Williams, for the appellant.

W. A. Cunningham and Jones & Hamiter, for the appellee.

³⁷⁸ **HILL, C. J.** In brief, the case was this: Dupree was a car inspector, engaged in inspecting cars of the railroad company at Hoxie. Arthur was an engine foreman in charge of the engine, switching, making up and breaking up trains in the Hoxie yards. He and Dupree ³⁷⁹ were in different departments of service, and were not working together for a common purpose, and were therefore not fellow-servants, within the meaning of sections 6658-6660 of Kirby's Digest. There were two kinds of inspection for cars, one called intermediate inspection, which was a general inspection without going into particular defects, and another called the interchange inspection. There was no interchange inspection in the Hoxie yards, and the inspections of Dupree were intermediate.

There is a conflict in the evidence as to the duties of the inspector in making an intermediate inspection. Dupree says that it was often necessary, in order to properly make it, to place his body under the cars; while others say that such action was not necessary for such inspection.

There was a rule of the company requiring inspectors to place in the daytime blue flags, and in the night-time blue lights, at either end of the cars being inspected, and only the person placing the signals was authorized to take them up. These signals were to protect the cars during inspection from movement. There is testimony tending to show that this rule was habitually disregarded, and its habitual disregard known to the foreman in charge of Dupree's department; and, on the other hand, there is evidence that it was the proper way to protect the car during inspection.

About 9 o'clock, a dark rainy night, Dupree and his fellow inspector, Cooper, went to their duties of inspecting cars. According to Dupree's testimony, Arthur passed them with his switch-engine and some cars, and was notified that they were engaged in inspecting certain cars, and Arthur told

them that he was going to Hoxie crossing to do some work there. This trip and work would have required his absence for twenty or twenty-five minutes. Within five or ten minutes after he left, while Dupree was under a bad-order car, inspecting the same with his torch, the car was struck by Arthur's switch-engine, causing Dupree the loss of an arm and a serious injury to his leg. A different version of the occurrence was given by Arthur.

The case was largely tried upon the question of whether or not the rule requiring the blue signals had been abrogated; ³⁸⁰ and the chief contention here is that there was error in certain modifications of instructions requested by the defendant which told the jury that Dupree assumed all the risks and hazards incident to his duties as car inspector; and if he failed to comply with the rule, and was injured while failing to comply with it, such injury was one of the assumed risks of his employment, for which he could not recover, and that he would be guilty of contributory negligence in undertaking to do this work without obeying the rule; which were modified by the court by stating that such was the law unless said rule was abrogated. The jury was instructed that the burden of showing the abrogation of the rule was upon the plaintiff, and correctly instructed what was necessary in order to show that the rule was abrogated. Where a master promulgates a rule for the safety of his servants, and a servant is injured while in violation of that rule and on account of the violation thereof, then the court will declare him, as a matter of law, guilty of contributory negligence: *St. Louis etc. Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749, and authorities cited. But where such rule is habitually violated, and such violation is known to or acquiesced in by the master, so that it amounts to an abandonment of the rule, then evidence of such habitual violation is admissible for the purpose of repelling the inference which would otherwise be drawn from the existence of the rule itself: *St. Louis etc. Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749.

The question of the existence or abrogation of the rule was properly submitted to the jury; and there is sufficient evidence to sustain a finding either way on that issue.

But the real question of the case was not so much the existence or abrogation of that rule as it was the negligence of Arthur in hitting the cars while Dupree was inspecting them,

and the contributory negligence of Dupree in the manner in which he inspected the cars and in inspecting them without taking proper precautions for his safety while so engaged. If it was not a part of Dupree's duty to be under the car, or in other position of danger, while inspecting a car, then it would not be negligence to move the car while the inspection was in progress. If Arthur had known that Dupree was inspecting the cars, and that it was often a part of Dupree's duty to be under ^{as} a car while performing his inspection, then the company would be liable if Arthur suddenly moved the cars without notifying Dupree that he was going to do so. On the other hand, it would be contributory negligence on Dupree's part to go under a car without taking precaution by some sort of notice to a person operating a switch-engine about them that he was going to place himself in such position, unless such position was known to be part of the inspector's duty, and it was also known that he was making such inspection.

There is a sharp conflict in the evidence upon these points, and no specific instruction was given upon them; but there were general instructions given as the law of negligence and contributory negligence. These issues of fact should have been sharply drawn in appropriate instructions and sent to the jury for decision. Instead of that, general instructions were given as to negligence and contributory negligence, and many specific instructions asked by the defendant, as to the law of assumed risk and contributory negligence, were given, some with proper modification as to the abrogation of the said rule.

In this state of the record, the appellant cannot ask for a reversal on account of such instructions: *Western Coal etc. Min. Co. v. Jones*, 75 Ark. 76, 87 S. W. 440.

The admission of testimony as to certain statements made by Arthur next day is urged as erroneous. These statements would not be admissible as a part of the *res gestae*, nor as declarations of the agent, for they were not made while performing the duties of this agency. They are sought to be sustained as contradictory of his testimony. The questions asked the witness called for testimony fairly contradictory of Arthur's testimony. Part of the answers went beyond a fair contradiction; but part was competent. The fact that the answers contained more than the question called for, and that some incompetent matter was incorporated into them,

does not call for reversal unless the incompetent matter was prejudicial and properly objected to. The testimony was rather loosely drawn out, and the objections to it are not as specific as they might have been, and the court fails to find that any reversible error in this respect was committed.

Affirmed.

A Car Inspector is not a Fellow-servant with employes on the train, although the authorities are not entirely harmonious on this question: McDonald v. Michigan Cent. R. R. Co., 132 Mich. 372, 102 Am. St. Rep. 426; note to Mast v. Kern, 75 Am. St. Rep. 621-623.

The Promulgation and Enforcement of Rules for the safety of his employes is one of the positive duties of an employer when the nature of the work requires it: Merrill v. Oregon Short Line R. R. Co., 29 Utah, 264, 110 Am. St. Rep. 695. As to the effect of a disobedience, habitual or otherwise, of rules after they have been promulgated, see Merrill v. Oregon Short Line R. R. Co., 29 Utah, 264, 110 Am. St. Rep. 695, and cases cited in the cross-reference note thereto.

BRANCH v. MOORE.

[84 Ark. 462, 105 S. W. 1178.]

BROKER to Sell Real Property, When Entitled to Commissions. If, after real property has been placed in a broker's hands for sale, such sale is brought about by his advertisements and exertions, he is entitled to commissions, though the sale is made by the owner. (p. 82.)

BROKER to Sell Real Property, Attempt to Revoke the Agency. If, after a broker is employed to sell real property and introduces a purchaser to the owner, the latter then or subsequently revokes the agency and soon afterward makes the sale to a person introduced by the broker, the latter is entitled to his commissions. (p. 82.)

IF A BROKER to Sell Real Property is induced by the owner, after introducing an intending purchaser, to discontinue negotiations on the ground that the wife of the owner will not consent to the conveyance, and the owner subsequently effects a sale to the person thus introduced, the broker is entitled to his commissions. (p. 83.)

AGENCY to Sell Real Property, Right to Revoke.—An owner employing a person to sell real property may revoke the agency at any time before the sale is made, but he cannot do so merely for the purpose of depriving the broker of his commissions. (p. 83.)

A BROKER to Sell Real Estate cannot be Deprived of His Right to Commissions on the ground that the property was a homestead, and the authorization to sell was not binding on the wife if in fact the sale is made and she joins in a conveyance to the purchaser. (pp. 83, 84.)

Sain & Sain and W. C. Rodgers, for the appellant.

J. S. Lake and W. P. Feazel, for the appellee.

⁴⁶⁴ BATTLE, J. J. H. Moore brought this action against M. Branch to recover compensation alleged to be due him on account of a sale of land made by him for the defendant, who answers and alleges that plaintiff's authority to sell the land was revoked by him before the sale, and that the plaintiff was not entitled to any compensation. The facts in the case, as shown by the evidence adduced in the trial, are substantially as follows: "The defendant owned a farm in Howard county, in this state, which constituted his homestead, and placed it in the hands of plaintiff, a real estate agent, for sale, agreeing to accept for the same the sum of \$2,000 net, and to allow plaintiff to hold as compensation all for which he shall sell above that sum. Plaintiff immediately thereafter entered into negotiation with D. C. Irvin for the sale of the farm, took him to it and over it, and offered to sell it to him for \$2,250, and introduced him to defendant, they being strangers before that time. Irvin said the price was too much, but expressed himself pleased with the farm, and promised to return in a day or two to further examine it. Plaintiff says that he offered it to him for \$2,200, but Irvin says that he does not remember it. Plaintiff testified that in a day or two after this defendant said to him: 'You needn't put yourself to any further trouble to sell my place. I don't want to sell it now, and my wife won't sign a deed.' I said: 'All right, Uncle Mike.'" Irvin testified: "I do not know why he [defendant] claimed to have taken the land out of Mr. Moore's hands except what he said. He said his wife wouldn't sign it—the bond for title." The defendant testified: "Mr. Moore did not do anything toward selling except bring Mr. Irvin out there to look at the place. The next ⁴⁶⁵ morning I went back and asked Mr. Moore what he had done. He told me that he had not done anything; that the price was too high. I said: 'That is all right. I am glad of it. My wife said she wouldn't sign the deed if I sold it for \$2,000.' Mr. Moore said: 'All right; I will have nothing more to do with it.' I did not have any more negotiations with him about selling the land. I told him he could drop his part and have nothing to do with the land. He said: 'All right.'" In about four days thereafter he sold the land to Irvin for \$2,200. All these transactions occurred in the year 1906. Plaintiff testified that the land was in his hands during that year several times at different prices. "When he first put

it in my hands, I think he said he wanted \$1,400 net. This was sometime in the early part of the year 1906. He went from \$1,400 to \$2,000 net." This is not contradicted.

Upon these facts and evidence the court instructed the jury as follows:

"1. If you believe from the evidence that the defendant placed his land in the hands of J. H. Moore for sale, agreeing to allow him all in excess of \$2,000 he sold the land for, as his compensation, and if you further believe that the plaintiff, Moore, carried the purchaser to the owner of the land and showed and priced same to him and introduced him to the owner; and through such introduction and exertions on the part of Moore negotiations were begun between the purchaser and the owner of the land, and a sale thereof was made by the owner of the land for the sum of \$2,200, then Moore would be the procuring cause of said sale, and would be entitled to recover of the defendant all in excess of \$2,000 said land sold for, unless you further believe that the agency was terminated in good faith before the sale.

"2. If you believe from the evidence that the defendant employed plaintiff to sell his land, and agreed to pay him therefor all in excess of \$2,000 he sold the land for, defendant would not be relieved from said contract by the fact that his wife refused to sign the deed for \$2,000.

"3. The court instructs the jury that, although you may believe from the evidence that Moore consented to the withdrawal ⁴⁰⁰ of the land from sale, still he would not be bound by such assent if it was procured through a misrepresentation on the part of Branch that Branch's wife would not sign the deed.

"4. Although Moore may have agreed with Branch that he would make no further effort or go to no further trouble to sell his land, this would not affect his right to recover in this action if the sale was the result of, or was brought about by, the previous efforts of Moore.

"5. You are instructed that if you find from the evidence that the plaintiff procured a purchaser, introduced him to the defendant, and that he, the plaintiff, was the procuring cause of the sale, then the defendant could not withdraw his land from the hands of the plaintiff and defeat the collection of the commission unless the contract between plaintiff and defendant was by mutual assent abrogated with a full understanding of all the facts."

The defendant asked the court to instruct the jury as follows: "(2) The jury are instructed that the contract in controversy could be terminated by an oral agreement between the parties. So, if you find from the evidence that the contract was verbally terminated by mutual consent, you will find for the defendant, Branch." But the court refused to give it, but amended it, and gave it as amended, as follows: "(2) The jury are instructed that the contract in controversy could be terminated by an oral agreement between the parties. So, if you find from the evidence that the contract was verbally terminated by mutual consent, with a full understanding of all the facts, your verdict should be for the defendant."

He also asked, and the court refused to give, the following instruction: "(4) The jury are instructed that the defendant, Branch, had a right to revoke the contract made with Moore for the sale of his land, and that this could be done without the surrender of the written contract." But amended it by adding the words: "But this could not be done if you believe from the evidence that Moore had procured a purchaser under the terms of his agreement"; and gave it as amended.

And the court refused to instruct the jury at the request of the defendant as follows: "(6) If the jury finds from the ⁴⁶⁷ evidence that Moore refused to make a sale for less than \$2,250, and that Irvin refused to give this much, he would not be entitled to recover any commission, notwithstanding Branch sold the place for \$2,200."

"(9) The court instructs the jury that if the plaintiff, by his words or acts, induced the defendant, Branch, to act with reference to the sale of the land otherwise than he would have done but for such acts or words on the part of the plaintiff, and thereby make a sale of the land direct and without regard to the intervention of the plaintiff, Moore, that is, if the plaintiff induced the defendant to believe that the relations between himself and Moore were terminated, and Branch acted upon such belief in making the sale direct, the plaintiff would not be entitled to recover anything.

"(10) The jury are instructed that the authority to sell conferred on Moore by the contract in controversy can be revoked at any time before a valid and binding contract

for the sale of the land by the broker has been consummated."

Plaintiff recovered judgment for \$200, and the defendant appealed.

The facts in *Scott v. Patterson*, 53 Ark. 49, 13 S. W. 419, and those in this case are similar. In that case the real estate broker said to the owner of the land that he had done all he could to sell the land to the prospective purchaser, and that he was unable to do so, and that he "turned her (prospective purchaser) over" to the owner; that he might sell her the land if he could. The owner finally made the sale. He testified that he had nothing to do with selling the property until the brokers declined to have anything more to do with it. In that case the court, quoting from *Tyler v. Parr*, 52 Mo. 249, said: "The law is well settled that in a suit by a real estate agent for the amount of his commissions it is immaterial that the owner sold the property and concluded the bargain. If, after the property is placed in agent's hands, the sale is brought about or procured by his advertisements and exertions, he will be entitled to his commissions. Or, if the agent introduces the purchaser or discloses his name to the owner, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected, ⁴⁶⁸ the agent is entitled to his commission, though the sale may be made by the owner."

In *Hunton v. Marshall*, 76 Ark. 375, 88 S. W. 963, it was held that "a broker who has been employed to sell real estate is entitled to his commissions where he has brought about between his principal and another negotiations which resulted in a sale, which was consummated by the principal."

If there had been no attempt to revoke the agency of appellee, he would unquestionably have been entitled to his commissions. He was authorized to sell the land for any sum exceeding \$2,000, appellant agreeing to allow him as compensation for his services all received in excess of that amount. He found a purchaser, took him to the land, introduced him to appellant, they being strangers to each other, showed him the land, offered it to him for \$2,250; the purchaser said the price was too high, but expressed himself as pleased with the land and promised to return and look at it again. Negotiations were approaching success,

when appellant informed appellee that he need not make any further effort to sell the land, giving as a reason for reserving it from sale that his wife would not join him in executing a deed. In about four days thereafter he continued the negotiations already begun and sold the land to the purchaser found by appellee for \$2,200. The jury could have reasonably concluded from the undisputed evidence in the case that the appellee was induced by fraud to desist from the prosecution of his negotiations and finally concluded a sale. If so, he was entitled to the stipulated commissions. The mere refusal of the wife of appellant to join in the execution of the deed would not deprive him of them if the sale was made and the purchase money received, and all of this was "the result of, or was brought about by, his previous efforts."

Appellant contends that he had the right to revoke the agency of appellee at any time before the sale. This is true, if done in good faith. But he could not do so for the purpose of depriving him of his reward and appropriating his services without compensation. He could not make the revocation a pretext for defrauding appellee: *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906.

The court properly refused to instruct the jury as asked ⁴⁰⁰ by appellant in his ninth request. He asked the court to instruct the jury "that if the plaintiff, by his word or acts, induced the defendant, Branch, to act with reference to the sale of the land otherwise than he would have done but for such acts or words on the part of the plaintiff, and thereby make a sale of the land direct and without regard to the intervention of the plaintiff, Moore; that is, if the plaintiff induced the defendant to believe that the relations between himself and Moore were terminated, and Branch acted upon such belief in making the sale direct, the plaintiff would not be entitled to recover anything." He asked the court to so instruct the jury, regardless of the acts, words, and conduct of himself that induced the words or acts of appellee mentioned in the ninth request. There was evidence to show that such was the case. If so, they did not excuse, justify, or extenuate his own acts and words. He could not take advantage of his own fraud in misleading appellee.

Appellee contends that the land constituted his homestead, and he could not lawfully authorize the appellee to

sell it without his wife joining him in executing an instrument for that purpose, but this contention is not tenable. Appellee is not seeking to enforce any contract to sell or convey the land, or any lien thereon. The land has been sold. No party is seeking to avoid the sale. Appellee is asking only for compensation for services rendered.

The instructions given by the court, construed as a whole and read in the light of the evidence, contained no prejudicial error.

Judgment affirmed.

If the Owner of Land Agrees to Pay a Broker a percentage of the price for which the property shall be sold to any purchaser produced by him, the broker earns his commission in case he produces a customer to whom the principal in fact sells: Bowe v. Gage, 127 Wis. 245, 115 Am. St. Rep. 1010, and cases cited in the cross-reference note thereto.

FLOWERS v. FLOWERS.

[84 Ark. 557, 106 S. W. 949.]

DOWER, Assignment of Right to.—A widow's right of dower in property of her deceased husband cannot, before its assignment in the manner prescribed by law, be conveyed by her to a stranger, so as to confer on him rights enforceable in an action at law, but such a conveyance is valid and enforceable in equity. (p. 85.)

ADMINISTRATOR, Trust Relation of.—An administrator of an estate stands in a trust relation toward those interested in the estate, including the widow and heirs. (p. 85.)

TRUSTEE, Purchase of Trust Estate by.—The administrator of a decedent may purchase and take a conveyance of the dower interest of his wife, when there was no threat, fraudulent misrepresentation, or concealment of facts, and the price paid was fairly adequate at the time, though the interest subsequently became worth much more. (pp. 85, 86.)

DOWER, Conveyance of does not Include Right to Rents and Profits Prior to the Assignment of.—The quarantine rights of the widow until dower shall be assigned cannot be transferred to another. Hence, one to whom she assigns her rights is not entitled to an accounting of the rents and profits of the dwelling-house and the lands thereto attached prior to the assignment of dower. (pp. 86, 87.)

R. G. Davies, for the appellants.

George G. Latta, for the appellee.

558 McCULLOCH, J. Appellee, Henry Flowers, instituted this suit in equity against Josephine Flowers, the only

child, Linnie Simons, the widow, and John H. Reece, the administrator of the estate of King B. Flowers, deceased, to recover and have assigned to him the dower interest of said widow in said estate which he alleged had been conveyed to him by her. He set forth in and exhibited with his complaint deeds executed to him by said widow purporting to convey her dower interest in the real estate and personal property of said decedent in consideration of the sum of twelve hundred dollars.

The defendants answered, denying the execution of said conveyances and also alleging that the consideration for said deed was grossly inadequate, and that the execution of said conveyance was procured by fraud, threats, misrepresentation and concealment of material facts concerning the value of decedent's estate and the interest therein of the widow.

The chancellor granted the prayer of the complaint for an allotment of dower, and the defendants appealed.

It has been settled by a decision of this court that a widow's right of dower in the property of her deceased husband cannot, before assignment in the manner provided by law, be the subject of a conveyance by her to a stranger so as to confer on him any rights capable of assertion in a court of law, but that such conveyance is valid and enforceable in equity: *Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256. See, also, 2 *Scribner on Dower*, sec. 33 et seq.

At the time of the execution of the conveyance in question by the widow appellee was administrator of the deceased husband's estate. He therefore stood in a trust relation toward those interested in the estate, including the widow and heirs: *Reeder v. Meredith*, 78 Ark. 111, 93 S. W. 558, and cases cited.

⁵⁵⁹ This court in the case just cited quoted with approval the following rule laid down in *Perry on Trusts* (section 195) with reference to transactions between such trustees and the cestui que trust: "A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the cestui que trust intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the action of every

shadow of suspicion. . . . Any withholding of information or ignorance of the facts or of his rights on the part of the cestui que trust, or any inadequacy of price, will make such purchaser a constructive trustee."

Bearing in mind this stringent rule imposed upon a trustee who purchases from his cestui que trust, we do not find in this case any of the elements which would require that the conveyance be set aside. The evidence does not sustain the charge of threats, fraudulent misrepresentation or concealment of facts. The consideration for the conveyance was twelve hundred dollars, of which the sum of six hundred dollars was paid in cash and a note for the balance was executed to the widow, and she afterward transferred the note to another person, and appellee paid it. The price paid appears to have been fairly adequate at the time, though the interest in the property was worth much more at the time of the decree.

The plaintiff asked in his complaint that he be also decreed the rents and profits of the lands since the death of King B. Flowers, and that an accounting thereof be had; and the court in the final decree awarded to plaintiff all of the right and interest of the widow "in all the rents and profits of said real estate that have accrued since the death of King B. Flowers, to the extent authorized by law." The court made no finding as to amount of such rents and profits, nor did it order an accounting to ascertain the amount thereof. We are left to conjecture, to some extent, as to what the chancellor meant by the expression "to the extent authorized by law," but we assume that he meant to hold that the plaintiff succeeded, by virtue of said conveyances, to the quarantine rights of the widow until dower should be assigned, and was therefore entitled to recover ⁵⁰⁰ the amount of rents and profits of the dwelling-house and lands thereto attached. In this view the learned chancellor erred. We held in *Griffin v. Dunn*, 79 Ark. 408, 96 S. W. 190, that the widow's right to hold the dwelling-house and farm attached until assignment of dower is a personal privilege, and not an estate in the land, and cannot be transferred to another.

Inasmuch, however, as a court rendered no decree for any specific amount of rents, there is no prejudice in the erroneous ruling; but the decree, in so far as it adjudges in general terms the right of the plaintiff to recover rents

and profits before the assignment of dower, is disapproved, and the decree to that extent is modified.

In all other respects the decree will be affirmed, and it is so ordered.

The Assignability of a Widow's Right of Dower is discussed in the note to Sanders v. McMillan, 39 Am. St. Rep. 25.

PINDALL v. WATERMAN.

[84 Ark. 575, 106 S. W. 964.]

CONTRACTS OF ATTORNEYS, Rescinding Because of Unconscientious Advantage Taken.—If a man who has killed another and is charged with murder in the first degree and threatened with mob violence, and is under great excitement, enters into a contract with a firm of attorneys, whereby they agree to defend him, receiving of him property in excess of seven thousand dollars in value, leaving him an estate of a little more than one thousand dollars, and a few days thereafter he commits suicide, such contract may, in a suit brought by his administrator, be adjudged to be unlawful and oppressive, and relief granted therefrom. (p. 94.)

H. M. Armistead, for the appellants.

F. M. Rogers, for the appellees.

⁵⁷⁷ **BATTLE, J.** The above suits grew out of the same facts, and involved the same principles of law and equity, and have been submitted for our consideration upon the same briefs.

The facts, as shown by the evidence adduced in these causes, are substantially as follows: J. J. Schmidt resided in Desha county, in this state. He was about sixty years old; was industrious and penurious; and acquired an estate of about the value of \$8,089.60. He killed R. H. Willis, another citizen of Desha. He was arrested, charged with murder in the first degree. "Excitement was very high immediately after the killing. Mob violence was threatened and feared." He was hurried away to Arkansas City to avoid the mob. He underwent a great change on account of the trouble and excitement following the killing. Witnesses say he seemed to be dazed and stunned, and not the same man he had been. He looked haggard and broken. His voice did not sound natural. He appeared to be in

great trouble. He was nervous and excited. One witness says he impressed him as a man who did not know exactly what he was doing. He says: "After having been carried to dinner and then back to the courthouse for supper, he turned and went in the wrong direction. He didn't seem to know the way to the hotel." Witnesses differed as to his sanity, but the majority thought he was sane. He was imprisoned in jail. While incarcerated, E. S. Pindall and X. O. Pindall, two attorneys, presumably at his request, had an interview with him, while in the condition before stated. The result was he executed a note to E. S. Pindall for \$5,000 for a fee for services to be rendered in defending Schmidt against the charge of killing Willis, and a mortgage on lot 6 in block 7 in Evans' addition to the town of Dumas, and the southwest quarter of section 34 in township 9 south, and range four west, of the value of \$5,000, which constituted all the real estate owned by Schmidt; and X. O. Pindall, associated with E. S., received for ⁵⁷⁸ services to be rendered in the same behalf the promissory note of the Dumas Mercantile Company for \$500, and forty shares in the stock of the Bank of Dumas, of the par value of \$25 each, and \$500 in money, and a draft on the Dumas Mercantile Company for \$500, leaving Schmidt, out of an estate of \$8,089.60, \$1,089.69 represented by a small amount of cash, some rent notes not due, two mares, some farming implements, a lot of household furniture, two mule colts and a saddle. For the fees so secured the Pindalls, in part performance of their contract, sued out a writ of habeas corpus, and caused Schmidt to be admitted to bail in the sum of \$5,000, and his discharge from imprisonment. In two days thereafter Schmidt was found dead, hanging by the neck in his barn. He died intestate, leaving H. J. Schmidt his only son and heir surviving. Gus Waterman was appointed the administrator of his estate.

H. J. Schmidt, heir, and Gus Waterman, as administrator of J. J. Schmidt, deceased, brought suit in the Desha chancery court against E. S. Pindall and X. O. Pindall to set aside the note and mortgage executed to E. S. Pindall and among other things, state as follows:

"Plaintiffs say at the time the defendants procured said Schmidt's signature to said note and mortgage said Schmidt was not indebted to said E. S. Pindall in any sum.

"Plaintiffs say that at the time defendants procured the signature of said Schmidt to said note and mortgage said Schmidt was insane, and by reason of his insanity was incapable of entering into a valid and binding contract.

"Plaintiffs say that plaintiff H. J. Schmidt is the owner in fee simple of said land, subject to such interest as his co-plaintiff may have therein for the purpose of administration.

"Plaintiffs say that defendant E. S. Pindall is a practicing attorney at law; that at the time defendant procured said note and mortgage from said Schmidt the latter was confined in the jail in Desha county, upon a charge of murder in the first degree; that defendant claims that he was employed by said Schmidt to defend him upon said charge in all the courts to which same might be carried, and that property was delivered to him in payment for services to be rendered. Plaintiffs say that the only service which defendant rendered said Schmidt was ⁵⁷⁹ in appearing before the county judge of Desha county in habeas corpus proceedings, by which Schmidt was granted bail in the sum of \$5,000; that within two days after executing said bail and being released from jail said Schmidt died, committing suicide by hanging himself.

"Plaintiffs say that by reason of the death of said Schmidt the service to be rendered which defendant claims is the consideration for which said note and mortgage were delivered to him cannot be performed, that said consideration has failed, and that defendant has not given nor can he give any consideration for said sum; that if defendant's claim that said note and mortgage were delivered to him under contract be true, defendant is not entitled to retain nor enforce same, because said contract is now impossible of performance.

"Plaintiffs further say that at the time at which defendant claims to have entered into said contract with said Schmidt the latter was insane and by reason of his insanity could not make a valid and binding contract; that said contract is null, and that defendant acquired no lien on said property thereby."

The defendant E. S. Pindall answered in part as follows:

"The defendant denies that the note and mortgage to him was without consideration, and says that at the time it was made the defendant Schmidt employed said E. S. Pin-

dall and X. O. Pindall to defend him on the charge of murder in the first degree, and state that this defendant, and X. O. Pindall, his codefendant, are attorneys at law, practicing in the courts of Desha county and in other counties of the state and in the supreme court of the state of Arkansas.

"Defendant denies that the said Schmidt at the time of executing the note and mortgage was insane, and therefore incapable of entering into a valid and binding contract.

"Defendant, further answering, pleads the truth of this matter to be as follows: Said Schmidt, being charged with the crime of murder in the first degree, and arrested on said charge, employed this defendant, who is an attorney at law, as stated, as one of his attorneys to defend him; that it was expressly agreed between this defendant and the said Schmidt that this defendant's retainer should be \$5,000, and said Schmidt executed the note and mortgage in question as payment, and security for ⁵⁸⁰ payment of said sum, the contract being thereupon consummated; this defendant entered into the discharge of his employment, and has performed all the services required of him under said employment; that the note and mortgage belong to this defendant."

In this case the court found that the allegation of insanity was not sustained; that by the death of Schmidt the consideration of the note and mortgage had failed, but that E. S. Pindall had received no compensation for his services in the habeas corpus proceedings, and that such services were reasonably worth \$500; that E. S. Pindall was indebted to the estate of Schmidt for the occupation of the residence of the deceased in the sum of \$72, and ordered and decreed that plaintiff pay to him (E. S. Pindall) the sum of \$428, and upon payment thereof that E. S. Pindall cancel the mortgage on record, and deliver the same and the note to plaintiffs.

Gus Waterman, as administrator of the estate of J. J. Schmidt, deceased, also brought a suit in the Desha chancery court against X. O. Pindall to enjoin him from assigning and disposing of the property delivered to him by Schmidt and the Bank of Dumas from entering upon its books any assignment of the stock transfer to the defendant, and the Dumas Mercantile Company from paying its said note, and, upon final hearing, to require the defendant to deliver to plaintiff said note, stock certificate, and \$500

delivered to him by Schmidt; and for so asking made substantially the same allegations as are contained in the complaint in the suit brought by H. J. Schmidt, heir, and Gus Waterman, administrator.

The defendant X. O. Pindall, answering, denied "that he has in his custody money and chattels belonging to the estate of J. J. Schmidt, the deceased, as alleged; denies that the title to said property was in J. J. Schmidt at the time of his death; denies that at the time the defendant procured possession of said property from the said Schmidt the said Schmidt was insane and therefore incapable of making a valid and legal contract; admits that defendant is a practicing attorney at law, and that at the time he procured said property from said Schmidt ⁵⁸¹ the latter was confined in the Desha county jail on charge of murder in the first degree.

"This defendant says that he is a lawyer practicing at the bar of Desha county and other counties in the state of Arkansas, and the supreme court of the state of Arkansas; that the said Schmidt was charged with the commission of the crime of murder in the first degree, and arrested on said charge and incarcerated in jail; that he employed this defendant as one of his attorneys to defend him upon said charge upon an express consideration expressed in the contract at the time it was made and paid at the time, said consideration being promissory notes for \$500, a certificate for forty shares in the Bank of Dumas, and \$500 in money, and a draft on the Dumas Mercantile Company for \$500; that this defendant has duly performed said contract upon his part, and holds nothing belonging to the estate of the said J. J. Schmidt in his hands."

In this case the court found that J. J. Schmidt, prior to his death, paid X. O. Pindall \$500 in cash, and delivered to him the promissory notes and bank stock described in the complaint for services to be rendered in defending him against charges for killing Willis; that the allegation as to the insanity was not sustained by the evidence; that the performance of the contract of Schmidt and Pindall "had become impossible of performance"; and that the \$500 paid Pindall in cash was full and adequate compensation for all services rendered Schmidt by him; and ordered and decreed that defendant Pindall deliver to plaintiff the notes of Dumas Mercantile Company for \$500, the certificate for

forty shares in the Bank of Dumas, and the note executed by Schmidt to Pindall for \$500; and ordered and decreed that the Dumas Mercantile Company and the Bank of Dumas be restrained and enjoined as the plaintiff prayed for in his complaint.

Professor Page says: "Inadequacy of consideration may be found in connection with circumstances of oppression which do not amount to technical duress; and the combination may justify a finding of undue influence. Thus a transaction entered into under great mental distress, caused by domestic calamity, . . . will be relieved against in equity. The propriety of relief is especially clear if, under great mental distress due to ⁵⁹² the death of her husband, the person seeking relief is induced by threats of violence to relinquish a legacy given her by her husband's will for an inadequate and nominal consideration. So a transaction entered into for an inadequate consideration, by taking advantage of the financial necessities of the party seeking relief, will be relieved against in equity": 1 Page on Contracts, sec. 228, and cases cited.

Mr. Freeman, in his notes to Hough's *Admrs. v. Hunt*, 15 Am. Dec. 572, says: "There is a large class of cases in which courts of equity will rescind contracts, which are against some public policy, where an unconscientious advantage has been taken, by one of the parties, of the condition or circumstances of the other party, when there is gross inadequacy of consideration, or when there has been imposition or oppression practiced upon a person who had reposed confidence in the party who had abused it. The ground on which a court of equity affords relief in such cases is, that while there may not have been any actual fraud practiced by either party to such contract, yet there has been a constructive fraud perpetrated upon the party to the contract, who, from any cause, may not have stood upon an equal footing with the person with whom he has contracted."

In *Robinson v. Sharp*, 201 Ill. 86, 66 N. E. 299, while the relation of attorney and client existed, the court did not place its judgment entirely upon that ground. The court said: "That the appellees, in entering into the agreement to pay one-half of the insurance money to the appellant, were actuated by serious apprehensions as to the possibility or probability of collecting anything thereon must be ad-

mitted. The chancellor believed, from the proof, that such apprehensions were aroused by the appellant. That there was ground for such fear is beyond question, and there is nothing in the evidence to show that appellant had any reason to believe, or did believe, that any litigation or contention would arise to prevent, or even delay, the collection of the policies. The amount contracted was clearly oppressive and unjust, and the chancellor correctly ruled that appellees should be relieved from the obligation of the contract, and that appellant was entitled to a reasonable compensation for the service performed."

In *Kelley v. Caplice*, 23 Kan. 474, 33 Am. Rep. 179, the syllabus is as follows: ⁵⁸³ "On June 11, 1875, C. was indebted to K. & M. in the sum of \$600; at the time C. had in his possession an endowment policy issued by an insurance company, insuring his life in favor of his wife. In consideration of the satisfaction of this indebtedness and \$275, C. and his wife executed a written assignment of the policy to M., and delivered the policy and assignment to him, and thereby transferred all their right, title and interest in the policy. Afterward M. paid to the company all subsequent premiums and premium notes. The policy matured May 12, 1878. The amount due thereon was \$1,477.73. K. & M. demanded this sum from the insurance company, but it refused to pay without Mrs. C.'s receipt on the back of the policy. Mrs. C. refused to sign her name unless she was paid \$477.73 when the policy was collected. In compliance with this extortionate demand, K. executed to Mrs. C. his written promise to pay to her this sum on the payment of the policy, and M. guaranteed the payment of the money within ten days after the policy was paid. When the policy was paid, K. & M. refused to comply with their written promise, Mrs. C. brought her action thereon, and the court gave her judgment for the full amount, interest and costs. Held, that as Mrs. C. availed herself of the situation in which K. & M. were placed to exact an unreasonable sum and an unconscionable bargain, she cannot enforce their written promise, but may recover what is fairly due her for the inconvenience, or service in writing her signature."

The court said: "The mind revolts at the enforcement of such a promise, and as the courts, as a rule, under such circumstances seize upon the slightest act of oppression

or advantage to set at naught a promise thus obtained, we are of opinion that Mrs. C. is only entitled to what may be fairly due her for writing her signature, and that she cannot recover on the agreement."

In this case Schmidt was a man about sixty years of age. He was sober, industrious and penurious, and accumulated an estate of the value of about \$8,089.60. He killed a man; was charged with murder in the first degree. The excitement caused by it was very high, and mob violence was threatened and feared. He was arrested and imprisoned. On account of the excitement and trouble experienced by him, he grew haggard and worn ⁵⁸⁴ and at times looked dazed and unconscious of what he was doing. In this condition E. S. and X. O. Pindall, two lawyers, together visited him, presumably at his invitation, and received from him as security and payment for fees property worth about \$7,000, and his note for \$500, leaving property worth only \$1,089.69. In a few days thereafter, to relieve himself of the troubles and excitement then torturing him he ended his life by suicide. Property and life ceased to have any value with him, although before that time he had been penurious. While in this condition, the Pindalls received of him what, in the absence of an explanation, seems to be unreasonable, oppressive and exorbitant fees and promises to pay fees, which come within that class of transactions against which equity will relieve. No effort to explain or show that the fees were fair and reasonable was made. They alleged that they made the contracts, and have at all times been ready to perform the service they contracted to render. This is their defense. It is not sufficient.

Decrees in both cases affirmed.

For Authorities upon the principle involved in the principal case, see Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150, and note.

BILLINGSLEY v. ST. LOUIS, IRON MOUNTAIN, AND
SOUTHERN RAILWAY COMPANY.

[84 Ark. 617, 107 S. W. 173.]

SURVIVAL OF HUSBAND'S ACTION for Killing of His Wife.

A cause of action existing in favor of a husband for the killing of his wife through carelessness and negligence does not survive to his executor, where the statute purports to authorize the executors or administrators to prosecute actions arising from wrongs done to the property or person of another. The death of the wife is not an injury to the person or property of the husband. (p. 96.)

Stuckey & Stuckey, for the appellant.

T. M. Mehaffy and J. E. Williams, for the appellee.

⁶¹⁸ WOOD, J. This suit was instituted by one G. W. Hurley against the appellee to recover damages in the sum of twenty thousand dollars, the alleged value of the services and companionship of Hurley's wife, who, it was alleged, "was killed through the carelessness and negligence of appellee's servants," and "by wrongful act, neglect or default of appellee."

While the suit was pending, Hurley died, and it was sought to revive the cause in the name of appellant as his executor. The court, instead, abated the action, and this appeal is prosecuted from a judgment dismissing the cause.

The only question is, "Did the cause of action survive the death of Hurley?" The action is based upon section 6288 of Kirby's Digest as follows: "When a wife be killed in this state by the wrongful act, neglect or default of any person, company or corporation, the husband ⁶¹⁹ may have a cause of action therefor against such wrongdoer, and be entitled to damages for the services and companionship of his said wife in whatever amount the jury trying the cause may consider he is entitled to; provided, suit be brought within two years from the time the said cause of action occurs, which action may be brought by and in the name of the husband."

The statute under which survival to the executor of Hurley is sought reads as follows: Sec. 6285. "For wrongs done to the person or property of another an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator against such wrongdoer, or after his death against his executor or administrator, in the same

manner and with like effect in all respects as actions founded on contract."

To establish a survival under this section, it must be held that the killing of the wife of Hurley was an injury to the person or property of Hurley himself. Such is the contention of appellant; but the case of *Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880, decides directly to the contrary. Judge Cockrill, rendering the court's opinion, said: "The 'injury to the person' mentioned in the provision has been construed to mean a bodily injury or damage of a physical character, and no other; and the injury to property, so far as it relates to personal property, is only such as was contemplated by the statute of 4 Edward III, chapter 7, on the same subject."

It would be absurd to hold that the death of the wife would be a physical injury to the person of the husband, and the case and the authorities cited show that such rights as arise out of the domestic relation are not "property," in the meaning of the statute. The domestic services of a wife, and her companionship with the husband, possess none of the attributes of "property." The husband has the right to them by virtue of the marital relation, but they are purely personal to him. They cannot be bought and sold; no pecuniary value can be placed upon them for that purpose. They are in him, and die with him. They are not things, but acts, sentiments and conditions. They are not "property," in the sense of this statute. Although, in the case of *Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880, the question was as to the right of survival of the action against the administrator of a wrongdoer,⁶²⁰ yet the statute under consideration here was necessarily under review there, and the construction given the words "wrongs done to the person or property" concludes the question here, unless we overrule that case. This we are unwilling to do,*as we are convinced that it is correct and supported by sound reason and abundant authority. We will not enter upon a review here of the authorities, but, see *Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880.

The judgment is therefore affirmed.

The Question Whether an Action for Wrongful Death abates on the death of the person entitled to prosecute it is discussed in Matter of Meekin, 164 N. Y. 145, 79 Am. St. Rep. 635; note to Brown v. Electric Ry. Co., 70 Am. St. Rep. 685.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

LIEBHARDT v. WILSON.

[38 Colo. 1, 88 Pac. 173.]

CORPORATIONS—Acts of Stockholders—Liability.—Corporations are not responsible for the acts of their stockholders not acting in a representative capacity. (p. 99.)

CORPORATIONS—Debts of Adjunct Corporation.—Whether a corporation was formed by another corporation to be used as an adjunct of the first is immaterial, so far as the liability of the original corporation for the debts of the other is involved, if such debts were incurred after the adjunct corporation had gone out of business and had been revived and operated by third persons. (p. 99.)

CORPORATIONS—Liability of Majority Stockholders.—A stockholder in a corporation is not liable for its acts beyond his statutory liability, from the mere fact of his being the majority stockholder. (p. 100.)

CORPORATIONS—Liability of Majority Stockholder.—If a majority stockholder in a corporation is not in charge of its business nor consulted as to its transactions, he is not personally liable for a purchase made by it from a third person, although he afterward bought the same property for another corporation in which he is a stockholder. (p. 100.)

CORPORATIONS—Liability of Stockholders—Extent of Interest.—The liability of a stockholder in a corporation does not depend upon the amount of stock which may be held by him therein, unless he has used an influence possessed by reason of his interest for fraudulent purposes. (p. 104.)

PRINCIPAL AND AGENT—Factors—Sales—Purchaser's Liability to Principal.—A purchaser of property from a commission merchant who credits him with the amount of the purchase and sells other goods to him, and in settlement of their accounts pays to such merchant the balance, is liable to the principal in case such merchant fails to pay him. (p. 104.)

CUSTOMS—Factors.—A local custom among factors to credit the buyer with the amount of a sale and charge him with goods received from him is not binding on the principal of a factor. (p. 105.)

Doud & Fowler, for the appellants.

T. H. Hood, for the appellee.

^a **BAILEY, J.** This is an action in the nature of a creditor's bill, brought by appellee against appellants.

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It appears that the appellee consigned to the Denver Produce Company, a corporation, a carload of walnuts, to be sold upon commission. The produce company disposed of the walnuts, but failed to account fully to appellee for the value thereof. Appellee brought suit in the county court of Arapahoe county, and recovered judgment against the company for fifteen hundred and eight dollars and twenty-three cents. He then brought this action, the complaint being in the nature of a creditor's bill, and obtained judgment against defendants, G. G. Liebhardt ³ and the Liebhardt company, from which judgment they appealed.

The cause of action supporting the judgment against Liebhardt is entirely different from that supporting the judgment against the Liebhardt company, if any cause of action exists against either. The defendant Liebhardt was a stockholder in each concern, holding the majority of the stock in the produce company and a minority of the stock in the Liebhardt company. The Liebhardt company was not a stockholder in the produce company. It did not have a dollar invested in the produce company, either directly or indirectly. The holdings of Liebhardt in the produce company was his individual matter. If the sale of the walnuts by the produce company to the Liebhardt company amounted to a conversion of them, it was a conversion by the corporation, and not by defendant Liebhardt. The walnuts were purchased by the Liebhardt company, and credit given by it, and it was applied to the use and benefit of the Liebhardt company.

Liebhardt was not interested in the transaction, except as he was a stockholder of the Liebhardt company. If Liebhardt is indebted to the plaintiff, it is because of his conduct as a stockholder of the produce company, or because of some individual and personal conversion of plaintiff's property. The Liebhardt company, not being a stockholder in the produce company, and not having any interest in the stock held by Liebhardt, cannot be said to be responsible or liable for defendant Liebhardt's actions or misconduct, if any existed. If there was a conversion of the property of the plaintiff, or any of the property of the produce company, by defendant Liebhardt in his personal capacity, it cannot be said that the Liebhardt company would be responsible for that, unless it received the ⁴ benefit of the tortious conduct of the individual. Corporations are not re-

sponsible for the actions of their stockholders, unless the stockholders are acting in a representative capacity.

Much stress is laid upon the fact that the produce company was originally formed by the Liebhardt company as an adjunct to the last-named company, or, as is said by appellee, to be used as a dummy corporation for defendant herein, and it must be that it is because of this fact that the joint judgment was rendered.

The object for which the produce company was originally formed is not material in this action, because it appears, and is undisputed, that the produce company was organized by the Liebhardt company in 1894, to be used as an adjunct to the Liebhardt company, and was actually under the same management, if not nominally so. After a time the produce company purchased the holdings of the principal competitor of the Liebhardt company, and subsequently turned its stock of goods over to the Liebhardt company, and went out of business in January, 1896, nearly two years before plaintiff consigned his walnuts to the produce company. Some time after the produce company went out of business, defendant Liebhardt and one Nunemacher concluded to engage in the commission business, and, instead of forming a partnership or a new corporation, took the papers of the old Denver Produce Company, reduced the capital stock to two thousand dollars, and started their business with two thousand dollars capital. The defendant company did not have any money invested in the produce company as thus resurrected. It was not a stockholder. The investment was an individual one, made by defendant Liebhardt, and this was the condition at the time the plaintiff dealt with the concern. This being true, it is absolutely immaterial in this case as to what relationship ⁵ existed between the Liebhardt company and the produce company when the latter was originally formed. In determining the liability of defendant Liebhardt, it must be remembered that, in this transaction, no liability attaches from the mere fact of his being the majority stockholder. There is not one measure of liability for a stockholder holding but a few shares, and another measure for a stockholder holding many shares. The liability of stockholders, as such, is created by statute, and by statute alone, and we have no right to add to those liabilities; neither have we the power to take from them.

Our attention has been called to no provision of the law by which Liebhardt becomes liable, simply, because he is a

stockholder. If he is liable at all, it is because of his actions as an individual, or because of something which he did that he should not have done, or because of something he did not do that he should have done as an individual, the doing or not doing of which was rendered possible by reason of his being a stockholder. With this in mind, let us determine, if we may, what conduct of his renders him liable for the value of these walnuts.

Liebhardt and Nunemacher agreed to go into the commission business with a capital stock of two thousand dollars. To enable them to do so, and to avoid the expense of forming a new corporation, they reduced the capital stock of the Denver Produce Company, which had theretofore ceased doing business and was an idle corporation. Nunemacher, Mrs. Nunemacher and Mr. Dowd were chosen as the directors of the company. Mr. Nunemacher was the business manager of the concern. He was in absolute control, and so far as the record shows, never advised with the other directors nor with Liebhardt, the principal stockholder.

* Liebhardt knew that the car of walnuts was coming. He was informed of this as a representative of the Liebhardt company, for the purpose of determining whether or not the Liebhardt company would undertake to handle a portion of the nuts. He was not advised upon what terms the nuts were taken, nor from whom they came, and was not advised of the fact that they were not paid for and plaintiff fully settled with, until after the action between plaintiff and the produce company was instituted. Upon the receipt of the walnuts and the attempted delivery of a portion of them to the Liebhardt company by Nunemacher, Liebhardt, acting for the Liebhardt company, refused to accept them upon commission, or to take them at all, except as a direct purchase, for six and one-half cents per pound, and the nuts were purchased by the Liebhardt company at that price.

These are all of the facts upon which the liability of Liebhardt can be said to be based, and they do not warrant a judgment against him.

In the case of *Salomon v. Salomon & Co., Ltd.*, [1897] App. Cas. 22, it appears that a trader sold a solvent business to a limited company, with a nominal capital of forty thousand shares of one pound each, the company consisting only of the vendor, his wife, a daughter and four sons,

who subscribed for one share each. Twenty thousand shares were issued to the vendor. No shares other than the twenty thousand and seven were sold. The affairs of the company were wound up, and, after satisfying the debentures, there was not enough to pay the ordinary creditors. The action was brought by the company against the majority stockholder.

Lord Halsbury states, in his opinion: "I observe that the learned judge (Vaughn Williams), held that the business was Mr. Salomon's ⁷ business, and no one else's, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it, and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say, at the same time, that there is a company and there is not."

The reasoning applies to the case at bar. If there was a corporation, and the corporation conducted the business, it cannot be said that Liebhardt is liable for the acts of the company beyond his statutory liability as a stockholder.

The plaintiff dealt with the corporation as such, and not with the stockholders as individuals. The fact that Liebhardt owned the majority of the stock would not tend to make him liable if, under the same facts, he was not liable had he owned but one share.

Much stress is laid upon the proposition that Liebhardt was the owner of the majority of the stock of the corporation. It is said that he owned all of the shares except two or three. The undisputed facts appear to be that, at the time of the reorganization of the produce company, Liebhardt and Nunemacher each agreed that Liebhardt should have one thousand and one shares of the stock, and Nunemacher nine hundred and ninety-nine shares. However, one share was issued to Mr. Dowd and one share to Mrs. Nunemacher, to enable them to act as members of the board of directors.

Mr. Nunemacher did not have the means with which to pay for his stock. He borrowed one thousand ⁸ dollars

from Liebhardt, giving his promissory note signed by his father in law, and further secured the payment of it by transferring his stock to Liebhardt. This note was subsequently paid and surrendered to Nunemacher, but, for some reason which is not explained, the stock was not retransferred to Nunemacher.

Plaintiff argues that this makes Liebhardt the owner of all of that stock, because of the provision of the statute requiring its transfer upon the books of the company. It is unnecessary for us to pass upon that question.

Credit was not extended to the corporation upon the strength of Liebhardt's owning the majority of the stock. On the contrary, the plaintiff complains because he, with the balance of the public, was kept in ignorance of the fact that Liebhardt was a stockholder at all. However, be this as it may, we do not consider that it is important.

"How does it concern the creditor whether the capital of the company is owned by many persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person who practically takes the whole of the profits? The creditor has notice that he is dealing with a company, and he knows, or ought to know, the liability of the members": Lord Herschell in *Salomon v. Salomon & Co., Ltd.*, [1897] App. Cas. 22.

The creditor in the present case gave credit to and contracted with the corporation. The effect of the decision below is to give him the benefit of trading and contracting with a copartnership.

It is asserted in the complaint that Liebhardt owned and controlled the corporation, and this statement is the foundation of much of the argument of plaintiff. However, the allegation does not appear to have any support except that contained in the complaint. ⁹ The testimony is to the effect that Liebhardt took no part in the management of the concern, except that monthly balance sheets were submitted to him.

Lord McNaughten, in *Salomon v. Salomon & Co., Ltd.*, [1897] App. Cas. 22, at page 53, says: "It has become the fashion to call companies of this class 'one-man companies.' That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although

the requirements of the law may have been complied with. it is inaccurate and misleading; if it merely means that there is a predominant partner, possessing an overwhelming influence and entitled practically to the whole of the profits. there is nothing in that that I see contrary to the intention of the law or against public policy or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid, it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd."

There is nothing in the record tending to show that Liebhardt used any power, authority or influence which he might have had as the majority stockholder, in directing or controlling the management of the produce company, for fraudulent purposes or otherwise, until long after this walnut deal was consummated, and then only to the extent of closing the business, he being dissatisfied with Nunemacher's management.

One of the by-laws of the corporation provides that the board of directors shall resign upon request of the majority stockholder. If they fail to resign, ¹⁰ the majority stockholder may remove them. It is said that this by-law is illegal, and was adopted so that the majority stockholder would have absolute control of the corporation, and could use it for fraudulent purposes if he so desired. However, there is no proof to show that the majority stockholder ever attempted to exercise this power. He never requested the resignation of the directors, nor made any change in the management. It is one thing to have the power to commit a fraud, but quite another to exercise it.

A number of authorities cited by plaintiff are to the effect that the board of directors hold the property of a corporation in trust for the creditors, and that a majority stockholder who wrongfully controls the board of directors assumes this trust. We have examined these authorities, and find that they are not in point under the facts of this case. It will serve no good purpose to review them at length. We may, however, refer to *Nix v. Miller*, 26 Colo. 203, 57 Pac. 1084, as being typical of the others.

In the *Nix* case, it appears that Home and Nix, as copartners, were engaged in the mercantile business. Their copartnership was in debt. They formed a corporation,

transferred the firm property to the corporation, and the corporation assumed the debts. Nix was a member of the board of directors. The corporation used the property of the company to pay the individual debts of one of the directors. A creditor brought an action against the directors. Nix defended, upon the ground that he paid no attention to the management of the corporation, and the court held that he could not relieve himself of liability where, by his negligence and inattention to the corporation business, he permitted his codirectors to misappropriate the funds of the corporation, and ¹¹ that he could not escape liability because he did not share in the acts of misappropriation.

In the present action, defendant Liebhardt was not a member of the board of directors, and did not assume to control or direct the affairs of the company. We know of no provision of the law which makes the liability of a stockholder dependent upon the extent or degree of interest which may be held by him in the corporation, in the absence of a showing that he used the influence, which he might have by reason of his interest, for fraudulent purposes.

In the case of *Louisville Banking Co. v. Eisenman Bros. & Co.*, 94 Ky. 83, 42 Am. St. Rep. 335, 21 S. W. 531, 19 L. R. A. 684, it appeared that a corporation styled "Eisenman Bros. & Co." was duly organized, and J. G. Eisenman subsequently became the owner of all of the capital stock which had been issued. He indorsed certain drafts in the name of the corporation. The corporation failed, and the court found that Eisenman was not personally liable upon the drafts, they being the obligations of the corporation, and not of the individual. The fact that the individual was the sole owner of the corporate stock was held not to make him personally liable. This is in line with the decision in *Salomon v. Salomon & Co., Ltd.*, [1897] App. Cas. 22.

As to the Liebhardt company, it appears from the testimony that it purchased from the produce company nine thousand six hundred and forty pounds of plaintiff's walnuts at the agreed price of six and one-half cents per pound, which would amount to six hundred and twenty-six dollars and sixty cents. The manner of doing business between these two corporations, according to witness Liebhardt's testimony, is as follows: "We gave them credit when we bought goods from them, but when we sold goods

to them, we charged them with them, and when we came to settle, if we owed them, we would give them a check, and, ¹² if they owed us, they would give us a check for the difference."

The business of factors or commission merchants may not be practiced in this manner to the prejudice of the principal. A factor has authority to sell goods of his principal, but he has not the power to use them for the payment of debt, nor to barter nor exchange them for other goods: *Geurreiro v. Peile*, 3 Barn. & Ald. 616; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Warner v. Martin*, 11 How. 209, 13 L. ed. 667.

It is contended that the manner in which this business was conducted was binding upon plaintiff, because it was according to the custom of commission merchants in the city of Denver. Under somewhat similar circumstances, in the case of *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631, 76 S. W. 211, the court said: "This so-called custom was an arrangement among the local dealers solely for their own convenience, which they acted on entirely in reliance upon the financial responsibility of each other. If, in the absence of any such custom, defendant would have no right to apply the price of plaintiff's fruit on the individual debt of Shea, the custom could give him no such right, for the effect of such a custom would be to permit an agent to appropriate his principal's property to the payment of his own debt, which would be contrary to the well-established principles of law, as well as good morals. Therefore, such custom would be void."

While plaintiff is entitled to a judgment against the defendant corporation, this cause must be reversed, for the reason that the judgment rendered was excessive. The value of the walnuts purchased from the factor was six hundred and twenty-six dollars and sixty cents. After the produce company went out of business, it was determined that the Liebhardt company was indebted to the produce ¹³ company, on account of their mutual dealings, in the sum of five hundred and thirty-five dollars and eighty-five cents. This amount was paid by the Liebhardt company to the attorney of the produce company, and by him paid into court to be applied upon plaintiff's judgment. Plaintiff received the money. After deducting this from the price of the walnuts, six hundred and twenty

six dollars and sixty cents, it would leave ninety dollars and seventy-five cents, for which amount, with interest from the date of the former judgment, plaintiff should recover from the Liebhardt Commission Company. The action should be dismissed as to the other defendants.

The judgment will, therefore, be reversed and remanded for further proceedings, in accordance with the foregoing opinion.

Chief Justice Gabbert and Mr. Justice Goddard concur.

The Stockholders in a Corporation are not personally liable for the acts or omissions of its officers: Atchison etc. R. R. Co. v. Cochran, 43 Kan. 225, 19 Am. St. Rep. 129. Even the sole owner of the stock of a corporation would seem not personally liable on indorsements made by him in the name of the corporation: Louisville Banking Co. v. Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335.

The remark made by the judge, ante, page 104, "We know of no provision of the law which makes the liability of a stockholder dependent upon the extent or degree of interest which may be held by him in the corporation," etc., was doubtless inadvertent, and so singularly contrary to the law that it will probably mislead no one. The liability of a stockholder, when by law he is liable at all as such, is necessarily dependent upon the extent of his interest. In other words, it is generally by statute made to bear the same proportion of the corporate liability as the number of shares held by him bears to the whole number of outstanding shares of the corporate stock. We assume that, in making the remark, the court was not thinking of the liability of a stockholder as such for his proportion of the corporate indebtedness, but his liability personally for the whole of such indebtedness attempted to be asserted simply upon the ground that he was the majority stockholder, and as such controlled, or was entitled to control, the management of the corporation.

LAESCH v. MORTON.

[38 Colo. 171, 87 Pac. 1081.]

EASEMENTS—Oral Agreement—Statute of Frauds.—An oral agreement for a perpetual right of way over the lands of another creates an easement or interest in land which is within the statute of frauds, and to be taken therefrom must be supported by clear, definite, and conclusive evidence. (p. 107.)

MINES AND MINING—Rights of Cotenant.—An owner of an undivided interest in a mine has no right to use the tunnel therein to convey ore from an outside mining claim. (pp. 107, 108.)

APPEAL—Reversal of Judgment.—A judgment may be reversed for lack of the character and degree of evidence required to support it. (p. 108.)

Margaret Laesch was, at the time this action was brought, and still is, owner of an undivided one-half interest in the Elida mining claim. Morton acquired the other one-half

interest in August, 1890, at which time there was a tunnel driven in on the claim three hundred and twenty-four feet, and he thereafter continued the tunnel through the Elida claim and into another claim owned by him and known as the Joe Reynolds mine, and conveyed the output of the latter through the Elida tunnel. This action was brought by Margaret Laesch against Morton to obtain an accounting and compensation for the use of the tunnel, and for an injunction against its further use in conveying the output of outside claims. The defendant claimed the right to use the tunnel because of an oral agreement with the plaintiff, who denied such agreement and set up the statute of frauds.

Judgment dismissing the action, and plaintiff appealed.

Morrison & De Soto and A. R. Morrison, for the appellant.

A. D. Bullis, for the appellee.

¹⁷³ GODDARD, J. The law applicable to this case is well settled, and the only question for our consideration is whether the evidence of the defendant, when given its full weight and purport, is sufficient to sustain the judgment. The perpetual right of way, which the defendant claims he acquired from plaintiff, constitutes an easement or interest in land. The oral agreement upon which he relies is within the statute of frauds, and under the well-settled rule, in order to take such agreement out of the statute of frauds, it is incumbent upon him to support the same by clear, definite and conclusive proof: *Fetta v. Vandevier*, 3 Colo. App. 419, 34 Pac. 168, affirmed in *Vandevier v. Fetta*, 20 Colo. 368, 38 Pac. 466; *Whitsett v. Kershow*, 4 Colo. 419.

The evidence on the part of the defendant does not, in our opinion, meet the requirements of this rule. It consists of a conversation testified to by the representative and agent of defendant. This conversation is, in itself, general and indefinite as to the terms of the agreement, and is positively denied by ¹⁷⁴ the plaintiff. Nor does it satisfactorily appear that the defendant acted upon the alleged agreement in running the tunnel, but rather upon his supposed right to use it to transport the output from the Joe Reynolds mine by virtue of his undivided interest therein. He was so advised by counsel, and, in answer to plaintiff's demand for compensation, defendant's attorneys did not claim the

right to the use of the tunnel by virtue of any agreement, but gave as the reason why she was not entitled to compensation for such use "that the parties were tenants in common in the tunnel." That they were mistaken in assuming that defendant's relationship to the property gave him the right to use the common tunnel to convey ore from an outside claim is settled in *People v. District Court*, 27 Colo. 465, 62 Pac. 206. Yet defendant twice asserted such right, and did not claim the right to use the tunnel by virtue of an agreement with plaintiff until it appeared in his amended answer.

It must be assumed that the court below, by rendering judgment for defendant, found the issue as to the agreement in his favor, and while, under the doctrine frequently announced in this court, we are precluded from disturbing such finding unless clearly against the weight of the testimony, we feel compelled to reverse the judgment, not alone because of the conflict in the testimony, but because of the lack of the character and degree of proof required in such cases.

Judgment reversed and cause remanded.

Chief Justice Gabbert and Mr. Justice Bailey concur.

Cotenancy in Mines is the subject of a note to *Cedar Canyon Con. Min. Co. v. Yarwood*, 91 Am. St. Rep. 851.

The Acquisition of an Easement in land is within the statute of frauds: *Walker v. Shackelford*, 49 Ark. 503, 4 Am. St. Rep. 61; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550. But see *Zuamanacek v. Jelinek*, 69 Neb. 110, 111 Am. St. Rep. 533.

CITY OF DENVER v. UTZLER.

[38 Colo. 300, 88 Pac. 143.]

MUNICIPAL CORPORATIONS—Obstructions in Streets—Liability.—It is the duty of a city to maintain its streets in a reasonably good condition for ordinary travel by persons using due care and prudence, and the city has no right to allow its citizens owning property bordering upon the street to place obstructions upon such portions thereof as are intended to be used as a travelway, and when such obstruction is the proximate cause of an injury, and the person injured could not have avoided it by the exercise of reasonable and ordinary care and prudence, the city is liable. (p. 110.)

MUNICIPAL CORPORATIONS—Use of Horses in Streets—Duty to Fasten.—A person has no right to leave his horse in a public street unless it is securely fastened or in charge of some one competent to take care of it, and he is bound to take care that the horse does no injury in consequence of being frightened by anything that may occur. (p. 116.)

MUNICIPAL CORPORATIONS—Excavations in Streets—Liability for Injury to Horses.—If a horse takes fright and runs away and is injured because of the negligence of a municipal corporation in leaving a dangerous excavation in the street unprotected, an action may be maintained against the city; provided, that the driver of the horse exercised due care and skill in driving or managing it. (p. 118.)

MUNICIPAL CORPORATIONS—Defects in Streets—Liability for Injury to Horses.—A defect in a public street within a city does not render the corporation liable for an injury to a team of horses coming in contact with it unless the defect is the proximate cause of the injury, and this cannot be said to be true where the carelessness or negligence of the driver permits those causes to be set in motion which produce the damage. (p. 119.)

H. M. Orahood, city attorney, and Benedict & Phelps, for the appellants.

J. A. Rush, for the appellee.

³⁰² BAILEY, J. It appears that, at the time of the accident, the width allowed for the sidewalk upon 12th avenue, in the city of Denver, was sixteen feet. At the place of the accident, however, the curbing was not placed sixteen feet from the edge of the street, but at a distance of something less than that. Between the curbing and the driveway in front of Mrs. Myers' premises was a gutter made of cobble-stones. A flagstone was placed across this gutter, and, upon that, a stepping-stone, used for convenience in entering carriages and the like. There was also a hitching-post outside the gutter and near the stepping-stone. The stepping-stone and flagging across the gutter extended something like four feet beyond the curbing, but still was within the sixteen feet allowed by ordinance for sidewalks, as was the hitching-post. The defendant Myers' property was located upon 12th avenue near Ogden street.

It appears that the plaintiff was engaged in the business of hauling coal, using one horse for that purpose. On the thirtieth day of August, 1897, he was delivering coal at the residence of Mrs. Bonesteel, at No. 1112 Ogden street. To deliver this coal he drove into the alley between Ogden street and the next street east, going from 11th avenue toward 12th. After removing the coal, he stepped up the horse, and got out of the wagon to clean up such of the coal as he had not succeeded in throwing into the lot. He left the horse standing without tying, fastening or securing it in any manner, leaving the lines attached to the seat on the wagon, so that he could not reach them without get-

ting into the wagon. While he was on the ground behind the wagon, cleaning up the coal, the horse began to move away. Plaintiff ran and jumped into the rear end of the wagon. By the ³⁰³ time he got there, the horse had turned from the alley to 11th avenue, going toward Broadway, which would be west. It ran down the alley and along 11th avenue to Ogden street. At this point there are car tracks. It seems that the driver had gotten into the seat and secured the lines, but, in crossing the tracks, he again lost them. He got down and reached the lines. By this time the horse had come to 12th avenue, turned there, and, shortly after turning, ran against the stepping-stone in front of the Myers premises. The driver was thrown out, and struck his knee on the cobble-stones in the gutter. It appears that he held to the lines, the horse dragging him, until he struck the hitching-post with his side, knocking off some of the skin.

On the 13th of June of the next year plaintiff brought this action against Mrs. Myers and the city. Judgment was rendered against defendants for five hundred dollars, on the third day of June, 1902.

At the close of plaintiff's testimony, defendants moved for judgment as of nonsuit. This motion was overruled. At the close of all of the testimony, defendants requested the court to instruct the jury to return a verdict for defendants. This request was denied. Error is assigned because of the court's action in that respect. There are many other errors assigned in the record which we do not deem necessary to consider.

The horse has been a fruitful source of profit to lawyers, and of laborious study and anxiety to courts.

It is the duty of a city to maintain its streets and highways in a reasonably good condition for ordinary travel by persons using due care and prudence in the use of the same. Citizens owning property bordering upon the street have not the right to place obstructions upon such portions of the street as are intended to be used as a travelway, and the city ³⁰⁴ has no right to suffer this to be done. Where it is permitted, and one lawfully upon the street and using due care is injured because of such obstruction and without fault upon his part, the city is liable. The city is not liable, however, except in cases where an obstruction is the proximate cause of the injury, and it is not liable if the party injured could have avoided the injury by the

exercise of reasonable and ordinary care and prudence. It is the difficulty of determining what was the proximate cause of the injury and as to what is due care that has filled the reports of the various courts in this country with much legal lore on the question of the runaway horse coming in contact with the defective street.

At one time it seemed to be a question whether he who encumbers the highway unlawfully should not be made answerable for any direct damage which happened to anyone who was injured thereby, whether the person thus injured was in the use of proper care or not; but this matter was finally set at rest in England in the case of *Butterfield v. Forrester*, 11 East, 59, determined nearly one hundred years ago, wherein it is said: "Two things must concur to support this action: An obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it."

It is said in the case of *Palmer v. Inhabitants of Andover*, 2 Cush. 600, that the doctrine announced in *Butterfield v. Forrester*, 11 East, 59 has never been questioned.

In this state there are three cases bearing somewhat upon the question involved here: *Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621; *Thunborg v. City of Pueblo*, 18 Colo. App. 80, 70 Pac. 148; *Farmers' Highline Canal etc. Co. v. Westlake*, 23 Colo. 26, 46 Pac. 134.

In the *Johnson* case, it appears that the city maintained, or permitted to be maintained, a ditch thirteen feet wide upon one side of the street. Between the ³⁰⁵ ditch and the street-car track was a driveway nine feet wide. The steps of the street-cars projected eighteen inches from the track, leaving seven and one-half feet from the steps to the ditch. A car came upon the driver of a wagon unnoticed until it was very near. The team shied, and, either from the shying or from the striking of the rear end of the wagon by the car, the horses fell into the ditch. The court of appeals, in passing upon this matter, said: "The horse becoming frightened and participating in the injury in no way modifies the liability. There are numerous cases where the municipality has been held liable for injuries to the horse by reason of defects in the street when the horse had become frightened and unmanageable."

Higgins v. Boston, 148 Mass. 484, 20 N. E. 105, and *Spaulding v. Inhabitants of Winslow*, 74 Me. 528, are cited in support of this proposition. The Massachusetts case does not

support the doctrine laid down by the court of appeals. It appears in this case that a horse, while being driven along a private way toward a city street sixty-six feet wide, from which it led at right angles, became uncontrollable at a distance of about one hundred feet from such street. When the street was reached, the driver had not regained control sufficiently to enable him to safely turn and drive along it, and he drove directly across it and down a bank on the other side which was unprotected by a railing upon the adjoining land, and the person with him was injured. Held, that the want of a railing, even if it would have been useful, is not the sole cause of the injury, and that the city was not responsible therefor. The uncontrollable condition of the horse contributed directly to it, and that condition arose outside of the limits of the highway.

The Maine case is in point, and supports the doctrine of the court of appeals case, because the horses merely shied, and the driver only lost control of them ³⁰⁸ momentarily, and this seems to have been the fact in the Johnson case. The cause of the accident in the last-named case was so different from the cause of the accident in this case, as to render it of but little value as an authority. The application of entirely different legal principles is involved.

In the case of *Thunborg v. City of Pueblo*, 18 Colo. App. 80, 70 Pac. 148, it appears that the fire-plug against which the cart collided was concealed by weeds so that it could not be observed by one using ordinary care. There was some proof in that case that the horse was running away and the driver was unable to control him completely. The runaway, however, was without any fault on the part of the driver. Under these facts, the court of appeals said that, if the horse was going excessively fast, it was quite immaterial whether the plaintiff was able to restrain him or not, for, unless the plaintiff himself be responsible for the immoderate speed, it constitutes no defense to the city.

In the present case, if the driver had taken the precaution of fastening his horse or of having the lines in such a position that he could readily secure possession of them, the horse would not have escaped and the accident would not have occurred, and it seems that these are precautions which should occur to a man of ordinary prudence.

The Farmers' Highline Canal etc. Co. v. Westlake, 23 Colo. 26, 46 Pac. 134, was an action instituted by the widow to recover for the death of her husband, the death having been occasioned by a horse, attached to a carriage driven by deceased, running away and overturning the carriage into the canal of defendant. This court said: "The roadway was reasonably safe for the passage of ordinary teams. In the frenzied condition of the horse that was being driven by the deceased, it is doubtful if any reasonable precaution that the public officers or the defendant company could have taken ³⁰⁷ would have insured safety. The injury sued for was primarily caused by the fright of the horse, and that fright was not caused by any defect in the roadway or in the construction or operation of defendant's ditch."

The duty of cities in relation to the maintenance of streets is stated as follows by Mr. Dillon: "The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. They are under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist or such as may reasonably be expected to occur. They are not bound to keep the streets in such condition that a traveler thereon may, with safety, run his horses at a furious rate of speed or drive thereon unmanageable horses, nor are they bound to keep the streets in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away": 2 Dillon on Municipal Corporations, sec. 1015.

There are two lines of decisions in this country relating to accidents occasioned by runaway horses coming in contact with defective streets, one supporting the next announced by Dillon and the doctrine as laid down by this court in Farmers' Highline Canal etc. Co. v. Westlake, 23 Colo. 26, 46 Pac. 134, the others announcing a doctrine somewhat at variance with these cases, but, as we view the matter, the plaintiff is not entitled to recover under either doctrine.

Moulton v. Inhabitants of Sanford, 51 Me. 127, was a case wherein the plaintiff was crossing a bridge over a narrow stream in the town of Sanford. The horse became frightened, and ran so near the edge that the body of the wagon was detached from the forward wheels and thrown into the stream. The court determined ³⁰⁸ that the frightened horse was the

primary cause of the accident, saying: "When a horse becomes unmanageable, unless his condition is caused by a defect in the highway, such defect is not the primary cause of an accident to which it contributes. A witness, on being asked to state the cause of such an accident, would give that which caused the condition of the horse. So long as the primary cause continues in operation, it may occasion the damage; and, if it happened upon a defective road, it is by no means thereby rendered certain that it would not otherwise have occurred upon one not defective, for it is clearly true that no proof can establish the fact that the damage would not have been sustained but for the defect, so long as it appears that some other cause contributed to the result."

In *Jackson v. Town of Bellevieu*, 30 Wis. 250, it appeared that one of the highways of the town of Bellevieu was out of repair, numerous gulleys and dangerous holes having been washed out and left unprotected. Plaintiff's horse having become frightened by some cause other than the defects in the highway, ran away, fell into one of these holes, and was killed. Plaintiff recovered judgment against the town. Dixon, C. J., in a remarkably clear opinion, says: "The escape and flight of the horse in this case was in no way connected with or attributable to any defect or insufficiency in the highway, and, conceding the same to have been defective at the point of injury, still the town is not liable, because the owner or driver was in no situation to exercise ordinary care or prudence to prevent the injury at the time it happened, which proof is in all cases necessary in order to charge the town, unless the situation or disability of the driver in this respect is caused by the same or ³⁰⁰ some other defect in the highway. . . . It is not the duty of towns to provide roads which shall be safe for runaway or unmanageable horses, or such as have escaped from control of their drivers without the fault of the towns, and, where injuries are sustained under such circumstances, it appearing that otherwise they might not have been sustained, the loss must fall upon the owners whose misfortune, if not whose fault, it is that they so happened."

Fogg v. Town of Nahant, and *May v. Town of Nahant*, 98 Mass. 578, is a case wherein the horse threw his tail over the line and, for a considerable distance, was consequently not under control. The driver could not prevent coming upon

a defect in the highway. He could have prevented this had he regained control of the horse, and the court held: "The liability of the town for an injury to a traveler, occasioned by a defect or want of repair in a highway, depends upon proof that the defect caused the injury. If a want of due care on the part of the person injured contribute to cause the injury, he cannot recover. And if, without fault or negligence on his part, his horses have escaped from his control, and have run away or become wholly unmanageable, so that no care can be exercised by him in respect to them, and this condition of things is not produced by a defect in the way, the town is not responsible for what may happen in consequence, even if the carriage upsets at a place where the way is defective."

This case went back for retrial and was again brought to the attention of the Massachusetts supreme court in 106 Mass. 278, and it appears that, at the second trial, the trial judge directed a verdict for the defendant, which was approved by the supreme court.

³¹⁰ In *Davis v. Inhabitants of Dudley*, 4 Allen, 557, it appeared that the plaintiff was riding in a sleigh, that he was using due care, that, in consequence of a secret defect, the bolt connecting the cross-bar and thills with the sleigh broke, let them fall upon the heels of the horse; the horse ran away, and struck a pile of wood lying within the street, and broke his leg. It was said by the court that: "It is now perfectly well settled that, to maintain an action of this kind, it is incumbent upon the plaintiff to prove that he sustained an injury in his person or property by means of a defect in the highway while he was himself using due care."

While there was no question about the defect in the road, the judgment for the plaintiff was reversed, for the sole reason that the plaintiff had lost control of the horse, and was therefore unable to exercise due care.

In *Titus v. Inhabitants of Northbridge*, 97 Mass. 258, 93 Am. Dec. 91, it is said: "When a horse, by reason of fright, disease or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or regain control over his movements, and in this condition comes upon a defect in the highway . . . by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable."

Before considering the cases relied upon by appellee, it will, perhaps, be well to call attention to the duty of the plaintiff in the management of his horse. The rule is well settled that a person has no right to leave his horse in a public highway unless it is securely fastened or is in charge of some one competent to take care of it. He is bound to take care that the horse shall do no injury in consequence of being frightened by anything that may occur: *Bigelow* ³¹¹ v. *Reed*, 51 Me. 325; *Norris v. Kohler*, 41 N. Y. 42; *Doherty v. Sweetser*, 82 Hun, 556, 31 N. Y. Supp. 649.

In the case last cited, it is said: "It has become almost proverbial that no horse is safe to leave untied on the street."

Some of the cases relied upon by appellee are the following, which, if rightly considered, bar the plaintiff from recovering because he failed to exercise ordinary care and prudence.

Hunt v. Town of Pownal, 9 Vt. 411, appears to be the leading case upon which the authorities cited by appellee are based. The facts of that case were, that the highway was about eleven feet wide; it ran along the base of a mountain on one side, and had a rapid stream on the other. While traveling in a wagon and using due care, the nut, which had been secured on the inner end of the bolt connecting the left arm of the tongue to the forward axletree, came off. The wheels thereupon turned out at right angles with the road, toward the river, and the wagon, with all its contents, was precipitated down the bank. Under these facts, the court held: "If the road be out of repair, and the injury happened by reason of such want of repair, and the plaintiff or his agents are guilty of no want of care or prudence, the defendants are liable. . . . If there be no fault on the part of the plaintiff, which common sagacity and forecast could have anticipated and provided against, and the loss be the combined result of accident and the insufficiency of the road, the plaintiff may recover."

In Connecticut, the rule seems to be as follows: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable. Nor ³¹² will the fact that the horse of the plaintiff was uncontrollable for some distance before the injury change or

in any way affect the liability of the defendants": Baldwin v. Greenwood's Turnpike Co., 40 Conn. 238, 16 Am. Rep. 33.

In *Winship v. Enfield*, 42 N. H. 197, it appeared that the horse became frightened by some parties throwing some wood from an adjoining lot over the fence into the highway. The horse ran away and, in passing over a water-bar which was laid across the road near by, the plaintiff's wagon was overturned and she was thrown out and injured. She recovered judgment against the town. While the judgment was reversed, it was held that, where the plaintiff is in no fault and the injury was the combined result of accident and the defendant's neglect to repair the road, the town must be held liable, even though the vices of the horse or defects in the wagon may have contributed to the injury, if there was also fault on the part of the town that contributed to the same result; provided, always, that the plaintiff was without fault.

In an action to recover damages against the city for an injury to plaintiff's horse by reason of a defective bridge, the petition alleged that plaintiff was driving his horses and sleigh through the streets, and the horses, without fault of plaintiff, became frightened and ran away and, being unmanageable, ran toward the bridge, throwing plaintiff out of the sleigh. In crossing the bridge one of the horses stepped through a hole, negligently permitted therein by defendant, whereby the horse's leg was broken. Due care and diligence on the part of the plaintiff in driving his team were averred. Held, that the petition averred a cause of action; that a demurrer thereon on the ground that it showed that the horses were beyond the control of plaintiff, and that he was not exercising due care at the time of the injury, was ³¹³ improperly sustained: *Manderschid v. City of Dubuque*, 25 Iowa, 108.

In that case, the driver was exercising due care and skill at the time the horse became frightened, but, notwithstanding the exercise of such duties, the team became frightened and unmanageable, and passed beyond his control.

Hull v. City of Kansas, 54 Mo. 598, 14 Am. Rep. 487, was a case where the horse threw his tail over the rein and commenced backing, and backed into a hole in the street, injuring the horse and buggy. It was held that the plaintiff was entitled to recover because the driver used due care and be-

cause he had only lost control of the horse temporarily, and that the accident would not have occurred except for the defect in the street.

In the case of *Spaulding v. Inhabitants of Winslow*, 74 Me. 528, cited by plaintiff, the court says: "If the horse became by fright unmanageable, substantially freeing himself from the control of the driver, and the upset ensued from such unmanageableness, the fright of the horse should be regarded as a proximate cause . . . of the accident. . . . If, however, the horse, while being properly driven, upon sight of the hole suddenly started or shied, and swerved or sheered a few feet from the direct line of travel, and, through only a momentary loss of control by the driver, threw the wagon into the ditch on account of the want of a railing, and the road was defective for want of a railing, in such case the misadventure of the horse should not be considered as causing the accident."

Where a horse takes fright and runs away and is injured because of the negligence of the municipal corporation in leaving a dangerous excavation in the street unprotected, an action may be maintained against the corporation; provided, of course, that the driver of the horse exercised due care and skill in ³¹⁴ driving and managing it: *Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612.

In *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574, it is said: "A municipal corporation, bound to keep its streets in repair, is only bound to the exercise of reasonable diligence in keeping said streets safe and convenient for such use of them as is ordinarily, and as could reasonably be, expected. It is not bound to keep them in such a condition that damage may not be caused thereon by horses which have escaped from the control of their drivers, and are running away. Where, however, without any fault on the part of a driver, his horse becomes frightened and unmanageable, and this with a culpable defect in the highway produces an injury, the municipality is liable, provided the injury would not have been sustained but for such defect; the fact that the horse was at the time beyond the control of the driver is no defense."

Hey v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733, is cited by plaintiff. In that case the city was found liable for injuries to a horse which became frightened and fell with the carriage over a precipice into the river. It was determined,

under the peculiar circumstances of the case, that the extreme danger at that place in the highway made it necessary to erect barriers to prevent such accidents. The court, however, said: "It is true that ordinarily provision is not to be made against contingencies so rare as runaway horses. Roads and bridges are constructed for the purpose of ordinary travel, and if they fill such purpose, they are sufficient, and those who have them in care are not chargeable with the results of extraordinary accidents that may occur upon them."

These, of course, are not all of the cases cited by appellee, but they are sufficient to show the doctrine which he contends for. The difficulty in attempting ³¹⁵ to make these authorities sustain appellee's position is that, in most, if not in all, of them, the fright of the horse was occasioned by accident or something entirely beyond the control of the driver; while, in this case, plaintiff left his horse standing in the alley, not fastened or secured in any way, and with the lines in such a position that he could not reach them. The horse started to run away, and the accident was the result. Ordinary foresight and prudence should have suggested to the plaintiff that his horse was liable to run. He neglected the dictates of experience because, as he says, "the horse was gentle and kind, and not in the habit of running away," forgetting that it is the unloaded gun and the gentle horse that usually go off unexpectedly.

The effect of affirming this decision would be to make an accident insurance company of every city and town in the state. A driver would have carte blanche to leave his team standing, knowing that, if it ran away and injured itself by coming in contact with some defect in the street, the city would be made to pay for the damage.

A defect in a public street within a city or town does not render the corporation liable for an injury occasioned by a team coming in contact with it, unless the defect is the proximate cause of the injury, and this cannot be said to be true where the carelessness or negligence of the driver permits those causes to be set in motion which produce the damage. Under the facts in this case, the plaintiff was not entitled to recover. The judgment of nonsuit should have been rendered; failing in that, the court should have directed a verdict. Consequently, the judgment will be reversed.

Chief Justice Gabbert and Mr. Justice Goddard concur.

The Liability of Municipal Corporations to persons injured by reason of defective or dangerous streets is the subject of a note to Dudley v. Flemingsburg, 103 Am. St. Rep. 257.

To Leave a Horse Standing Loose in a public street is negligence: Damonte v. Patton, 118 La. 530, 118 Am. St. Rep. 384, and see the cases cited in the cross-reference note thereto.

MOORE v. FIRST NATIONAL BANK.

[38 Colo. 336, 88 Pac. 385.]

BILLS AND NOTES—Indorsement and Reindorsement—Liability—Estoppel.—If a bank, after indorsing a note to its president for collection, and receiving from him a reindorsement to its own order, transfers the note for value to a third person without striking out its indorsement, and the failure to strike out the indorsement is not caused by mistake, accident, or oversight, the bank is estopped to deny its liability to such third person as an indorser in blank, regardless as to whether the reissue was before or after maturity. (p. 125.)

BILLS AND NOTES—Contract to Pay Debts.—If a person, in consideration of an assignment to him of all of a bank's assets agrees to pay all of its liabilities, he is liable for the payment of a note on which the bank is liable as an indorser. (p. 125.)

CONTRACT TO PAY DEBTS—Extent of Liability.—If one assumes the debts of a bank in consideration of a transfer to him of its assets, his obligation is not limited to the amount of its estimated liabilities. (p. 126.)

T. Y. Bradshaw and T. W. Emerson, for the appellant.

Story & Story, for the appellees.

237 CAMPBELL, J. Action by an indorsee against an indorser of a promissory note.

The Milwaukee Mining Company executed its promissory note for five thousand dollars, payable to the order of J. A. Hinsey, which was afterward indorsed and delivered by the payee to The First National Bank of Ouray. Thereafter the bank indorsed and delivered it to L. L. Bailey, its president, presumably for the purpose of collection. Bailey brought suit on the note against the maker, and caused a writ of attachment to be issued and levied upon its property.

There was no defense to the action, but before judgment was taken, negotiations were begun between Bailey, representing the bank, and the officers of the city of Ouray, for a trade or exchange of the note by the bank for certain of its certifi-

cates of deposit which the city held aggregating about five thousand dollars, these certificates representing funds which the city had on deposit with the bank. The exchange was consummated, the city giving up its certificates to the bank in exchange for the note with the bank's indorsement remaining thereon; the complaint alleging ³²⁵ that the bank, as a part of the consideration, agreed with the city that the bank's indorsement theretofore placed upon the note should constitute, and be in lieu of, a new and present indorsement, and that the bank would be liable to the city as an indorser without other or further indorsement being made by it; and the city, relying and acting upon the strength of such agreement of indorsement, parted with its securities.

Bailey took judgment upon the note against the maker and assigned this judgment to the city. Execution was issued and returned unsatisfied owing to the fact that a prior attachment in another suit in another court was issued and levied upon the property of the maker, and all of its property was thereafter levied upon thereunder and sold to satisfy the prior lien. The judgment secured by Bailey was worthless, and the mining company, the maker, insolvent.

The indorsements upon the note at the time it came into possession of the city and when this action was begun, thus appear in the order as made:

"Pay to the order of The First National Bank of Ouray, Colorado; demand, notice and protest waived.

"J. A. HINSEY.

"Pay to the order of L. L. Bailey.

"FIRST NATIONAL BANK OF OURAY.

"By A. G. SIDDONS,

"Cashier.

"Pay to the order of The First National Bank of Ouray without recourse on me.

L. L. BAILEY."

After the transfer of the note to the city, the bank became insolvent and ceased to be a going concern, whereupon the defendants McClure, Hurlburt and Stevens submitted to it a proposition in writing, which was accepted, whereby they agreed to assume and pay all its liabilities as a consideration for the transfer to them of all its assets.

³²⁹ This action was brought by Moore, as treasurer of the city of Ouray, the successor of Charles F. Jordan, to whom, in

his official capacity, the note in controversy and judgment had previously been assigned, against The First National Bank of Ouray and against McClure, Hurlburt and Stevens upon their assumption of its liabilities. To an amended complaint setting up substantially the foregoing facts, the defendants severally filed demurrers upon two grounds: 1. That the amended complaint was a departure from the original; and 2. It did not state facts sufficient to constitute a cause of action against any of the defendants. As Stevens, one of the defendants, was the judge of the court in which the action was brought, Judge Stimson, judge of another district, was called in to hear the demurrer, and he overruled it as to both grounds.

The defendants then filed their answer to the amended complaint, putting in issue some of its averments, to which a replication was filed. The answer and replication become immaterial upon this review, as do the rulings on the demurrer, because, after the issues were made up and Judge Shumate, judge of another district, had been called in to try the cause upon the merits, he sustained the objections of defendants to the introduction of any evidence by plaintiff in support of the amended complaint upon the ground that therein no cause of action was stated as against any of the defendants in the action. Afterward the plaintiff made specific and detailed offers of proof in its support, which were likewise refused.

The question upon this appeal is as to the sufficiency of the amended complaint. It would seem, from the foregoing statement of its averments, confessed by the demurrer, that the plaintiff ought to recover. The maker of the note was insolvent, and, after maturity, and while it was in possession of the ³⁴⁰ First National Bank, or of its president, legal attempt to enforce payment resulted in failure. As a consideration for the note, the city delivered up certificates of deposit aggregating about five thousand dollars. If it fails to recover in this action, that amount of public money is lost. A consideration of the specific objections which defendants make to the amended complaint is probably the best way to dispose of the appeal.

There are two branches to the case: 1. The question as to the liability of the bank; 2. As to the liability of the defendants McClure, Stevens and Hurlburt. All the transactions occurred while the statute enacted in 1865, entitled "Bonds, Bills and Promissory Notes," was in force: Mills' Ann. Stats., sec. 244 et seq. The defendants' contentions in support of the ruling of the court refusing the offer of proof and entering

judgment for defendants are thus stated by them: 1. That the legal effect of the indorsement as made by Bailey, for the purpose of retransferring the note to the bank, was to cancel both the bank's and Bailey's indorsements thereon; and, if this be not true, it limited the payment of the note to an order made by the bank; 2. That, under our statute, the note could be assigned so as to transfer the legal title from the bank to the city only by a written indorsement thereon, and, conceding that delivery of the note would constitute an equitable assignment of the bank's interest therein, it gave to the city, or the plaintiff's predecessor in office, the city treasurer, only those rights which the First National Bank had, viz., the right to collect the note as against the maker and Hinsey, the payee, who was the first indorser; that, under the common-law rule, suit upon this bank could be brought only in the name of the First National Bank, and the bank could not sue itself; that, while the code authorizes the real ³⁴¹ party in interest (the equitable owner of a note) to sue thereon in his own name, that provision creates no liability against the holder of the legal title, as the mere delivery of the note by the bank to the city treasurer created no liability against him, as holder of the legal title.

To the first proposition defendants cite *Adrian v. McCaskill*, 103 N. C. 182, 14 Am. St. Rep. 788, 9 S. E. 284, 3 L. R. A. 759. That case lays down no such doctrine as they assert. It was there ruled that, when a note had been assigned and goes out on a certain line which subsequently proves to be a collateral line, and thereafter comes back to the party who thus sent it out with the names of some of the collateral indorsers remaining thereon and is then reissued after maturity, neither the party to whom it is reissued, nor that party's assignees, can proceed against any of the indorsers in the collateral line, because such indorsers are not in the line through which such party or his assignees trace title; in short, that a prior indorser cannot recover from a subsequent one. If the reasoning of that case be applied to this, instead of supporting the contentions of defendants, it is authority for the claim of the plaintiff that, when Bailey indorsed the note and retransferred it to the bank, the Bailey transaction was wiped out, and title was left in the bank; and when it subsequently delivered the note to the city treasurer with its indorsement thereon, even though this indorsement was put upon the note at the time of the transfer by the bank to its president for a special pur-

pose, the bank is liable to its transferee precisely as it would be if the indorsement was in blank, general and unrestricted, and made at the time of the transfer.

Defendants say that, under our statute, as previously construed by the supreme court of Illinois, from which state it was taken, the legal title to a ³⁴² promissory note can only be transferred to an assignee by an indorsement on the note itself by the person having the legal title. Delivery passes the equitable, but not the legal, title. The defendants, therefore, assuming that the bank transferred the note to the city treasurer only by delivery, argue that thereby the equitable, and not the legal, title passed; hence, even if this suit had been brought, as required by the common law, in the name of the bank for the use of the plaintiff, no judgment could have been taken by the bank against itself; and as, by delivery, the city acquired only an equitable title, being only such as the bank itself had, the bank, by mere delivery, did not assume the liability of an indorser, and no action upon the note by the city against it would lie.

Whatever may be said of this contention, if the assumed fact of transfer by delivery only was true, it is entirely foreign to this case if the assumption of fact upon which it is based is not borne out by the record. First, it is observed that plaintiff does not rely on a transfer by delivery. She asserts what, in a legal sense, is an indorsement in blank. In the amended complaint there is an allegation that, at the time the city surrendered to the bank its certificates of deposit and received therefor this note, the bank agreed with the city treasurer that its former indorsement still remaining upon the note should stand in lieu of a present indorsement. But it is apparent that plaintiff claims nothing by virtue of the contemporaneous agreement which defendants say was oral, though the complaint does not say it was of that character, and, while there is not an averment in the complaint, in those words, that at the time this transaction took place the bank indorsed the note, yet there are allegations of the various indorsements upon the ³⁴³ note which are stated to have been there at the time the note was delivered by the bank to the city.

These allegations show that the bank indorsed this note to Bailey, its president, for a special purpose, which purpose was accomplished. Afterward the bank, indorser, received back the paper from Bailey, and thereafter reissued it for value without striking out its former indorsement. This indorse-

ment was not left by mistake, accident or oversight. Plaintiff's contention, which we think is correct, is that under the facts the bank is estopped to deny its liability thereon as indorser, and it makes no difference whether the reissue was before or after maturity. *Brook v. Vannest*, 58 N. J. L. 162, 33 Atl. 382, supports this proposition, and *St. John v. Roberts*, 31 N. Y. 441, 88 Am. Dec. 287, seems to us conclusive upon the subject. The indorser is held liable upon the doctrine of estoppel. The city was certainly a purchaser for a large consideration and in good faith, and the bank, in reissuing and delivering to it the note without erasing its former special indorsement, in legal effect then indorsed the note in blank. That such indorsement passes the legal title, fixes the indorser's liability and authorizes this action by the city as indorsee directly against the bank as indorser, is too plain for argument.

In thus disposing of the case, we do not invoke the doctrine announced in *Doom v. Sherwin*, 20 Colo. 234, 38 Pac. 56, that, though indorsement by the payee of a note is necessary to transfer title, indorsement by his transferee is not necessary, as he can pass title by delivery, since plaintiff does not rely upon this rule, and counsel have not cited the case to this effect.

Defendants' objection to the cause of action alleged against the individual defendants McClure and others are: (1) that no liability against the bank has been stated, consequently none against these defendants; ³⁴⁴ and (2) if a liability as against the bank is pleaded, the complaint fails to allege that the contract whereby McClure and others assumed all the liabilities of the bank was made, or intended by the parties to be, for the benefit of the plaintiff. These objections are not well taken. We have held that the complaint states a cause of action against the bank.

It further charges that, in consideration for a transfer to them by the bank of all its assets, McClure and others assumed and agreed to pay all its liabilities, aggregating about the sum of forty-one thousand dollars. Facts are alleged in the pleading from which it necessarily follows that the note sued on is one of the liabilities of the bank, and that the individual defendants agreed to pay all its liabilities. The complaint clearly brings the plaintiff within the class for whose use and benefit the contract was directly made: *State v. St. Louis & S. F. Ry. Co.*, 125 Mo. 596, 28 S. W. 1074; *Rohman v. Gaiser*,

53 Neb. 474, 73 N. W. 923; *Lehow v. Simonton*, 3 Colo. 346; *Green v. Richardson*, 4 Colo. 584; *Green v. Morrison*, 5 Colo. 18.

The estimate of the sum of the liabilities at forty-one thousand dollars does not limit to that sum the liabilities which the individual defendants assumed. At all events, if the pleading is vulnerable at all, it is on the ground of uncertainty, and no such objection was taken below. As against a general demurrer, the amended complaint is good.

In thus disposing of the case, we assume, as we must, the truthfulness of the allegations of the complaint. What facts the trial may disclose, we do not know.

Judgment reversed, and cause remanded for a new trial.
Reversed.

Chief Justice Gabbert and Mr. Justice Steele concur.

One Who Obtains Possession of a Bill or note, after indorsing it, is restored to his original position, and cannot, nor can a purchaser from him with notice, hold intermediate indorsers liable who could look to him again; and when such indorsements are in blank, parol evidence is admissible to show the relation in which they stand: Adrian v. McCaskill, 103 N. C. 181, 14 Am. St. Rep. 788. See, too, Garden City Nat. Bank v. Fitler, 155 Pa. 210, 35 Am. St. Rep. 874; Berney v. Steiner, 108 Ala. 111, 54 Am. St. Rep. 144.

COLORADO LUMBER, LAND AND IMPROVEMENT COMPANY v. DUSTIN.

[38 Colo. 398, 87 Pac. 1142.]

STATUTE OF FRAUDS—Right to Invoke.—If one performs services for another in consideration of an oral contract under which he is to be paid in land, he cannot, by invoking the statute of frauds, rescind such contract and recover in money for such services, unless the other party also insists upon the statute and refuses to perform the contract on his part. (p. 127.)

Action in assumpsit to recover for certain services performed. On the trial the defendant offered to prove an oral agreement with the plaintiff whereby the latter was to receive land in payment for his services, and that the former was ready and willing to perform his part of the contract. This offer was rejected by the court and a money judgment rendered in favor of plaintiff. Defendant appealed.

Sheafor & Dolman, for the appellant.

⁴⁰⁰ GODDARD, J. The question for our determination is whether the court erred in excluding testimony tending to prove the oral agreement relied on by defendant to defeat a recovery of the money judgment for services rendered in pursuance of such agreement; in other words, whether the plaintiffs were entitled to revoke the statute of frauds to avoid the obligations of the oral agreement under which the labor was performed, and recover therefor upon an implied assumpsit, notwithstanding the defendant is willing to carry out the agreement on its part.

We think it is clear that this may not be done. The party to be charged may avail himself, if he so elect, of the protection of the statute, if its requirements have not been complied with, as a defense to an action upon an executory oral contract, or he may waive the protection of the statute, in which event the contract would be perfectly good against him. But a third party cannot escape his obligations growing out of such a contract by denying the obligation of the contract on the party to be charged thereby: Browne on the Statute of Frauds, 5th ed., sec. 135.

It has been uniformly held that where a party has rendered services, or paid money, in consideration of an oral contract, for purchase of land, he cannot rescind such contract and recover for such services, or the money paid, unless the other party insists upon the statute, and refuses to perform it on his part. Among the numerous authorities to this effect, see the following: Shaw v. Shaw, 6 Vt. 69; Philbrook v. Belknap, 6 Vt. 383; Abbott v. Draper, ⁴⁰¹ 4 Denio, 51; Crabtree v. Welles, 19 Ill. 55; Cob v. Hall, 29 Vt. 510, 70 Am. Dec. 432; Day v. Wilson, 83 Ind. 463, 43 Am. Rep. 76; Coughlin v. Knowles, 7 Met. 57, 39 Am. Dec. 759; Gammon v. Butler, 48 Me. 344.

In Shaw v. Shaw, 6 Vt. 69, it is said: "The statute applies only to executory contracts, not to those in whole or in material part executed. Therefore, when one party has partly performed under such a contract, he cannot recover for what he has done, unless the other party insist upon the statute, and refuse to perform. This is too obviously just to require comment, and to disregard it would be to do violence to every leading principle. The contract cannot be considered void

so long as he, for the protection of whose rights the statute is made, is willing to treat and consider the contract good."

Under this obviously just rule, the defendant should have been permitted to introduce the evidence offered and to show, if it could, that the plaintiffs were not entitled to recover a money judgment for the services rendered.

The error of the court in excluding the evidence offered by the defendant necessitates a reversal of the judgment.

Reversed.

Chief Justice Gabbert and Mr. Justice Bailey concur.

For Authorities in support of the principal case, see the note to Durham v. Wick, 105 Am. St. Rep. 793.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. DOWNEY.

[38 Colo. 414, 88 Pac. 451.]

INSURANCE—Fidelity Bond—Breach of Warranty to Examine Account.—If an application for an officer's fidelity bond contains a statement that his accounts shall be examined and verified by his employer quarterly, and that such statement shall be considered as a warranty, and the bond provides that the guarantor shall be notified immediately upon discovering any fraud or dishonesty on the part of such officer, the verification of such officer's accounts as required by his bond is not satisfied by accepting as true, the amount which he has in bank, as shown by his deposit book, without any investigation to ascertain from the bank whether such book represents the true state of his account, and in case of the officer's defalcation the guarantor is not liable on the bond. (pp. 130, 131.)

Story & Story and T. Y. Bradshaw, for the appellant.

T. J. Barnett, J. F. Wood and J. H. Murphy, for the appellee.

⁴¹⁵ **BAILEY, J.** This was an action originally begun in the county court of Ouray county, and from there appealed to the district court, and from a judgment in favor of plaintiff was appealed from the district court to this court. It was brought to recover the sum of one thousand dollars and interest alleged to be due under the terms of a certain indemnifying bond executed by the appellant in favor of the Ouray Miners'

Union No. 15 of the Western Federation of Miners, and given to secure the faithful discharge of his duty by one John M. Hogue, the secretary-treasurer of the union.

In the application made by the appellee for the bond, among other representations, the following appears:

"Q. How often will his books and accounts be examined and verified with funds and property on hand and in book?
A. Every three months.

⁴¹⁶ "Q. By whom will this be done? A. By the board of trustees, three persons.

"The foregoing answers, statements and representations are hereby warranted to be true and correct, and it is hereby agreed on behalf of this body or association, in consideration of the execution of said bond, that throughout the continuance thereof the checks and supervisions above described shall be faithfully observed, and that the business of said body or association shall continue to be managed and conducted as above set forth. The above answers, statements and representations are to be considered warranties, and they shall form the basis of the guaranty hereby applied for."

In introducing its testimony, the plaintiff produced C. C. Burge as a witness upon its behalf. He testified that he was a trustee of the Ouray Miners' Union during all of the period of Hogue's incumbency in office; that his cotrustees were Eugene Riley and James Cox. He first learned that Hogue was short in his accounts on the evening of February 16, 1901. The witness and another member of the board made a quarterly examination of Hogue's accounts in December, 1900. On the occasion of the examination, Hogue gave the trustee his books and accounts that he had in his possession. The trustees went over them, and ascertained the amount of the money he had received and disbursed, and, taking a balance, found that Hogue should have on hand and in bank seven hundred and forty dollars and some odd cents. As the witness remembered, there was about four hundred and forty dollars in the bank, the balance Hogue had in cash. Hogue laid the money on the table, and witness counted three hundred and three dollars and some cents, which, together with the amount in the bank, made a true balance at that time.
⁴¹⁷ The witness stated: "I made an examination of the books. He submitted a little statement-book, I should call it a bank-book, showing the amount he had in the bank, and I checked

that book as true—it was an ordinary deposit-book.” The witness did nothing to verify the amount that was in the bank. He did not know whether or not checks had been drawn against the account that were not shown in the book. He did not know whether the three hundred and three dollars, which Hogue had in his possession was obtained by giving a check upon the amount shown by the deposit-book to be in the bank, and he made no effort to determine the exact amount that was upon deposit in the bank at the time he audited the account.

Eugene Riley, another of the trustees who assisted in the examination of the accounts, and who was called by the defendant as its witness, said that, in determining the amount of money he (Hogue) had on hand, they took the bank-book, which was not verified by witness as one of the trustees because the bank was closed. He did not count the money that Hogue produced, but thought that the other trustee did. This testimony in relation to the manner in which the books and accounts were examined and verified, and the funds and property on hand and in the bank, was not disputed, explained or in any way contradicted. The defendant requested the court to instruct the jury to return a verdict for the defendant. This request was denied. The jury returned a verdict for the plaintiff, and defendant moved to set aside the verdict and grant a new trial. This request was denied. In refusing these two requests, the court erred, and because these errors will necessarily require the reversal of the case, we will not consider the other errors assigned.

⁴¹⁸ We arrive at the conclusion that the court erred in these particulars, for the following reasons: The bond provides, among other things, that the miners’ union should notify defendant immediately upon discovering any fraud or dishonesty on the part of an employé. The statement made in the application, to the effect that the accounts of the employé should be examined and verified quarterly, was made for the evident purpose of enabling the guarantor to know what means were to be adopted by the employer to discover fraud or defalcation in the event of its occurrence. It is alleged in the complaint that the shortage of Hogue was not discovered until February 16th, more than two months after the quarterly examination of December 10th. For aught that appears in the testimony, much of this shortage may have existed at the time of the attempted examination of the accounts.

This examination was made by two of the trustees. According to their own testimony, they made no investigation whatever to ascertain the amount of money Hogue actually had in the bank, and in checking up the funds on hand, merely took the balance shown by Hogue's bank-book. It needs no argument to show that, without such an investigation at the bank, there could be no checking up of the funds on hand. For anything which the trustees might have known, the cash which they claimed Hogue had on hand might have been drawn from the bank subsequent to the balancing of the bank-book, and, therefore, there was not a compliance with the safeguard which the union had agreed to give to the defendant.

To verify means to prove to be true or correct, to establish the truth of, to confirm. Nothing of this nature was done or attempted to be done by the trustees, so that there was an absolute breach of the contract ⁴¹⁹ made by the union which was the inducement offered defendant for making the bond. The union, having failed to do that which it was compelled to do under its agreement, released appellant from all liability under the bond. The trial court should have directed the jury to find for the defendant. Since the representations of the obligee were in response to the obligor's specific inquiries, they were material to the risk, and when the obligee failed to perform that part of the contract, it became, either knowingly or otherwise, a party to the fraud which the bond was given to indemnify them against, and, being a party to the fraud, it cannot call upon the obligor for remuneration. In the bond, it is expressly asserted by the obligor that the answers to these questions were deemed material. As we have seen, they were material to the risk as a matter of fact, and, as a matter of law, the obligor relied upon them and had the right to rely upon them, and presumably the company would not have issued the policy had the obligee not made answers as it did. In any event, whether the bond would have been entered into under other or different circumstances or not, is immaterial. The plaintiff accepted this bond under these conditions and under the agreement to do that which it failed to do, and, as a consequence, could not recover. The foregoing reasoning is based upon the following authorities: American Bonding & T. Co. v. Burke, 36 Colo. 49, 85 Pac. 692; Carpenter v. American Ins. Co., 1 Story, 57, Fed. Cas. No. 2428; Carrollton Furniture Co. v. American Cr. Co., 124 Fed. 25, 59 C. C. A. 545;

Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595, and other cases and authorities cited in the foregoing. The judgment of the district court will be reversed.

Reversed.

Chief Justice Gabbert and Mr. Justice Goddard concur.

For Authorities on the question decided in the principal case, see the note to First Nat. Bank v. Fidelity etc. Co., 100 Am. St. Rep. 782, on fidelity insurance. The bond of a surety company, like any other insurance policy, must, when doubtful or ambiguous, be given the strongest interpretation against the insurer that it reasonably will bear: American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72.

MORTGAGE TRUST COMPANY v. REDD.

[38 Colo. 458, 88 Pac. 473.]

JUDGMENTS—Collateral Attack.—A judgment may be collaterally attacked for error in assuming jurisdiction, but it cannot be thus attacked for an error committed in the exercise of jurisdiction legally obtained. (p. 136.)

JUDGMENTS—Collateral Attack—Guardian's Sales—Failure to Give Notice.—The giving by a guardian of the required statutory notice by publication of his petition to sell his ward's estate is not essential to the jurisdiction of the court, and its omission is not fatal to the judgment, nor does it render it open to collateral attack. (pp. 136, 137.)

JUDGMENTS—Collateral Attack—Guardian's Sales.—In a proceeding by a guardian to obtain permission to sell his ward's real estate, the constitution and statute expressly gives the district court jurisdiction of the subject matter, and by filing the petition for leave to sell, the court acquires jurisdiction of the person of the ward, and is then called upon to determine whether the facts entitle the petitioner to the relief asked, and also whether the petitioner has given the notice required by statute, and, if error is committed in passing upon either of these questions, it is not in acquiring, but in the exercise of, jurisdiction, and the judgment rendered therein is not subject to collateral attack. (pp. 139, 140.)

GUARDIAN AND WARD—Sales—Publication of Notice—Sufficiency.—If the statute provides that notice of a guardian's application to sell his ward's real estate shall be published for three successive weeks, such requirement is satisfied by the publication in three consecutive weekly issues of a newspaper before the date noticed for the filing of the petition, or making the application for the order of sale. (p. 146.)

JUDGMENTS—Presumption as to Jurisdiction.—If a judgment of a court of general jurisdiction is rendered in a special statutory proceeding, the same presumptions of jurisdiction attach thereto as to a judgment of the same court when proceeding according to the course of the common law. (p. 147.)

GUARDIAN AND WARD—Sales of Real Estate.—If a guardian, under order of court, sells real estate belonging to his wards, and one of them, after becoming of age, transfers her interest therein to a subsequent purchaser, a nonsuit cannot be granted in an action to foreclose a trust deed thereon, on the ground of invalidity of the guardian's sale. (p. 147.)

R. H. Gilmore, for the plaintiff in error.

C. E. Herrington and F. Herrington, for the defendant in error.

⁴⁶⁰ GUNTER, J. This was an action to foreclose a trust deed. At the close of the evidence for plaintiff—plaintiff in error—upon motion of defendant, Etta L. Redd, the court entered a judgment of nonsuit. It will be seen, as our opinion proceeds, that the vital question upon this review of that ruling is the validity of a judgment of the district court of said Arapahoe county, rendered May 27, 1889, permitting a guardian to sell the real estate of his wards, which realty later and at the date of the institution of this action was covered by the above trust deed. The procedure in securing the last-mentioned judgment, that is, the order permitting the sale, was under section 2083 of 1 Mills' Annotated Statutes, reading, so far as pertinent to this ruling, as follows:

"To obtain such order, the guardian shall present to the district court . . . a petition setting ⁴⁶¹ forth the condition of the estate, and the facts and circumstances on which the petition is founded. Notice of such intended application shall first be given by publication in some public newspaper, published in the county where such proceeding is to be had, for three successive weeks; or, if no such newspaper is published, then by posting written notices, in three of the most public places in said county, at least three weeks before the time of the hearing by the court."

The facts material to this review are: Etta L. and Lillie B. Redd, minors, owned certain real estate. Their guardian filed in the district court of said county his petition for leave to sell said realty, and, on May 27, 1889, the court made an order of sale containing, *inter alia*, this recital:

"Now, on this day, came the said petitioner, Alexander W. Redd, guardian of the persons and property of the above-named Lillie B. Redd and Etta L. Redd, infant wards, and presented to the court here his verified petition as guardian aforesaid, praying leave and authority to sell at private sale and dispose of certain real estate of which said wards are

jointly possessed in fee, . . . and it appearing to the court that said wards aforesaid had been duly and personally notified in the premises, and that three weeks' publication of notice had been made and had according to law."

July 16, 1889, the guardian filed a second petition in the same case, asking therein permission to encumber said property to secure funds for the use of said wards. Leave was granted to encumber until a sale at a reasonable price could be made, and, acting thereunder, on July 16, 1889, the guardian, as such, borrowed of plaintiff two thousand dollars, giving his promissory note as guardian therefor, of date July 23, 1889, payable August 1, 1892, and to secure the same, gave the trust deed involved. May, 1890, pursuant to the ⁴⁶² order of sale of May 27, 1889, the guardian, for the consideration of six thousand five hundred dollars, sold and conveyed the real estate to one Braun, subject to the trust deed. June 26, 1890, Braun sold and conveyed to defendant, Kline, said realty by warranty deed, subject to said trust deed. October 17, 1891, Lillie B. Redd, then of full age, for a valuable consideration, conveyed all of her interest in said property to Braun. August 1, 1892, the note for two thousand dollars, secured by the trust deed, fell due, and Kline, who claimed ownership of said real estate through the warranty deed from Braun, and through the operation of the above deed of 1891 of Lillie B. Redd, for the purpose of securing an extension of the note, entered into a written agreement with plaintiff whereby he promised to pay the note at its maturity as fixed by the extension, and further agreed that, in case of default in payment of the note, said premises might be sold "according to the provisions of said deed of trust." September 15, 1892, the guardian's sale made to Braun was reported to and approved by the court. June 5, 1893, Kline conveyed the premises to one Findlay, who, July 21, 1894, reconveyed to Kline. Such is the history of the title to the date (April, 1896) of the institution of this suit to foreclose. The proceeding is against the land, there being no effort to hold Etta L. Redd personally. Alexander W. Redd, Lillie B. Redd, Etta L. Redd, Findlay, Kline, the heirs of Braun, and others unnecessary to mention, were made parties defendant. All of defendants defaulted except Etta L. Redd, who appeared by answer and cross-complaint and by counsel at the trial. At the close of the evidence for plaintiff, defendant, Etta L. Redd, moved a nonsuit, which,

as stated, was granted. To review the judgment entered in pursuance of this motion, the case is here.

⁴⁰³ As Kline, by his above-mentioned agreement of August 1, 1892, in consideration of an extension in the time of payment, assumed the note and agreed that the trust deed should be a lien on the realty in question, he cannot question the validity of the note or trust deed, nor is he doing so. Further, if Kline is the owner of said realty, then Etta L. Redd has no interest in this proceeding to foreclose, which is directed solely against the realty, and no right to object to it. There is no question about Kline's ownership of the realty, if the judgment permitting the sale by the guardian of May 27, 1889, is valid.

In this proceeding to foreclose the trust deed, defendant, Etta L. Redd, by her answer, assails the validity of that judgment, on the ground of an alleged jurisdictional infirmity.

Although this ground of assault—lack of jurisdiction—is urged in this proceeding to foreclose, which proceeding is collateral to that in which the judgment so assaulted was rendered, yet it is the right of the defendant to so attack the judgment, and, if jurisdictional infirmity be shown, it will be fatal here to that judgment. In *Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 209, 24 Pac. 548, the court said: "Though the authorities are somewhat conflicting upon questions of this kind, we think that the better doctrine is, that a judgment rendered without obtaining jurisdiction of the person may be impeached and set aside by a proceeding in equity for that purpose; that in such proceeding the recitals of the record will not be taken to import absolute verity; and also that an action brought upon a judgment pronounced without obtaining jurisdiction of the person of the defendant may be defeated by a proper answer, under a system of procedure allowing equitable defenses to be interposed in all civil actions. To warrant such relief, the contradiction of the record ⁴⁰⁴ must be clearly established; but we need not discuss the kind or quantum of evidence required, since, in this case, no issue was taken on the cross-complaint": Colo. Civ. Code, secs. 59, 60; Bliss on Code Pleading, sec. 347; Freeman on Judgments, sec. 495; *Marr v. Wetzel*, 3 Colo. 2; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523.

In *Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568, it is said: "The right to attack a judgment for jurisdictional infirmity, or for fraud, is not confined to the complaint; it extends as well to the answer and replication": See, also, *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824; *Symes v. People*, 17 Colo. App. 466, 69 Pac. 312; *Symes v. Charpiot*, 17 Colo. App. 463, 69 Pac. 311; *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060.

While the right to attack a judgment in a collateral proceeding for a jurisdictional infirmity—that is, error in assuming jurisdiction—is well settled in this jurisdiction, on the other hand, it is equally well settled that a judgment cannot be questioned collaterally for an error committed in the exercise of jurisdiction.

The opinion in *Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001, supports the syllabus, which reads thus: "Decrees and orders of court entered in the exercise of jurisdiction, even though erroneous, are not open to collateral attack."

In *Brown v. Tucker*, 7 Colo. 30, 1 Pac. 221, the court said: "The decided weight of authority is to the effect that, whether jurisdiction has been obtained by the service of process, actual or constructive, all subsequent proceedings are exercise of jurisdiction, and, however erroneous, they are not void, but voidable only, and not subject to collateral attack": ⁴⁶⁵ See also, *Powell v. National Bank of Commerce*, 19 Colo. App. 57, 74 Pac. 536.

The difficulty lies not in the existence or recognition of the general principle so announced, but in applying it to the facts here presented.

The statute (section 2083, *supra*) provides: "Notice of such intended application shall first be given by publication in some public newspaper, published in the county where such proceeding is to be had, for three successive weeks."

The defendant says that the petition for leave to sell was filed, and the judgment authorizing the guardian to sell was rendered, without giving the notice so provided; that giving such notice is a jurisdictional requirement, and its omission fatal to the judgment authorizing the sale. If giving such notice was not essential to jurisdiction, its omission, being simply an error in the exercise of jurisdiction, is immaterial in this collateral proceeding, and the proof of a failure to give the notice would not, in this proceeding, affect the validity of the judgment authorizing the sale. If the omission of

the notice, in the procedure leading up to the order of sale, was but an error in the exercise of jurisdiction, it can be reviewed only in a direct proceeding such as a writ of error to, or an appeal from, that judgment. It has been, and is, the consistent policy of the appellate courts of this jurisdiction, and is, we think, a most wholesome one, to uphold against collateral attack judgments of courts of general jurisdiction when the parties have once had their day in court. In fact, the rule permitting, in a collateral proceeding, attacks on judgments on jurisdictional grounds and permitting the absence of jurisdiction to be shown even in contradiction to jurisdictional recitals in the record, is founded largely on the reason that a party should not be, and cannot be, deprived of his constitutional right, his day ⁴⁰⁸ in court, by a false jurisdictional recital in the record, as that he had been personally served with summons, when, in truth, there had been no such service: 1 Freeman on Judgments, 4th ed., sec. 133.

As this opinion proceeds, it will appear that the complaining defendant, Etta L. Redd, had her day in court, and that the giving of the statutory notice in question was not essential to the court acquiring personal jurisdiction as to her.

The general policy of the courts of this commonwealth to surround judgments of courts of general jurisdiction, even when not proceeding according to the course of the common law, with every presumption of jurisdiction and thereby to uphold such judgments, is seen in their holdings in cases of collateral attacks upon judgments in attachment suits and decrees rendered under the irrigation statutes.

Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698, was an action to recover a money judgment in which jurisdiction of the defendant—a nonresident—was obtained by attaching real estate standing in the name of a third party. It did not affirmatively appear from the record that the attachment was served as required by our code. While it was admitted that jurisdiction depended upon service of the writ of attachment, as required by the code, yet it was contended that it was not essential to the validity of the judgment that the record should affirmatively show this fact. It was contended that, although the proceeding by attachment was a special statutory proceeding, yet, as the judgment in such proceeding was that of a court of general jurisdiction, the

same presumptions were in favor of jurisdiction in such action as in other cases.

The court, in that case, *inter alia*, said: "There exists an irreconcilable conflict in the authorities upon this question. This conflict arises from the view the different courts entertain as to the nature ⁴⁶⁷ of the jurisdiction that the courts exercise in enforcing remedies provided by the attachment acts; some holding that the power to take cognizance of attachment proceedings is a special jurisdiction conferred by the statute, which was not within the general jurisdiction of the courts; and that everything necessary to show that such jurisdiction has been rightfully exercised must appear upon the face of the record; while, by others, it is held that attachment proceedings are within the general jurisdiction conferred by the constitution, and that the statute has only prescribed a new mode or process for bringing the persons or property within their control; and that the same presumption in favor of jurisdiction of such actions will be indulged as in other cases."

The court then cites a number of cases in support of the latter view, and proceeds: "We think the rule announced in these cases is supported by the better reason; and that, when action of a court of general jurisdiction is invoked in attachment proceedings, although its power to so act is conferred by a special statute, it, nevertheless, in exercising such special powers, acts judicially and is none the less a court of general jurisdiction because it proceeds according to rules and practice prescribed by the statute. The same considerations of public policy and reasons exist why the record, if silent, should be aided by the same presumptions which obtain in cases of personal service."

The same declaration of the law is made by this court in the recent cases of *Burris v. Craig*, 34 Colo. 383, 82 Pac. 944, and *Farmers' Union Ditch Co. v. Rio Grande Canal Co.*, 37 Colo. 512, 86 Pac. 1042.

Mr. Freeman is in full accord with the law as so announced by our courts. At section 123, volume 1, fourth edition, of *Freeman on Judgments*, he says: ⁴⁶⁸ "The doctrine that the judgments of courts of record are of less force, or are to be subjected to any closer scrutiny, or that they are attended with any less liberal presumptions, when created by virtue of a special or statutory authority, than when rendered in the exercise of ordinary jurisdiction, has been repudiated in

some of the states; and the reasons sustaining this repudiation have been stated with such clearness and force as to produce the conviction that the doctrine repudiated has no foundation in principle, however strongly it may be sustained by precedent. . . . And, finally, it is suggested that, as no reason has been given for regarding the same tribunal with different degrees of consideration, according to circumstances which seem not to affect its claims to our confidence, therefore, all its adjudications, though arising out of the exercise of lawful jurisdiction conferred at different times or from different but equally competent sources, should be subjected to similar rules and indulged with equal presumptions."

The policy of the law to uphold judgments in cases of collateral attack is seen in the following citations:

"In doubtful cases, as the safer course, the courts are inclined to treat defects as errors or irregularities rather than jurisdictional defects": 17 Am. & Eng. Ency. of Law, 2d ed., p. 1066.

"Notwithstanding general definitions, the courts have found it difficult to determine, in many cases, whether errors and omissions in the course of legal proceedings rendered the proceedings void, or were mere irregularities. In doubtful cases, however, as the safer course, the courts incline to treat the defects as irregularities rather than as nullities": *Salter v. Hilgren*, 40 Wis. 363.

400 "No order which a court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. The only question in such a case is, Had the court or tribunal the power, under any circumstances, to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose. In the case before us, it was for the circuit court to determine, in the first instance, when and how the authority with which it was invested to direct a sale, should be exercised; and if, in so doing, it committed an error, no matter how egregious, whether in the construction of the statute or otherwise, still the order was valid until reversed on appeal. It was a mere error or irregularity, which could only be taken

advantage of by appeal, but cannot be inquired into in this proceeding": *Tallman v. McCarty*, 11 Wis. 401; *Salter v. Hilgren*, 40 Wis. 363.

"The district courts shall have original jurisdiction of all causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law": Colo. Const., art. 6, sec. 11.

By section 2083, *supra*, that court was expressly given jurisdiction or the power to authorize guardians to sell real estate of their wards, and the procedure for the exercise of such power was thereby provided. By the constitution and the statutes, it was given jurisdiction of the subject matter, and, by the filing of the petition, the court acquired jurisdiction of the persons of the minors. By the filing of the guardian's petition for leave to sell, the court acquired jurisdiction. It was then called upon to determine whether the facts entitled the petitioner to the ⁴⁷⁰ relief asked. It was also called upon to determine whether the petitioner had given the notice required by the statute. If error was committed by the court in passing upon either of these questions, it was error, not in acquiring jurisdiction, but in the exercise of jurisdiction. If the error, committed in determining whether the required notice had been given, was error in the exercise of jurisdiction, then, under all the authorities, such error could be availed of only by a review of that judgment in a direct proceeding, as on appeal therefrom or error thereto. The statute under which this proceeding was conducted was taken from the statutes of the state of Illinois, and had received a construction there before its adoption by us.

"Under a familiar rule, by adopting this statute, we accepted this construction": *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109.

In *Mason v. Wait*, 4 Scam. 127, the action was upon a promissory note; a defense thereto was want of consideration, in that no title had been conveyed to the land, constituting the consideration for the note. The contention was that a sale, by a guardian, of the land, under a statute similar to that before us, was void because the court, in the action authorizing the sale, was without jurisdiction of the person of the minor. The court overruled this contention, saying: "It was not necessary that the ward should have a day in court. The proceeding was not adverse to her interest, nor

against her. It is her own application, by her legally constituted guardian. She is in the court by her guardian. No summons to her was necessary; nor could she have any other day or guardian ad litem in court, unless upon suggestion, as *amicus curiae*, it would appear that the guardian was about to abuse the trust, or was seeking power to injure and misapply the estate. I think it altogether ⁴⁷¹ an erroneous view of such cases to regard them as proceedings against the heir, to divest her of her interest or property. It is an application by her, or on her behalf, for power and authority to do acts for her benefit and interest."

This declaration of the law is expressly approved in *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109. *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463, was an action in ejectment. To sustain the general issue, the defendants relied upon title deraigned through a sale by the guardian under a statute substantially the same as the one here involved. Defendants introduced the record of the circuit court in support of the validity of their title deraigned through the sale by the guardian. Plaintiff objected to the admission of the notice of intention to petition the circuit court for the order of sale, also to the sufficiency of the petition and the notice of sale under which the property was sold, and other steps in the procedure. The court, in overruling these objections and in commenting upon their insufficiency, said:

"They all (the decisions) agree that enough must appear, either in the application or the order, or, at least, somewhere upon the face of the proceeding, to call upon the court to proceed to act; and all agree that, when that does appear, then the court has acquired jurisdiction, or, in other words, is properly set to work. When the jurisdiction is thus established and the court is authorized to hear, it follows, as a necessary consequence, that it is authorized to adjudge, and that judgment thus being entered by authority of law, no matter how erroneous it may be, or even absurd—though it be made in palpable violation of the law itself, and manifestly against the evidence—is, nevertheless, binding upon all whom the law says shall be bound by it—that is, upon all parties and privies to it—until it is reversed in a ⁴⁷² regular proceeding for that purpose. While it remains a judgment, it cannot be inquired into, nor its regularity questioned, in any collateral proceeding. In another action, the inquiry is not whether the court acted properly, but, had it a right to

act at all? Was the judgment rendered in the exercise of an usurped power, or of a conferred authority? If the former, the whole proceeding is utterly void, everywhere. If the latter, it is always obligatory, till reversed. The rule then is a very simple one, and, ordinarily, of easy application. The inquiry is not whether the proof was sufficient, but, was such a case presented to the court as called upon it, under the statute, to act, to deliberate, and to decide? Was its aid properly invoked? If so, then the court acted within its jurisdiction, and every presumption is in favor of its judgment. Indeed, nothing can be alleged against it now."

In speaking of the notice of intention to apply for the order permitting the sale, the court said: "Several objections were taken to the notices of the sale and other matters involved in the adjudication of the circuit court, either in granting the original sale, or in the final order, confirming the report of the guardian; but they can avail nothing. That court having had jurisdiction to hear and determine, it cannot be permitted now to deny that it proceeded properly and determined correctly."

In *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463, is cited with approval in passing upon a question arising out of the statute before us, and the court considered it a sufficient reason for such approval that the statute had been borrowed from Illinois and had been construed upon the point there in question in *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463, by the supreme court of that state, before its adoption here. The same reason goes in support of the binding force of ⁴⁷³ *Young v. Lorain*, upon the question before us. In *Re Harvey*, 16 Ill. 127, which was a review by appeal from the order of the circuit court declining to approve a report of sale of a guardian, who had proceeded under and by authority of the statute under consideration, the court quotes with approval the following, from *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463:

"They all [the decisions] agree that enough must appear, either in the application or the order, or, at least, somewhere upon the face of the proceeding, to call upon the court to proceed to act; and all agree that when that does appear, then the court acquired jurisdiction, or, in other words, is properly set to work."

Iverson v. Loberg, 26 Ill. 179, 79 Am. Dec. 364, was an action of ejectment. The defendants relied upon a sale by

an administrator of the real estate in question under an order of the county court. The validity of the judgment of the county court authorizing the sale was attacked upon certain alleged infirmities in the petition for the order of sale, and certain defects in procedure dehors the petition; the court said:

"We are obliged to affirm this judgment much against our inclination. This sale was, no doubt, a great outrage, and we should, as at present advised, not hesitate to reverse the proceeding, were it directly before us. But here it comes up collaterally, and we cannot disregard that proceeding unless it was void for the want of jurisdiction. We cannot hold that such was the case. The petition stated enough to require the court to act in the premises—to set it in motion—and that was sufficient to give the court jurisdiction, and whatever was done under it was not in the exercise of an usurped power, but of one conferred by law, and, although the court may have exercised that power erroneously, its orders and ⁴⁷⁴ decisions were binding till reversed. If we are to look into any errors in that proceeding, it must be brought before us by writ of error."

Mulford v. Stalzenback, 46 Ill. 303, was a bill in chancery to set aside deeds made under order of court by the guardian of lands belonging to the complainants, minors, upon the ground, among others, that the circuit court making the order of sale had no jurisdiction. Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463, was approved, and the court said: "The rule is that enough must appear, either in the application or the order, or, at least, somewhere upon the face of the proceedings, to call upon the court to proceed to act, and when that does appear, then the court has properly acquired jurisdiction."

Harris v. Lester, 80 Ill. 307, reaffirms the well-settled principle of law that: "Where a court has jurisdiction of the subject matter and the persons of the parties, its judgment or decree, when questioned collaterally, will be held valid."

In Gibson v. Roll, 27 Ill. 88, 81 Am. Dec. 219, Mason v. Waite, 4 Scam. 127, is approved in its holding that an application to sell real estate by the guardian of a minor under the section of statute before us, "is not a proceeding adverse to the heir, but is a proceeding by his guardian for his benefit, and it should be treated as if the proceeding were by the heir himself."

In *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217, the general principle is reiterated in this language: "When the validity of acts done under a judicial proceeding is collaterally called in question, we have to look only to the jurisdiction, and, if that is found to have existed, then it matters not how erroneous the proceedings of the court may have been, the rights of third persons, acquired while such proceedings ⁴⁷⁵ were unreversed, and by virtue of them, must be protected."

There is nothing in *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, contra the decisions we have just cited. There the guardian, acting under the statute before us, had obtained an order of sale and sold certain real estate, and the sale had been confirmed by the court. On writ of error to the judgment of confirmation, it was sought to reverse that judgment. The proceeding was a direct one. It was contended that there was fatal error in the petition invoking the jurisdiction of the court. The appellate court held otherwise. It was contended that fatal error was committed in not appointing a guardian ad litem for the infant wards. Upon this point, the court said:

"Upon examination of the authorities cited by counsel for appellants, we find them to be cases wherein the proceedings to sell the infant's estate were either adverse to this interest, or were had under statutes making the appointment of a guardian ad litem a requisite to the validity of the sale. Our statute does not require such appointment."

The reason assigned by the court was, that the minors were in court by their guardians, and that the proceeding was not adverse to their interests nor against them. The next point made was that the petition for the order of sale was based upon an insufficient notice. The court held it unnecessary to decide this question, or its effect upon the proceeding, because the sufficiency of the notice was not questioned as to the lands actually sold under the decree. Other points are ruled in the decision, but the question before us was not decided. Further, that proceeding was direct, while the present proceeding is collateral.

Knickerbocker v. Knickerbocker, 58 Ill. 399, was a writ of error to a judgment authorizing a guardian ⁴⁷⁶ to sell certain real estate belonging to the ward. It therefore differed from the present proceeding in that there the attack was direct; here it is collateral. The court there, in effect, declared

that the judgment, or order of court, was entered without giving the preliminary notice of intention to apply for the order, and that absence of such notice was fatal to the decree. The court does not decide that, if the judgment had been called in question in a collateral proceeding, it would have declared the judgment a nullity because of the failure to give the statutory notice here in question.

To sum up, the order of sale was made in 1889, the sale thereunder in 1890, and the sale approved by the court in 1892. Seven years after the date of the order permitting the sale—that is, in 1896—in the present action brought to foreclose the trust deed in a collateral action, the effort is made, because of the alleged insufficiency in the length of publication of the notice of the guardian to apply for the order of sale, to have such order or judgment declared a nullity. In the mean time, the property, for money considerations substantial in amount, and by warranty deeds, has several times changed hands. The authorities agree that the judgment should not be disturbed in this character of proceeding—collateral—except for a jurisdictional infirmity; they are further to the effect that, where it appears that the court had jurisdiction of the person, and, therefore, the party had his day in court, in doubtful cases defects in procedure should be treated as errors subject to review only in direct proceedings, and not as jurisdictional defects. Further, the infirmity complained of has been held, in the state from which we have adopted the statute, as not jurisdictional when presented, as here, collaterally.

⁴⁷⁷ We conclude that it cannot be shown in this proceeding, for the purpose of invalidating the judgment of 1889, that there was a failure to give the notice prescribed by the statute. If there was a failure to give such notice, it constituted an error in the exercise of jurisdiction, and not in its assumption. The judgment could be questioned for such alleged error only by such direct proceeding as writ of error to, or appeal from, the judgment authorizing the sale or the judgment confirming the sale. It is not necessary for us to hold, and we express no opinion as to whether, the absence of such notice would constitute reversible error if the question were here by such direct proceeding.

If, however, it be conceded, for the purposes of this ruling, that giving the notice in question is a jurisdictional re-

quirement, and, therefore, that its omission can be shown for the purpose of nullifying the judgment in this collateral proceeding, has it been shown that such notice was not given?

The notice was published in the weekly issue of a newspaper for the period of two weeks, and for three consecutive insertions, the first publication being in the issue of April 24, 1889, and the last publication in the issue of May 8, 1889, the date noticed being May 9th. Defendant, Etta L. Redd, says that such publication was fatally defective in that it was not made for a sufficient length of time; that the first publication should have been made in an issue of the newspaper published at least three weeks before the day noticed for the filing of the petition requesting permission to sell.

Section 2083, *supra*, provides: "To obtain such order, the guardian shall present to the district court a petition, setting forth the condition of the estate, and the facts and circumstances on which the petition is founded. Notice of ⁴⁷⁸ such intended application shall first be given, by publication in some public newspaper, published in the county where such proceeding is to be had, for three successive weeks."

The remainder of the section, pertinent to notice, applies to posting written notices in counties where no newspaper publication can be made.

As has been seen, the statute provides that notice of the intended application shall first be given by publication in some public newspaper, published in the county where such proceeding is to be had, "for three successive weeks." The notice here was published in three consecutive weekly issues of a newspaper before the date noticed for filing the petition or making the application for the order of sale. Such publication was for three successive weeks, and satisfied the requirements of the statute: *Decker v. Myles*, 4 Colo. 558; *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043; *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109.

It is next contended that the notice in evidence ran for May 9th, and, even if sufficient to sustain an order of sale based on a petition filed on that date, it will not support an order of sale resting upon a petition filed on a later date.

In discussing this contention, we assume again, only for the purpose of the ruling, that the question of the efficiency of the publication of the notice of application for the order can be considered here.

While the certificate of the trial judge does not state that the bill of exceptions contains all the evidence, we are able to see, from an inspection of the bill, that it does present all of the evidence submitted to the trial judge and upon which he acted.

Therefrom it appears that a notice for leave to sell ran for May 9th. A petition for leave to sell was filed. It does not appear, from the evidence, upon what date it was filed. May 27th, the order permitting ⁴⁷⁹ the sale was made. This order was the judgment of a court of general jurisdiction, and, although rendered in a special statutory proceeding, the same presumptions of jurisdiction of the subject matter and of the parties attach thereto as to judgments of the same court when proceeding according to the course of the common law: *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 Pac. 698; *Burris v. Craig*, 34 Colo. 383, 82 Pac. 944; *Farmers' Union Ditch Co. v. Rio Grande Canal Co.*, 37 Colo. 512, 86 Pac. 1042.

Applying this presumption to the facts, it will be presumed, in the absence of evidence to the contrary, that the petition was filed May 9th, and that the court retained jurisdiction when it entered the judgment of May 27th.

Therefore, we conclude that it did not affirmatively appear from the evidence before the trial judge that the notice by publication provided by the statute had not been given.

If we were wrong in the reasons heretofore assigned for a reversal, still the case should be reversed.

In 1892, Lillie B. Redd, then of full age, conveyed her undivided one-half interest in the property covered by the trust deed to Braun. This interest, perforce a previously made warranty deed running from Braun to Kline, passed to Kline, and was owned by him at the time he agreed that the trust deed should constitute a lien on the realty involved. He cannot question, and does not question, the validity of the trust deed as a lien or otherwise. This rendered the trust deed manifestly good as to the undivided one-half interest of Lillie B. Redd. For this additional reason, the court erred in granting the nonsuit and dismissing the case.

Judgment reversed.

Chief Justice Gabbert and Mr. Justice Maxwell concurring.

**NOTICE OF APPLICATION AS AFFECTING VALIDITY OF
GUARDIAN'S SALES.****I. In the Absence of Statute, 148.****II. Under Statutes, 148.****I. In the Absence of Statute.**

An application by a guardian for a license to sell the real estate of his ward is generally conceded to be a proceeding in rem on behalf of the ward, and not adversely to him. Hence, in the absence of statute requiring it, notice to the ward of such application is not essential to the jurisdiction of the court to grant the license, and want of such notice is immaterial as affecting the validity of the sale: *Rice v. Parkman*, 16 Mass. 326. "In this form of proceeding the guardian sufficiently and fully represented the infants, and no notice to them was required by the statute of Maryland or by any general rule of law. The want of proof of such notice, or of any record of evidence on which the orphan's court proceeded in making the order, or the chancery court in approving it, or of any subsequent accounting by the guardian for the proceeds of the sale, is immaterial. The orders of these courts within their jurisdiction were conclusive proof in favor of the purchaser and grantee at the sale, and cannot be collaterally attacked": *Thaw v. Falls*, 136 U. S. 519, 10 Sup. Ct. Rep. 1037, 34 L. ed. 531. See, also, *Mitchell v. People's S. B.*, 20 R. I. 507, 40 Atl. 504. Proceedings by a guardian for the sale of the estate of his ward are not adverse, but are, in effect, proceedings by him and for his benefit, and the minor is in court by the filing of his petition, and thereby submits his property to the jurisdiction of the court. The order of sale is not against nor adverse to him, but is the granting of his request, and the fact that an order to show cause why a guardian should not be granted authority to sell the real property of his ward was set for hearing at a time less than four weeks after the making of such order, when the statute requires that such hearing shall not be less than four nor more than eight weeks from the time of the making of the order, does not render void the order of sale based upon the order to show cause, when the statute does not require any notice of the order nor of the application to sell his property to be served upon the ward. These principles, as we shall hereinafter show, are in many of the states not deemed inapplicable because their statutes have required notice to be given of application for orders authorizing guardian's sales: *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324.

II. Under Statutes.

While we think the rulings in the principal case are amply defensible on reason, it must be admitted that they are sustained by only the slight weight of authority, a very respectable minority seeming to maintain that where the statute requires notice to be given of

an application by a guardian for leave to sell his ward's real estate, the giving of such notice is jurisdictional.

The reasoning of what we regard as the better considered, and slightly more numerous, decisions on the subject is that a proceeding on the part of the guardian for the sale of real estate for the benefit of his ward is one in rem, and, being on behalf of the ward, and not adversely to him, notice of such proceeding is not essential to the jurisdiction of the court to grant a license for the sale: *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 37 Pac. 324; *Myers v. McGavock*, 39 Neb. 843, 142 Am. St. Rep. 627, 58 N. W. 522. Thus in *Beidler v. Friedell*, 44 Ark. 411, it was said that "courts of probate, controlling directly, and acting through the agency of guardians, have jurisdiction in rem of the property of wards. Want of notice of the sale was irregular and erroneous. This fact was admitted by demurrer to the answer. But it was not jurisdictional and would not have affected title on confirmation without appeal." And in *Daughtry v. Thweatt*, 105 Ala. 615, 53 Am. St. Rep. 146, 16 South. 920, it was maintained that a proceeding in the probate court for the sale of a ward's property is a proceeding in rem, and the jurisdiction of the court attaches when the application for an order of sale, made by the proper party, and disclosing a statutory ground for the sale, is presented to, and recognized by, the court. That whatever of error or irregularity may thereafter intervene must be corrected by an appropriate revisory remedy, and is not a ground for collateral attack on either the decree or the sale made thereunder. Hence a probate sale of a ward's property for the purpose of reinvestment, made on a proper application and showing by his guardian, cannot be collaterally attacked, on the ground that it was made without the statutory notice to the ward, and without the appointment of a guardian ad litem for him. It has also been decided that an application by a guardian to sell the real estate of his wards is a proceeding in rem, and on behalf of the wards, and is not adversary to them. Hence, notice of such application, under a statute requiring notice to be given to "all persons interested in the estate," is not essential to the jurisdiction of the court to grant the license, nor to the validity of the sale: *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522.

In *Barnes v. Hardeman*, 15 Tex. 366, it was said that "it is further objected that the order of sale and the proceedings thereon were void, because citation was not issued and served on the heirs as the statute prescribes. But in this case there was no one on whom to serve citation. The heirs were themselves petitioning by their guardian, and, of course, there was no occasion to cite them to answer to their own petition. . . . The petition in this case gave jurisdiction to the probate court to order the sale, and there is nothing in the objection that the order was made without the issuance of citation." In a statutory proceeding by a guardian for the sale of real estate of his ward, he represents the ward, and where a proper peti-

tion has been presented by the guardian to the proper court, that court has jurisdiction to order such a sale, and its determination is binding upon the guardian and ward, although no notice of the hearing is given: *Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364; overruling on this point, *Mohr v. Tulip*, 40 Wis. 66. As against a lunatic ward, a license to his guardian to sell his real estate is not invalid for insufficient publication of the notice of the hearing, the same being required only for the protection of other parties interested in the estate, and in Wisconsin, the publication of notice of the hearing is not essential to the jurisdiction of the proper court to grant the license to sell: *Mohr v. Manierre*, 101 U. S. 417, 25 L. ed. 1052. The cases from Illinois cited, quoted from, and relied upon, in the principal case as stating the law of that state, can no longer be considered as authority for the proposition that want of notice of the application to sell the ward's real estate is not jurisdictional and does not affect the validity of the sale, because it has been squarely and flatly decided in that state that if the record of a proceeding by a guardian for the sale of his ward's lands fails to show any notice of the application to the wards, the decree purporting to authorize the sale will be void for want of jurisdiction, and may be attacked collaterally: *Musgrave v. Conover*, 85 Ill. 374. It is true that it was decided in *Mason v. Wait*, 4 Scam. 127, that it was not necessary to the validity of the sale that the ward should have any other day in court, upon an application by his guardian for leave to sell the ward's real estate than such as the former has by his guardian's presence, as such a proceeding is not adverse to the ward's interests, nor against him. And in *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463, it was decided that to give the court jurisdiction to order the sale of the real estate of the ward, on the application of his guardian, enough must appear, either in the application or in the order, or somewhere upon the face of the record or proceeding, that the contingency existed, or at least was alleged, which authorized it to proceed under the statute, and make the order. When that does appear, the court has properly acquired jurisdiction, and is then authorized to adjudge, and its judgment, however erroneous, is, until reversed, binding upon all parties and privies to it, and cannot be collaterally attacked. But it was also decided as early as *Gibson v. Roll*, 27 Ill. 88, 81 Am. Dec. 219, that proceedings by a guardian to sell his ward's real estate are not adverse to the latter, and will, if regular and in conformity to law, bind the ward, but if not, he must have an opportunity to correct the errors. But later still, though not referring to the decision in 85 Ill. 374, the same court, almost at the same time, said: "A proceeding by a guardian to sell real estate for the maintenance of his ward is a proceeding in rem, being made on behalf of the owner of the estate, and hence it is only necessary the court should have jurisdiction of the subject matter": *Spring v. Kane*, 86 Ill. 582; but the court apparently, nevertheless, assumed that the giving of notice was a part of the means of obtaining jurisdiction of the subject matter, whereas

we had supposed this class of jurisdiction to be acquired solely from the constitution or other valid law. If due application, by a guardian, for the sale of his ward's real estate has been made, and jurisdiction has been acquired by due publication of notice, an amended order of sale may be validly made at a subsequent term of the court without further notice, as the case is still within the power of the court: *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414.

Consideration must now be given to those cases which are opposed to the rule laid down in the principal case, and maintain that the failure of the guardian to give the notice required by statute, that he will make application to the proper court for an order of sale of his ward's real estate, is jurisdictional and renders the sale void. In *Coy v. Downie*, 14 Fla. 544, it was decided that a guardian's deed was void where the record failed to show that in the proceedings for the sale of the interest of the ward in real property, the statute requiring an advertisement prior to obtaining an order to sell, had been complied with. As before shown in Illinois, where the record of a proceeding by a guardian for the sale of his ward's real property fails to show any notice of the application to the ward, the decree purporting to authorize the sale will be void for want of jurisdiction, and may be attacked collaterally: *Musgrave v. Conover*, 85 Ill. 374; and this, though the court still assent in general terms that the proceeding is in rem, and, therefore, that nothing but jurisdiction over the subject matter need exist, the court very strangely assuming that jurisdiction of the subject matter is acquired by the service or publication of notice: *Spring v. Kane*, 86 Ill. 582.

In Iowa, the rule is established that a guardian's sale of the real estate of his ward is not a proceeding in rem, but one adversary in its nature, and, when made without the notice required by statute, is void, for want of jurisdiction in the court ordering the sale: *Lyon v. Vanatta*, 35 Iowa, 521; *Rankin v. Miller*, 43 Iowa, 11. If the notice is defective merely, the jurisdiction is saved, and the proceeding cannot be collaterally attacked, but it is otherwise where there has been no notice, or where the paper relied upon as such is without the essential requirements of a notice: *Lyon v. Vanatta*, 35 Iowa, 521; *Bunce v. Bunce*, 59 Iowa, 533, 13 N. W. 705. The sufficiency of a notice of a petition for the sale of the real estate of a ward by a guardian, cannot usually be called into question collaterally, but this rule does not apply to a case where the paper offered is so deficient as not to answer the requirements of the statute in any degree, as, where that offered as a notice is not a notice in any sense, or is not a notice of that which is required to be notified: *Frazier v. Steenrod*, 7 Iowa, 339, 71 Am. Dec. 447.

Again, in Kansas, it has been determined that the notice required by the statute to be given to the ward of the hearing of his guardian's application for leave to sell his real estate is jurisdictional, and that a deed made without such notice is void: *Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547. In a case in Maine, it was said that "where

there is neither petition nor license, as well as no bond or notice of sale, and no oath, all of which are required by statute, the court had no jurisdiction over the subject matter": *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394, 34 Atl. 68.

In Mississippi, the rule prevails that in a proceeding for the sale of the real estate of minors upon petition of their guardian, it is indispensable to the jurisdiction that a guardian ad litem be appointed to represent their interests, and that the court has no jurisdiction to appoint such guardian, until after service of notice on them, either by citation or publication: *M'Allister v. Moye*, 30 Miss. 258. It is essential to the validity of a guardian's sale of the real estate of his ward that citation be served upon the ward and three of his nearest relatives residing in the state, and the record must show the fact, otherwise the sale is void: *Stampley v. King*, 51 Miss. 728; *Temple v. Hammock*, 52 Miss. 360. If the statute requires "that all persons interested residing within the state" be cited upon an application by a guardian for the sale of land for a decedent, a decree for the sale of land for division, upon the petition of a guardian of some of the heirs, without his ward's being cited or a guardian ad litem appointed for them is void: *Rule v. Broach*, 58 Miss. 552. If a guardian joins in the petition with others for the sale of his ward's real estate, it is essential to the validity of the sale that the minors should be made parties and brought into court by citation duly served upon them, and the appearance of the guardian in court will not give it jurisdiction of the person of the minor: *Kennedy v. Gains*, 51 Miss. 625. In Mississippi, as elsewhere, if the service of the notice or citation is defective merely, the decree and sale cannot be impeached collaterally, but are good so long as the decree remains unreversed by direct proceeding: *Stampley v. King*, 51 Miss. 728. Although the petition is sufficient to warrant a guardian's sale to pay the debts of his ward, and such sale is ordered and made, it is void if the court failed to cause the issue and service of the statutory notice of the hearing upon the petition, as the latter act was requisite to give the court jurisdiction: *Beezley v. Phillips*, 117 Fed. 105, 54 C. C. A. 491. Contrary to the law of Mississippi, the rule in Georgia is stated to be that a statute which provides that a guardian, before he can sell the property of his ward, must apply to the ordinary for leave to sell, notice of which application must be duly published, contains nothing requiring the appointment of a guardian ad litem to constitute a valid sale of such property against the ward: *Prine v. Mapp*, 80 Ga. 137, 5 S. E. 66.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

CLEARWATER MERCANTILE COMPANY v. ROBERTS.

[51 Fla. 176, 40 South. 436.]

CONSTITUTIONAL LAW—Due Process of Law.—Service by Publication upon a domestic corporation which has failed to put forth officers or agents upon whom service may be had constitutes due process of law. (p. 154.)

JUDGMENTS Against Corporations—Service by Publication.—A personal judgment against a domestic corporation based upon service of process by publication as provided by statute is not void. (p. 155.)

F. M. Simonton, for the plaintiff in error.

D. C. McMullen, for the defendant in error.

¹⁷⁷ **COCKRELL, J.** This writ of error is prosecuted to review the denial of a motion to vacate a personal judgment against a domestic corporation consequent upon a default for want of appearance, the service having been made pursuant to section 1024 of the Revised Statutes. It is admitted that the provisions of the section were complied with strictly, but it is insisted that the said section is unconstitutional, in that it authorizes a personal judgment without personal service and therefore does not constitute due process of law.

The statute originally enacted in 1853, chapter 539, section 1, and brought forward in the Revised Statutes of 1892, reads:

“1024. Service upon domestic corporation in the absence of officers or agents.—When process against any corporation of this state cannot be served owing to the failure of said corporation to elect officers or appoint agents, their absence

from the state for the period of six months before the issuing of said writ, or because they are unknown, it shall be the duty of the officers to return said writ, with the causes of his inability to serve the same, and upon the return of said writ as aforesaid, the judge of the court from which the same shall have issued shall make an order at any time, setting forth the names of the parties, the nature of the action, suit or other proceeding, the court in which the same has been instituted, and requiring the said corporation to appear and defend the said action, suit or other proceeding, and the publication of said order once a week for the space of two months in some newspaper published in the county in which said action, suit or other proceeding shall be instituted, shall be a full and sufficient notification to the said corporation of the institution of said action, suit or other proceeding. However no judgment by default ¹⁷⁵ or decree pro confesso shall be taken or rendered against said corporation until due proof shall have been made of the publication of said order, as hereinbefore provided."

The transcript before us is scant, but we feel safe in holding that the plaintiff in error, now attacking this statute, was created by the authority of the state subsequent to 1853, and received its charter subject to all valid general laws applicable to domestic corporations.

It may be remarked incidentally that no contention is made that notice of the institution of the action was not actually received nor that the venue was improperly laid in a county other than the one in which under its charter the principal office of the corporation was located.

Assuming, then, these conditions, was it competent in the legislature to provide as to a domestic corporation, when it fails to put forth officers or agents upon whom service may be made, that by reason of such failure it shall be brought into court by publication, with proper precautions as to the ascertainment of the essential facts by the court in advance of any judgment? We answer in the affirmative.

We are dealing not with natural persons, who create the governments, but with fictitious entities, called corporations, which are created by the government, deriving therefrom their very existence, with such limitations as the creating power may impose, except with such limitations as may be expressly or by clear implications forbidden by its organic law or by the federal authority.

No provision of the state constitution is pointed out to us that prohibits such limitations nor do we think that the due process clause of the federal constitution is thereby violated. The great case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, expressly disclaims an intention to apply the principles there enunciated to the conditions before us,¹⁷⁹ and while we entertain a high respect for the justice pronouncing the opinion in the case of *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402, and may agree to the result therein reached, yet much of the reasoning is inapplicable to the case before us and the principle controlling us—that is the power of the state over its own creatures—is not discussed in the cited opinion: See note on this case in 50 L. R. A. 486.

To say in the instant case that no property of the corporation may be found within the state upon which an execution may attach, means only that the judgment may be futile, not that it is void, and the statute confers upon the creditor the privilege of accepting that chance as to a domestic corporation which can hold property only by the will of the state.

Strictly speaking, there can be no personal service upon a corporation, but only such constructive or substituted service as the law may provide. It is not unusual to provide as to certain kinds of nonresident corporations, that they may come into a state only on condition that service of process upon some state officer shall bind them personally; and we do not recall any decision holding that such service does not constitute due process of law. Generally service is made upon the principal officer of a corporation who may be found; this is constructive service strictly speaking, yet upon such service personal judgments are daily rendered. The fundamental object of all laws relating to service of process is to give that notice which will in the nature of things most likely bring the attention of the corporation to commencement of the proceedings against it and when legislation carries out this clear design it should not be stricken down by the courts.

¹⁸⁰ A case directly in point is *Town of Hinckley v. Kettle River R. Co.*, 70 Minn. 105, 72 N. W. 835. See, also, *Continental Nat. Bank of Boston v. Thurber*, 74 Hun, 632, 26 N. Y. Supp. 956, affirmed in 143 N. Y. 648, 37 N. E. 828.

The judgment is affirmed.

Shackleford, C. J., and Whitfield, J., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

The Legislature may Authorize Constructive Service on corporations, but the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, thus securing an opportunity to be heard and to make a defense. A statute providing that, until a domestic corporation files with the register of deeds a list of officers upon whom service may be made, service may be made by leaving a copy of the process with the register of deeds, has been held unconstitutional: *Pinney v. Providence Loan etc. Co.*, 106 Wis. 396, 80 Am. St. Rep. 41.

JENNINGS v. BOBE.

[51 Fla. 229, 40 South. 194.]

OFFICIAL BONDS—Liabilities of Sureties.—The liability of the sureties on an official bond is to be determined by the terms of the bond itself, and such terms cannot be extended beyond the reasonable meaning thereof construed with reference to the purposes contemplated by the law requiring the bond. (p. 157.)

OFFICIAL BONDS—Breach of.—Making an application for fees earned and unlawfully collecting from the county money as fees in excess of those allowed by law do not constitute a breach of a constable's bond conditioned that he "shall diligently and faithfully perform all the duties of his said office as prescribed by law." (p. 158.)

Avery & Avery and R. P. Reese, for the plaintiff in error.

Blount & Blount, for the defendants in error.

230 **WHITFIELD, J.** An action was brought by the plaintiff in error against C. J. Bobe as principal and M. F. Gonzalez and Edwin Senior as sureties on the official bond of said C. P. Bobe as constable for District No. 2, Escambia county, Florida. The bond was conditioned that "if the said C. P. Bobe shall diligently and faithfully perform all the duties of his said office as prescribed by law, then this obligation to be void, else to be and remain in full force and virtue." A demurrer to the declaration on the ground "that it does not show any breach of the condition of the bond sued on" was sustained, and the plaintiff not desiring to amend the declaration, final judgment was rendered by the court for the defendant. On writ of error here error is assigned on the order sustaining the demurrer to the declaration as well as on the rendering **231** of final judgment for the defendant. The bond is joint and several, and the action is brought against the principal and the sureties jointly.

Section 1257 of the Revised Statutes provides that "every constable shall give a bond in the sum of five hundred dollars, which shall be governed by the provisions governing bonds to be given by the clerk of the circuit court." Section 1381 provides that "the clerk of the circuit court shall, before he is commissioned, give bond . . . which . . . shall be conditioned for the faithful discharge of the duties of his office." There is no statute in this state regulating the liability of the obligors on the official bond of a constable. The liability of the obligors, therefore, is to be determined by the terms of the bond itself, and such terms cannot be extended beyond the reasonable meaning thereof construed with reference to the purposes contemplated by the law requiring the bond: See *Raney v. Baron*, 1 Fla. 327; *State v. Montague*, 34 Fla. 32, 15 South. 589; *Gato v. Warrington*, 37 Fla. 542, 19 South. 883; *Robinson v. Epping*, 24 Fla. 237, 4 South. 812; 25 Am. & Eng. Ency. of Law, 723.

The obligation of the bond in this case is that C. P. Bobe, as constable, "shall diligently and faithfully perform all the duties of his said office as prescribed by law." The breach of the bond alleged in the declaration is that C. P. Bobe as such constable did make out and present to the board of county commissioners of Escambia county, Florida, certain improper and excessive accounts for costs and charges against the county for service of process in criminal cases and services rendered therein in justice of the peace court, District No. 2, of said county, and did make affidavit to each of said bills and accounts so presented "that said bills were made out in ²³² accordance with the laws of the state of Florida," when in truth said bills were not made out in accordance with law, and that by reason of such representations so contained in said affidavit of Bobe the county commissioners were induced to pay and the said Bobe did receive certain sum in excess of any amount which he could legally charge against and collect from said county as constable for such services. In short, the breach of the bond alleged in the declaration is that C. P. Bobe, as constable, unlawfully collected from the county money in excess of the fees allowed by law. The statutes prescribe the fees of constables and the conditions on which they may be paid by the counties. It is also provided that "the officer shall make out his account against the county in such form as the county commissioners may require, stating the services for which the fee is charged, the title of the case in

which the services were performed, and the facts which, under the provisions of the preceding section, make the fees a good claim against the county, including all legal charges and costs before justices of the peace, and present the same to the board of county commissioners, with the affidavit that the same is correct. The county commissioners shall have the right to reject all or any portion of any account which is not a valid claim against the county, and shall allow and pay the same only when it is just, correct and reasonable, and no constructive mileage or illegal or unnecessary item or charge in any frivolous case shall be allowed." See section 8 of chapter 4323, Acts 1895, as amended by chapter 4672, Acts of 1899.

While the statute requires a constable to make out his account against the county in certain way, this requirement relates to the manner of exercising a right conferred on the constable, to wit: To collect certain fees for ²³³ services rendered; and it cannot be said that the making of applications for fees earned are among the duties prescribed by law which the obligors in this bond undertook that "the said C. P. Bobe shall diligently and faithfully perform." This conclusion is strengthened by the provisions in the statute above quoted giving to the county commissioners the right to reject all or any portion of any account which is not a valid claim against the county and providing that they shall allow and pay the same only when it is just, correct and reasonable, etc., which provisions are evidently intended as timely and ample protection for the county in the matter: See *Furlong v. State*, 58 Miss. 717.

The demurrer to the declaration was properly sustained and the judgment for the defendant is affirmed at the cost of the plaintiff in error.

Shackleford, C. J., and Cockrell, J., concur.

Taylor and Hocker, JJ., concur in the opinion.

Parkhill, J., disqualified.

As to the Acts of a Public Officer for Which the Sureties on his bond are liable, see the note to Feller v. Gates, 91 Am. St. Rep. 497. A surety on an official bond is liable for a statutory penalty incurred by his principal in taking illegal fees: Eccles v. United States Fidelity etc. Co., 72 Neb. 734, 117 Am. St. Rep. 830.

MANSFIELD v. JOHNSON.

[51 Fla. 239, 40 South. 196.]

EJECTMENT—Evidence—Harmless Error.—If both parties in ejectment claim the land through a common source of title, errors committed in allowing the introduction of improper evidence of such title are harmless. (p. 163.)

EVIDENCE—Record of Judgment.—A certified record of a judgment, although it does not contain a copy of the original judgment, but merely a copy of a certified copy of such original, taken from the minutes and judgment docket, is nevertheless admissible in evidence to show the existence of such judgment. (p. 164.)

EVIDENCE—Copy of Record.—A certified copy of the record of a judgment in a judgment-book taken therefrom is competent evidence of the record of the judgment in such book, and is unnecessary to produce the document which has been recorded upon such book to prove that fact. (p. 165.)

EVIDENCE—Transcript of Record.—The custodian of a record having authority to certify a transcript thereof has authority to specify in his certificate the particular record from which the transcript is taken, and such certificate is at least prima facie evidence of the fact recited. (p. 165.)

EVIDENCE—Copy of Records.—It is the duty of clerks of the circuit court who have authority to record instruments, or to make entries in the records of which they have custody, in the course of their official duty, to note on such records the date upon which they record such instrument or make such entries, and such notes become parts of such record, and the dates specified in such notes are to be taken as prima facie correct. In certifying such entries the clerk also has authority to certify such notes, and such certified copies are admissible in evidence. (pp. 165, 166.)

EVIDENCE—Copy of Execution.—If an original execution has been returned to the court issuing it, and the copy thereof offered in evidence is certified by the clerk of that court, who has the custody of the original, to be a true copy thereof, such certified copy is admissible without the production of the original. (p. 166.)

EXECUTION SALES—Rights of Purchasers.—If a judgment upon which an execution has issued has become a lien upon land before a deed thereof is recorded, it is immaterial whether the execution was actually levied before or after the record of the deed, as in either case the title of the purchaser at the execution sale would be superior to the title acquired by the grantee by virtue of such deed. (p. 167.)

NOTICE.—Recitals in Recorded Deeds not constituting links in the chain of title of a judgment debtor and to which he is not a party, purporting to show equities in third persons, are not notice to him thereof. (p. 168.)

EXECUTION SALES.—Rights of Purchaser at execution sale, whether such purchaser be the execution creditor or a third person, are fixed by the status existing at the time the lien is acquired, and not by the status existing at the time of the sale. (p. 169.)

EXECUTION SALES.—Notice of Equities—Bona Fide Purchaser.—If, at the time his lien is acquired, an execution creditor has

no notice, actual or constructive, of the equities of third persons in real estate, the title to which stands in the name of the judgment debtor as the apparent absolute owner, the execution creditor as purchaser at the execution sale of such land takes a good title, and is protected as a bona fide purchaser even though he had notice of the equities of others at the time of the sale. (p. 169.)

EXECUTION SALES—Rights of Purchaser—Estoppel.—If execution has been levied upon all the right, title, and interest of a judgment debtor in land, and sale has been made and a conveyance executed in pursuance of such levy purporting to convey such entire interest, the execution purchaser is not estopped from claiming the entire property by the fact that he remained silent at the time of the sale when a third person protested against the sale on the ground that the judgment debtor owned only an undivided one-fifth interest in the property sold. (p. 169.)

Shackleford & Pettingill, for the plaintiffs in error.

A. W. Cockrell and Son, for the defendant in error.

241 CARTER, C. J. In July, 1896, the defendant in error, hereinafter referred to as the plaintiff, instituted an action of ejectment against the plaintiffs in error, hereinafter referred to as the defendants, in the circuit court of Hernando county. The defendants filed their plea of not guilty, and upon application of the parties the cause was referred to a practicing attorney as referee for trial. A trial was had before the referee, who found for the plaintiff the fee simple title in and the right to possession of the land in controversy, and damages for mesne profits in the sum of five hundred dollars. Judgment having been entered upon the finding the defendants sued out this writ of error, and assign as **242** error certain rulings admitting documentary evidence over defendants' objections, and the ruling denying a motion for a new trial interposed by them. The grounds of the motion for a new trial were that the findings of fact made by the referee were not warranted by and were contrary to the evidence, and the judgment entered by him was not warranted by the evidence and was contrary to the law of the case. The evidentiary bill of exceptions appearing in the record purports to have been made up and settled at the instance of the plaintiffs in error in support of an assignment of error predicated upon the refusal of the referee to grant a new trial on the ground that the findings of fact made by him were contrary to the evidence or not supported thereby, and contains the written demand of the plaintiff that all of the testimony shall be reviewed for the purpose of showing that any error in law is in view of the whole testimony a harmless error. From the

evidence it appears that the land in controversy was originally owned by one John Eubanks, who for a long period of time exercised acts of ownership over it; that by his last will and testament he gave power to his executor to sell and convey it; that on August 6, 1881, the executor of Eubanks entered into a contract with George F. Drew, John L. Inglis, C. C. Keathley, J. M. Taylor and George K. Broome, for the sale of the land; that by mutual agreement between the parties the deed was to be made to Drew who was to hold the title in trust for himself and the other purchasers, each furnishing one-fifth of the purchase money; that on September 28, 1881, the executor of Eubanks executed a deed conveying said property to George F. Drew, his heirs and assigns in fee simple, with no mention of trust; that on April 8, 1882, George F. Drew filed his bill in the circuit court of Hernando county, Florida, against John P. ²⁴³ Wall, John P. Wall, Jr., and John A. Eubanks, who were alleged to be the heirs at law of John Eubanks, deceased, alleging the making of the deed by the executor of Eubanks to Drew; that questions had been raised as to the sufficiency of Drew's title under said deed, and praying that the sale by the executor be confirmed, and Drew's title quieted as against the parties named as defendants. Such proceedings were had that on May 8, 1882, the court entered a decree confirming the sale and deed by the executor, and quieting Drew's title under said deed as against the defendants, heirs of John Eubanks, deceased. Thereafter on December 26, 1888, John A. Eubanks executed a deed conveying the same property to George F. Drew, his heirs and assigns in fee simple. No mention is made of the trust upon which Drew was to hold the property in the deed executed by John A. Eubanks or in the court proceedings for quieting Drew's title. George F. Drew executed a certain instrument purporting to have been executed in 1883, which, after reciting the making of the deed to Drew by Eubanks' executor, of September 28, 1881, and the agreement of August 6, 1881, between Drew and Inglis, Keathley, Taylor and Broome for the purchase of the property from Eubanks' executor, and that the title was to be taken in the name of Drew for the use and benefit of the parties named, declared that Drew held said property in trust for the parties named for certain uses and purposes therein specified. This instrument was not recorded until February, 1892, and then without any acknowledgment or other proof of execution. On February 12, 1892,

Drew and wife executed a deed conveying to Keathley, Taylor, Inglis and Broome an undivided four-fifths interest in the property in controversy, for the expressed consideration of eight thousand four hundred dollars. This deed made no reference to the trust upon which Drew held the property ²⁴⁴ and was recorded February 15, 1892. On May 17, 1884, Keathley conveyed to one John McKeown one-half of his undivided one-fifth interest in the lands in controversy, the deed reciting that the lands were then owned by Drew, Taylor, Inglis, Kathley and Broome. This deed was recorded May 17, 1884.

The defendants in this suit were in possession, claiming under one Knight who held a lease from Inglis, Taylor, Broome and the administrators of the estates of McKeown and Keathley. At various times subsequent to the deed from Eubanks' executor to Drew, the latter executed conveyances embracing portions of the land, and in 1890 he also executed a mortgage covering an undivided one-fifth interest in all of the land, but in none of these conveyances was the trust mentioned, nor was there an intimation that Inglis, Taylor, Keathley or Broome had any interest in the land.

On February 17, 1891, the plaintiff Johnson began an action of assumpsit against Drew in the circuit court of Duval county. Drew was duly served with subpoena, appeared and filed pleas, and such proceedings were thereafter had that on May 11, 1891, during a term of the court then being held, judgment was entered in favor of the plaintiff Johnson against Drew for eleven hundred and sixty-five dollars and fifty-one cents and costs. A copy of this judgment duly certified by the clerk of the circuit court of Duval county was filed with the clerk of the circuit court of Hernando county, Florida, and recorded by him in the foreign judgment book on May 19, 1891. On June 13, 1891, an execution was issued upon the judgment of the clerk of the circuit court of Duval county, which on January 2d, 1892, came to the hands of the sheriff of Hernando county, who afterward, the precise date not being shown, levied it upon all the right, title and interest of Drew in ²⁴⁵ the lands in controversy. The property was sold on the first Monday in March, 1892, under said execution and purchased by the plaintiff, and the sheriff executed to plaintiff a deed conveying all the estate, right, title and interest of Drew in the property in controversy, in pursuance of such sale. There is testimony tending to show that at the time of

the sheriff's sale Keathley was present and protested against the sale, announcing that Drew only owned an undivided one-fifth interest, but there is no suggestion in the evidence that Johnson had any notice that Drew did not own the entire interest at the time his judgment was recorded in Hernando county. Other facts will be found in the opinion.

Plaintiff offered in evidence a certified copy of the record of the deed from Eubanks' executor to Drew. Defendants objected to its introduction upon the ground that the deed had never been legally proved for record or recorded. The acknowledgment states that the grantor "acknowledged that he signed the foregoing deed of conveyance for the purposes therein specified." Plaintiffs in error argue that an acknowledgment of the signing is not an acknowledgment of the execution of the instrument, and that consequently their objections were well taken and should have been sustained. In *Rhodus v. Heffernan*, 47 Fla. 206, 36 South. 572, it was held that where the plaintiffs and defendants in ejectment claim land through a common source of title, errors committed in allowing improper evidence of the title under which all the parties ²⁴⁸ claim are harmless. As will be seen from the statement of the facts the parties plaintiff and defendant claim through this deed, and the defendants themselves produced evidence recognizing its existence and validity. Under these circumstances it is unnecessary for us to determine whether the acknowledgment was sufficient to entitle the deed to record, so as to make the certified copy *prima facie* evidence of the due execution of the deed, as any error that may exist in the ruling admitting the document in evidence is, for reasons stated, harmless. This disposes of the first assignment of error.

The second assignment of error is expressly abandoned.

The third assignment of error is based upon the ruling admitting over objections a certified transcript of the record of the judgment obtained by Johnson against Drew. The transcript, after setting out the praecipe, summons, return, declaration and other proceedings, recites that "subsequently, to wit, on the eleventh day of May, 1891, during the regular term of said court, certain proceedings were had and judgment rendered as shown by the minutes of said term and the judgment docket, as follows, to wit": Here follows what purports to be the final judgment dated May 11, 1891, signed "W. B. Young, Judge," and immediately thereafter a certifi-

cate of Noble A. Hull, then clerk of the circuit court of that county, "that the foregoing copy of final judgment is a true and correct transcript of the same as appears upon the files and record of said office," dated May 15, 1891. The certificate to the transcript of the entire record of that judgment made by P. D. Cassidy, clerk, on October 25, 1897, is "that the foregoing pages numbered from 1 to 9 inclusive constitute a true copy of all the proceedings and a correct transcript of the record of the judgment in the case of James E. Johnson as plaintiff, and ²⁴⁷ George F. Drew as defendant, as appears upon the files and records of my office." The objection interposed was that the transcript offered did not contain a copy of the original judgment, but merely a copy of a certified copy of such original. We think it evident that the final judgment was written out and signed by the judge on May 11, 1891, during a term of the court, and that this judgment so signed was by the clerk entered upon the minutes of the court on May 15, 1891. As the minutes are required to be signed by the judge at the end of each term, it was perhaps unnecessary for the clerk to enter upon the minutes immediately following the entry of the judgment therein the certificate which he did enter in this case, but the fact that he did so does not invalidate the minute entry nor make the minute entry any the less a record entry, proper to be certified as such. As we construe the certified copy of the transcript of the judgment, the judgment entry and certificate of Hull, clerk, appended thereto, were taken from the minutes and the judgment docket which are original records and not mere copies of records. There was no error in the ruling here complained of.

The fourth assignment of error questions the propriety of the ruling admitting in evidence over defendants' objection a certified transcript of the record of the judgment of Johnson vs. Drew, as recorded in the foreign judgment book by the clerk of the circuit court of Hernando county. The objections interposed were that "it is not shown by the paper itself that it is a copy of a judgment recorded in Duval county, and the fact that it may have been recorded in Hernando county is not shown by the certificate of the clerk of Hernando county so as to entitle it to be received as evidence," and "because the certificate of the clerk of Hernando county is not ²⁴⁸ proof of the date of the record of the same by him." The document offered purports to be a copy of the judg-

ment signed by Judge Young dated May 11, 1891, to which is attached a certificate by the clerk of the circuit court of Duval county dated May 15, 1891, that the "foregoing copy of final judgment is a true and correct transcript of the same as appears upon the files and records of my said office." Immediately following this certificate are the words "Recorded May 19, 1891, Frank E. Saxon, Clerk Ct. Ct. H. C., by S. A. Wilson, D. C.," and then follows a certificate by the clerk of the circuit court of Hernando county, Florida, dated March 12, 1898, that the "within and foregoing" is a "correct transcript of the record of the final judgment in the case of James E. Johnson v. George F. Drew, as it appears of record in foreign judgment book 1 at page 47." Under the statutes in force at the time the judgment was recorded in Hernando county, judgments at law were not liens upon real estate in counties other than the one where rendered, unless recorded in the county where the real estate was situated (McClellan's Digest, sec. 2, p. 619); the clerks were required to provide a suitable book to be entitled record of foreign judgments in which they were required to record judgments when regularly presented to be recorded, and a judgment was entitled to be placed upon the record, upon the presentation of a transcript of same regularly certified under the seal of the court: McClellan's Digest, secs. 13, 14, p. 175. The transcript of the judgment offered was certified as being a correct transcript from the foreign judgment book, and the judgment as there recorded appears to have been regularly certified by the clerk of the circuit court of Duval county under the seal of the court. The objections interposed to its introduction were untenable. A certified copy of the record ²⁴⁹ of the judgment in the foreign judgment book, taken from that book, was competent evidence of the record of the judgment in that book, and it was not necessary to produce the document which had been recorded upon that book to prove that fact as contended here. We are also of opinion that the custodian of a record having authority to certify a transcript thereof has authority to specify in his certificate the particular record from which the transcript is taken, and that such certificate is at least prima facie evidence of the fact certified. Under our law, clerks of the circuit court are the custodians of various records, such as the minutes of the court, foreign judgment records, records of mortgages, deeds, etc. He has

power to certify any portion of these various records, as for instance that the transcript of a judgment is taken from the minute-book; of a deed that it is taken from the deed record; of a declaration or plea, that it is from the files of a particular case, and the like. Having the power to certify the entire records or any particular portion thereof, he must necessarily have power to limit his certificate to the particular part certified, otherwise his certificate would be nugatory, as in every instance it would be necessary to produce the original record or other proof along with the certified copy to show that the certified copy was taken from the proper record, and not from some other record in the office: Rev. Stats. 1892, secs. 1109, 1111. We are also of the opinion that it is the duty of clerks of the circuit court who have authority to record instruments or to make entries in the records of which they have custody, in the course of their official duty, to note on such records the date upon which they record such instruments or make such entries, and that such notes become parts of such record, and the dates specified in such notes are to be taken as *prima facie* correct. ²⁵⁰ In certifying such entries the clerk also has authority to certify such notes, and the certified copies are admissible on account of the inconvenience of removing the originals. This is true upon general principles although we have no statute enacting such a rule: *Bell v. Kendrick*, 25 Fla. 778, 6 South. 868.

The fifth assignment of error is based upon the ruling admitting in evidence a certified copy of the execution issued upon the judgment in favor of Johnson against Drew under which the sheriff's sale was had. The objections interposed were that the original execution was the best evidence and that no sufficient predicate had been laid for its introduction. The first objection was untenable because the original execution had been returned to the court which issued it, and the copy offered was certified by the clerk of that court who had official custody of the original to be a true copy of such original. Under those circumstances it was not necessary to produce the original, and the certified copy was admissible: Rev. Stats. 1892, sec. 1111. The other objection was interposed upon the theory that the execution could not legally have been levied upon the land in Hernando county until the judgment upon which it was issued had been first legally recorded in that county and that

there was no proof that this had been done. Without deciding the question whether an execution can legally be levied upon land in another county until the judgment has been recorded there, we are of opinion, as will be seen from the discussion of the preceding assignment, that the proof did show that the judgment had been properly recorded in Hernando county before the execution was levied, and this disposes of the second objection to the introduction of the certified copy of the execution.

²⁵¹ The sixth and last assignment of error questions the propriety of the ruling upon the motion for a new trial. Under this assignment several propositions are insisted upon which we shall consider in the order presented. It is said that the evidence does not show that Johnson's judgment against Drew was recorded in Hernando county before the levy of the execution under which the sale was made nor before the record of the deed from Drew to Inglis et al. We have already disposed of this adversely to the contention of plaintiffs in error, in discussing other assignments of error.

It is said that the evidence does not show that the execution was levied before the record of the deed from Drew to Inglis et al., but it is shown that the judgment upon which the execution issued had become a lien upon the land before the deed was recorded, and upon the principles announced in the cases hereinafter cited it was immaterial in such a case whether the execution was actually levied before or after the record of the deed, as in either case the title of the purchaser at the execution sale would be superior to the title acquired by the grantee by virtue of such deed.

It is said that the recitals in the deed from Keathley to McKeown which was recorded in 1884, and the mortgages and deeds from Drew to other parties recorded prior to the record of the judgment against Drew, furnished record notice to Johnson of the equities of Inglis, Broome, Taylor and Keathley. We have already pointed out in the statement the fact that none of these conveyances except that from Keathley to McKeown contained any suggestion that other persons had equities in the property. The mortgage executed by Drew purported to convey an undivided one-fifth interest in the land, but there is no suggestion in the document that Drew did not ²⁵² own the entire interest, nor that Inglis, Broome, Taylor and Keathley were interested in

the property. There was, therefore, nothing in these documents to put Johnson on notice. As to the deed from Keathley to McKeown, neither Drew nor Johnson were parties thereto, nor was it a link in the chain of title of Drew through whom Johnson claims. The recitals therein were recitals in deeds between strangers so far as plaintiff was concerned and he cannot be bound thereby, in the absence of actual notice, merely because the deed was recorded.

It is said that the purchaser at an execution sale takes only the right, title and interest which the execution debtor had subject to equities existing at the time the judgment was recorded, that this principle had been recognized by this court in *Holland v. State*, 15 Fla. 455, and *Massey v. Hubbard*, 18 Fla. 688, and that the limitations upon this principle, announced in *Carr v. Thomas*, 18 Fla. 736, *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334, 1 South. 516, and *Lusk v. Reel*, 36 Fla. 418, 51 Am. St. Rep. 32, 18 South. 582, which are based upon our statute protecting creditors and purchasers for a valuable consideration without notice against unrecorded conveyances, apply only in cases where the judgment debtor had the legal title to the property in his own right, and not in cases where, though apparently the holder of the legal title, he yet held it in trust for another. We have carefully considered the decisions referred to and also the decision in *Eldridge v. Post*, 20 Fla. 579, and *Rogers v. Munnerlyn*, 36 Fla. 591, 18 South. 669, but we are unable to see that they thus restrict the rule applicable under the statute referred to. In the case of *Lusk v. Reel*, 36 Fla. 418, 51 Am. St. Rep. 32, 18 South. 582, it was held that a purchaser at an execution sale against one to whom real estate had been conveyed through mistake, but without any knowledge,²⁵³ actual or constructive, of such mistake, was entitled to protection as an innocent purchaser. In that case the execution creditor was the purchaser. In the present case the title to the property in controversy was in Drew, with the knowledge and consent of the other parties interested. The deed conveying the property to him was an absolute conveyance in fee simple containing no intimation whatever that he held the property in trust. The declaration of trust, if executed before, was not recorded until after the record of Johnson's judgment in Hernando county, which fixed his lien upon the property, and the conveyance from Drew to the parties for whom he held the property in trust,

was executed and recorded after the record of Johnson's judgment in Hernando county. It is not claimed that the parties were ever in actual possession of the land, nor that Johnson had actual notice of their claims until the day of the sale. The notice given on the day of sale was unavailing, because the rights of the purchaser at the sale, whether such purchaser be the execution creditor of a third person, be fixed by the status existing at the time the lien is acquired, and not by the status existing at the time of the sale. This is clearly held in the decisions above referred to. If at the time the lien is acquired the creditor has no notice, actual or constructive, of equities of third persons in real estate the title to which stands in the name of the judgment debtor as the apparent absolute owner, the purchaser at the execution sale thereof takes a good title and is protected as a bona fide purchaser, even though the creditor or purchaser had notice of the equities of others at the time of the sale.

Lastly it is said that plaintiff was estopped by his conduct and silence at the time of the sale by which he had ~~led~~^{led} Keathley and one Barker, who were present at the sale and interested in the property, to believe that he acquiesced in the statement made at the sale that Drew only owned a one-fifth interest in the land and that interest only was being sold by the sheriff. There is testimony to show that Keathley protested against the sale and that Johnson was present at the time, but we think the referee was justified in his finding that Johnson did not by his conduct or silence lead anyone to believe that only a one-fifth interest was being sold. The execution was levied upon all the right, title and interest of Drew in the entire property and the deed recites that all his interest was sold and purports to convey such interest. The fact that other persons protested against the sale of all but a one-fifth interest, even though Johnson said nothing in reply to such protest, cannot, in the face of the fact that the entire interest was sold, operate as an estoppel upon Johnson as the purchaser, and prevent him from claiming that which was in fact sold and conveyed.

This disposes of all the points presented and finding no error, the judgment will be affirmed.

Hocker, Whitfield and Parkhill, JJ., concur.

Shackleford, C. J., and Taylor and Cockrell, JJ., being disqualified, took no part in the decision of this case.

An Execution Sale is not subject to equities of which the attaching or judgment creditors had no notice: Livingstone v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400. But see Boon v. Van Gorder, 164 Ind. 499, 108 Am. St. Rep. 314.

As to What Estates and Interests Judgment Liens attach, see the recent note to Flint v. Chaloupka, 117 Am. St. Rep. 776.

ANDERSON v. FULLER.

[51 Fla. 380, 41 South. 684.]

MUNICIPAL CORPORATIONS—Contracts for Public Work.—If its charter requires the officers of a city to award contracts for public work to the lowest bidder, a contract made in violation of its requirements is illegal and void, and neither the municipality nor its officers can make a binding contract for such work except in compliance with the requirements of the law. (p. 177.)

MUNICIPAL CORPORATIONS—Contracts for Public Work.—Under a city charter requiring its officers to award contracts for public work to the lowest bidder, the incorporation into the advertisement for bids, or in the specifications for the work upon which bids are predicated, of illegal or unauthorized conditions or obligations upon the contractor, compliance with which upon his part will necessarily and illegally increase the cost of the work, is not a letting of such contract to the lowest bidder, and will render the contract illegal and void. (p. 177.)

MUNICIPAL CORPORATIONS—Liability for Consequential Damages to Private Property.—A municipal corporation, if it confines itself within the limits of its power and jurisdiction, is not liable to an action for consequential damages to private property or persons, unless expressly made so, when the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable. (p. 179.)

MUNICIPAL CORPORATIONS—Grants of Franchise Rights—Rights of Public.—While municipalities may, by ordinance, grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable ordinances that are reasonable may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding they may interfere with legal franchise rights. (p. 179.)

MUNICIPAL CORPORATIONS—Franchise Rights.—A water company placing its pipes in the streets under a franchise contract with the city does so in subordination to the superior rights of the public, through its duly constituted authorities, to construct sewers in the same streets, whenever the public interest demands; and if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious

conduct, it has no cause of action against the corporation for reimbursements on account thereof. (p. 179.)

MUNICIPAL CORPORATIONS—Water-pipes in Streets—Cost of Removing.—A city is not authorized, directly or indirectly, to burden itself or its citizens, by contract, with the cost of removing and replacing the water-pipes of a corporation that necessarily have been interfered with in the laying of sewers in the streets. (p. 179.)

MUNICIPAL CORPORATIONS—Void Contracts—Suit by Taxpayer.—A taxpayer in a city may properly maintain a suit to restrain the paying out of public moneys upon its void and unauthorized contracts. (p. 180.)

Macfarlane & Glen and J. P. Wall, for the appellant.

Sparkman & Carter, P. O. Knight and C. C. Whitaker, for the appellees.

282 TAYLOR, J. On the twenty-seventh day of September, 1905, the appellant, alleging that he was a citizen and taxpayer upon real and personal property in the city of Tampa, Florida, filed his bill in equity in the circuit court of Hillsborough county against the appellees W. R. Fuller, Robert Mugge, S. J. Drawdy and B. M. Balbonton as members of the board of commissioners of public works of said city of Tampa and against the appellees, George C. Warren and Fred T. Warren, alleging therein, among other things, that the said board of commissioners of public works, being thereunto duly authorized, published a notice calling for bids for furnishing the material and labor necessary to construct a sewerage system in certain streets, alleys and avenues of the said city of Tampa, a copy of which notice is attached as an exhibit to the bill. Said notice for bids refers to certain specifications in the hands of the engineer of the board that are to be made the basis of such bids, and a copy of such specifications is also attached as an exhibit to the bill. That on the first day of August, 1905, the defendants, George C. Warren and Fred T. Warren, submitted to and filed with the said board of commissioners of public works a bid for furnishing the material and the performance of the labor necessary to carry out the said contract; that afterward in August, 1905, the said board of commissioners of public works accepted said bid of the said George C. and Fred T. Warren, and afterward, on the thirty-first day of August, 1905, attempted to enter into various written contracts with the said Warrens for the carrying out of the work provided for in said plans and specifications and the bid made by them,

the exact number of contracts so entered into being unknown to your orator, but alleges that all of said contracts were ³⁵³ identical in their provisions, except as to differences in the amounts bid on different streets as shown in their different bids. A copy of such contracts is attached as an exhibit to the bill. That said Warrens, with whom the said contracts were so entered into, were not in fact the lowest responsible bidders for the said contract, but that there was submitted to and filed with said board at the same time a bid on the part of Joseph E. and George W. Bryan as partners as Bryan & Company, which was in fact a lower bid than that of the said Warren & Warren by approximately the sum of six thousand dollars, and that said Bryan & Company are and were responsible bidders, able to carry out and perform the said contract, and that said board of commissioners were fully satisfied as to the responsibility of the said Bryan & Company, notwithstanding the fact that they awarded the contract to the said Warren & Warren; that said contracts entered into between the said board of commissioners of public works and the said Warren & Warren are upon their face utterly null and void, among other reasons for the reasons hereinafter mentioned;

(a) That the said contracts do not conform to the advertisement for bids and the plans and specifications therein referred to.

(b) That said contracts reserved to the said board of commissioners of public works the power to increase or diminish the work, to make any changes in the line, grade, plan, form, position, dimensions and material of the work, either before or after construction.

(c) That the said specifications required, and the said contracts provided that the contractor, at his own expense, should remove all gaspipes, water-pipes and conduits forming an obstruction to the line or grade of the sewer.

³⁵⁴ (d) That said specifications required and the said contracts provided, that the contractor shall be responsible for all the damages to buildings, bridges, railroads, street-car lines, pipes, culverts or other property on the line of the work and for all injury to gas or water-pipes and for all waste of gas or water due to the execution of the work.

(e) That said contracts provided that the price bid by the said contractor should include the replacing of all water-courses and drains, or proper rearrangement and reconstruc-

tion of any drain, water-pipe, gaspipe, telegraph, telephone or electric poles, pipes or any conduit of any nature or description which may be encountered and injured or which may interfere with the line or grade, of the work, also the maintaining of travel over any railroad or street-car line which may be liable to obstruction by reason of said work, and the proper repair of any injury to the same.

(f) That said specifications required, and the said contracts provided, that the contractor should assume liability for all damages occasioned by doing the work therein provided.

(g) That in and by the said contracts the said board of commissioners abdicated their functions in favor of the city engineer and invested him with powers and duties not authorized by law.

(h) That the said contracts and the specifications made a part thereof constituted an unlawful delegation of the authority of the board of commissioners of public works in respect to duties imposed upon them by law, and incapable of delegation.

(i) That the notice calling for bids by requiring separate bids on each street violated the provision of the city charter of said city which requires all contracts to be let to the lowest responsible bidder.

³⁸⁵ (j) That said specifications upon which bids were called for did not sufficiently apprise bidders of the nature, extent and character of the work so as to comply with the city charter requiring all contracts to be let to the lowest responsible bidder.

(k) That the said contracts are illegal and void.

That the said city of Tampa is not itself the owner of any gas or water pipes in the street of said city, or of any telegraph, telephone or electric poles, pipes or conduits of any nature, railroad or street-car line operated within the city of Tampa, and that all of the same are owned by private corporations doing business in the city of Tampa under franchises or licenses from said city, and that said city has no power or authority, either directly or indirectly to appropriate money of the city or impose an expense on the taxpayers of the city for the benefit of the said private corporations or any of them, all of which hold their franchises or licenses subject to the power of the city to require the construction of a sewerage system in the streets of the said

city in the interest of the public health of said city, and that some of the instruments or agencies of the said private corporations will be encountered, and that the installment of the said sewerage system will render it necessary to remove or change the same in the performance of the said contracts.

That said contracts are further illegal and void for the reason that in the proposed form of agreement furnished by the said board of commissioners of public works to some or all of the bidders on the said contract as a basis upon which bids should be submitted, and particularly to the said firm of Bryan & Company there was included a clause in the following words: "Payments for the above work under this contract may be made with cash or certificates of indebtedness for paving and sewers as the ^{said} board of public works may elect," while in the said contracts as entered into in writing and executed by the said board of commissioners of public works and the said Warren & Warren there is no such clause or provision. That all of the said contracts for doing the entire work specified in the said advertisement have been executed by the said board of public works and the said Warren & Warren, and that your orator is informed and believes that the said Warren & Warren are now preparing to enter upon the performance of the said contract and if they are permitted to do so, and the said board is permitted to pay out moneys under the said contract, the moneys of the said city will be illegally diverted to a purpose not authorized by law, and an illegal burden thereby imposed upon the taxpayers of said city.

The prayers of the bill were that the said contracts and each of them separately and as an entirety be decreed to be null and void and to have no binding force or obligation upon the city of Tampa or the officers thereof. That the defendants and each and every one of them, their agents, servants and employes, be enjoined and restrained from carrying out the terms of the said contracts and each of them. or attempting to enforce them or either of them in any manner, shape or form, and particularly from paying out or attempting to pay out any moneys thereunder to the said Warren & Warren or to anyone in their behalf. That if any moneys have been heretofore or shall be hereafter paid out to the said Warren & Warren or either of them or to anyone in their behalf on account of the said alleged contracts, an accounting shall be taken thereof by and under the direc-

tion of the court, and that the said defendants, W. R. Fuller, Robert Mugge, S. J. Drawdy and B. M. Balbonton be decreed to restore and pay to the city of Tampa any and all moneys so unlawfully ³⁸⁷ diverted by them. And for a temporary injunction for subpoena and for general relief.

The defendants answered the bill admitting all of the material averments thereof as to the terms and provisions of the advertisement for bids for said work and as to the terms of the specifications for such work that were the basis for the bids, and as to the terms and provisions of the contracts entered into for such work, but allege by way of demurrer that such averments, of the bill, if true, do not affect the validity of such contracts. They deny that Warren & Warren were not the lowest responsible bidders, and deny that the bid of Bryan & Company was lower than that of Warren & Warren. The answers seek to avoid the allegation of the bill that said contracts and specifications for the work on which they are based unlawfully obligate the contractors under the terms of their bid to remove and replace at their cost all water-pipes, gaspipes, telegraph and telephone and electric light poles, pipes and conduits, and street railway tracks that may come or stand in the way of laying said sewers, by alleging that none of such things were as a matter of fact in the way of such sewers as planned to be laid, and none thereof would in fact have to be moved and replaced in consequence of the laying of said sewers. They deny that said board of public works in and by said contracts abdicated its functions or illegally delegated its functions and powers to the city engineer in the matter of constructing such sewers, or thereby clothed him with duties not authorized by law, or that were exclusively to be performed by said board. Said answers further seek to avoid the allegations of the bill to the effect, that said contracts illegally impose the burden directly upon the contractor and indirectly upon the city of the cost of the removal and replacement of all telegraph, telephone and ³⁸⁸ electric light poles, pipes and conduits, and gas and water pipes, drains and conduits, street-car tracks, etc., that may come within the line of laying said sewers, by averring that though said provisions were contained in said specifications and contracts based thereon, yet it meant nothing, as it had always been and was so understood that notwithstanding such provisions were in said contracts, yet the public authorities of said city uniformly

construed it, and the gas, water, electric light, street railway and telephone companies in said city uniformly construed it to the effect that whatever removals or rearrangements were necessary to be made by the said respective private corporations in consequence of sewerage work were always to be made and at the expense of the corporation so affected, and not at the expense of the city contractor or the city of Tampa, and that such has been the universal construction and practice since 1897, and up to the present time, the contracts in each instance since 1897 having been the same as these contracts that are complained of. The separate answers of the defendants Warren & Warren, were practically the same as that of the board of public works. Upon the bill with its exhibits, answers and ex parte affidavits filed on behalf of the defendants sustaining the averments of fact in their answers, application was made by the complainant to the circuit judge for a temporary injunction as prayed in the bill. After argument the application was denied by an order made December 30, 1905, and from this order denying the injunction the complainant below has taken his appeal to this court.

³⁵⁹ Chapter 5363 of the Laws of 1903 provides for the election by the people of the city of Tampa of a board of commissioners of public works for said city from among the registered voters who are freeholders. By section 21 of this act such board is given exclusive power and control over the construction and repairing of all sewers. By section 24 of said act it is empowered to employ an engineer and such other employés, officials and assistants as may be found necessary. This section also provides that the contracts made by this board shall be made in the name of the city of Tampa, and that any improvements which shall involve an expenditure of more than three hundred dollars shall only be let or made after advertisement thereof, and shall be let to the lowest responsible bidder therefor, upon such terms and secured by such bond as the board may require. Section 28 of said act provides that whenever any sewer or drain shall have been heretofore or may hereafter be constructed or repaired in said city the city counsel shall, as soon as the cost of such improvement shall have been certified to them by the commissioners of public works, assess against the abutting property two-thirds of the cost of such improvement in proportion to the frontage of such abutting property on said street,

alley, park or highway so improved. Section 29 of said act provides that all such assessments shall constitute a prior lien to all other liens except taxes and those for the construction of sidewalks, with which liens they shall have equal dignity upon the real estate assessed. Section 30 of said act provides that when at any time the city council shall decide to construct or repair any sewer, such council shall pass a resolution or ordinance ordering the same done, and thereupon the commissioners of public works shall advertise for bids for making said improvements. ³⁹⁰ Section 31 of the act provides for the issuance by the city council of certificates of indebtedness for the amounts of the assessments against the abutting property, a separate certificate to be issued against each tract of land assessed containing a description of such land, the amount of the assessment, together with the general nature of the improvement, and shall be made payable to bearer in one, two and three years in equal annual installments with interest to be fixed by the city council at a rate not greater than eight per cent per annum payable annually from the date of the issuance of such certificate.

The rule is well settled that where the charter or incorporating act requires the officers of a city to award contracts for public works to the lowest bidder, a contract made in violation of its requirements is illegal and void, and that neither the municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law: 1 Dillon on Municipal Corporations, 4th ed., sec. 466; *Fulton v. City of Lincoln*, 9 Neb. 358, 2 N. W. 724; *Brady v. Mayor of City of New York*, 20 N. Y. 312; *Nash v. City of St. Paul*, 8 Minn. 172; *Maxwell v. Board of Supervisors etc.*, 53 Cal. 389. The purpose and intent of the law in requiring such contracts to be let or awarded to the lowest responsible bidder for the work is to secure the public improvement at the lowest reasonable cost to the taxpayers. Therefore the incorporation into the advertisement for such bids, or into the specifications for the work upon which such bids are predicated, of illegal or unauthorized conditions or obligations upon the contractor, compliance with which on his part will necessarily and illegally increase the cost of the work, is not letting of such contract to the lowest bidder, and will render the contract illegal and void: *California Imp. Co. v. Reynolds*, 123 ³⁹¹ Cal. 88, 55

Pac. 802; *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940. In the published notice for bids for the performance of the public work involved herein bidders were referred to the office of the engineer of the board of public works for specifications of the work and materials to be used therein. In the specifications thus referred to are the following provisions: "In digging about water-pipes, gaspipes, and sewer or drain-pipes, workmen must exercise special care, and such pipes shall be properly supported on timbers or chains, and the cost of such work and of repairs made necessary by injury to said pipes shall be paid by the contractor, and is included in the price paid for the sewer. When such pipes or conduits form an obstruction to the line or grade of the sewer, the contractor shall, at his own cost, and in the manner prescribed by the engineer, make such removals, alterations, or rearrangements as may be required by the engineer."

"The contractor shall be responsible for all damages to buildings, bridges, railroads, street-car lines, culverts or other property on the line of the work, and shall replace and make good all macadam or other pavement, crosswalks, etc., disturbed during the progress or in consequence of construction. The contractor shall be responsible for all injury to gas or water pipes and for all waste of gas or water due to the execution of the work. The contractor shall provide for the uninterrupted flow through all watercourses and drainage ways in the line of the work."

"The prices bid shall include . . . the relaying of all pavements and cross-walks, the protection and repairing of all gaspipes, water-pipes, sewers, drains and other conduits "

The contracts entered into by the board with the defendants ³⁹² Warren & Warren, in pursuance of these specifications and of their bids based thereon contained the following provision, in consonance with such specifications but going still further, viz.: "And the party of the second part (the contractor) further agrees that the prices above named shall include the cost of . . . the replacement of all watercourses and drains, the proper rearrangement and reconstruction of any drain, water-pipe, gaspipe, telegraph, telephone or electric light poles, or pipe or conduit of any nature or description which may be encountered and injured, or which may interfere with the line or grade of the work under this contract; also the maintaining of travel over any railroad or

street-car line which may be liable to obstruction by reason of said work, and the proper repairing of any injury to same."

Another rule well settled in the law of municipal corporations is that such a corporation, when it confines itself within the limits of its power and jurisdiction is not liable to an action for consequential damages to private property or persons (unless it be given by special constitutional provision or by statute) where the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable: 2 Dillon on Municipal Corporations, 4th ed., sec. 987 et seq. And while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water-pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced ³⁹³ to protect the public health, safety and convenience, notwithstanding the same may interfere with legal franchise rights. A water company placing its pipes in the streets under a franchise contract with the city does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets, whenever and wherever the public interest demands; and if in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursements on account thereof: McQuillin on Municipal Ordinances, sec. 521; National Water Works Co. v. City of Kansas, 28 Fed. 921; Kirby v. Citizens' Ry. Co., 48 Md. 168, 30 Am. Rep. 455; Elliott on Roads and Streets, sec. 476; New Orleans Gas Co. v. Drainage Com., 197 U. S. 453, 25 Sup. Ct. Rep. 471, 49 L. ed. 831. The city of Tampa was, therefore, not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the water-pipes, gaspipes, telegraph, telephone and electric light poles, drains or conduits or railway tracks that might necessarily have been interfered with in laying its sewers in the streets. And that these

contracts did indirectly undertake to cast such burden upon the city there can be no doubt, since the bidders for the work, being advised in advance that they would be required to bear the cost of such removal and replacement, would increase their bids sufficiently to cover such cost, thereby casting an unauthorized and illegal burden upon the taxpayers, and defeating the purpose and object of the law in having the contracts for such works awarded to the lowest responsible bidder. These provisions in these contracts, and in the specifications of the work upon which the bids for the contracts were submitted, requiring the contractors at their cost to remove³⁹⁴ and replace all water and gaspipes, telephone, telegraph and electric light poles, pipes, drains and conduits and all railway tracks that interfered with such sewers, go to the vitals of such contracts, and render them null and void upon their face; particularly is this true when the city is authorized by its charter to assess the cost of such work against the abutting property: *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 South. 678; *Colwell v. City of Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218. On the general subject see *Diamond v. City of Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448. That the complainant as a taxpayer in said city can properly maintain the bill filed to restrain the paying out of public moneys upon void and unauthorized contracts there can be no question: *Frame v. Felix*, 167 Pa. 47, 31 Atl. 375, 27 L. R. A. 802; *City of Blufton v. Miller*, 33 Ind. App. 521, 70 N. E. 989; *Peck v. Spencer*, 26 Fla. 23, 7 South. 642.

There are numerous other grounds of objection urged against the contracts involved herein, but as the objection discussed is fatal to the validity of such contracts it becomes unnecessary for us to pass upon the others.

It follows from what has been said that the circuit judge erred in denying the complainant's application for injunction. The order appealed from is, therefore, hereby reversed at the cost of the appellees and the cause remanded with directions to grant the injunction as prayed for in the bill.

Hocker and Parkhill, JJ., concur.

Shackleford, C. J., and Cockrell and Whitfield, JJ., concur in the opinion.

A Provision in a City Charter that Certain Contracts Shall be Let to the lowest responsible bidder is mandatory, and a compliance therewith is essential to the validity of such contracts: Inge v. Board of Public Works, 135 Ala. 187, 93 Am. St. Rep. 20; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931. See, however, Dillingham v. Spartanburg, 75 S. C. 549, 117 Am. St. Rep. 917.

Additional Stipulations Contained in a Municipal Contract awarded to one who is not the lowest responsible bidder, which were not embraced in the published notice for bidding, and which constitute a material charge, and therefore a departure from the basis of bidding, invalidate the contract: Inge v. Board of Public Works, 135 Ala. 187, 93 Am. St. Rep. 20. Compare Dillingham v. Spartanburg, 75 S. C. 549, 117 Am. St. Rep. 917.

BLUTHENTHAL v. JONES.

[51 Fla. 396, 41 South. 533.]

BANKRUPTCY—Discharge—Res Judicata.—A debt due to a creditor of a bankrupt, provable in bankruptcy proceedings, is barred by a discharge in bankruptcy granted upon notice to such creditor and without objection, although the bankrupt has been refused a discharge in bankruptcy in a former proceeding, on objection of the same creditor, and in respect to the same indebtedness, if the ground for such refusal does not appear, and the debt is one not excepted from the operation of the discharge by the terms of the bankruptcy statutes. (pp. 185, 186.)

H. K. Olliphant, for the appellants.

Wilson & Boswell, for the appellee.

³⁹⁷ **HOCKER, J.** On the 19th of June, 1905, the appellee as complainant filed his bill in the circuit court of Polk county against the appellants Bluthenthal & Bickart, alleging therein that on the 7th of August, 1900, the appellants recovered a judgment against him in the said court for seven hundred and thirty-one dollars and twenty-eight cents and six dollars and fifty-three cents costs, and an execution thereon issued and placed in the hands of the sheriff of said county; that said judgment was rendered upon an open account for goods, wares and merchandise sold and delivered to him by the said firm of Bluthenthal & Bickart; that on the 3d of August, 1903, complainant filed in the district court of the United States for the southern district of Florida, middle division, his petition in bankruptcy, and that among the claims or creditors of complainant scheduled and attached to this petition in bankruptcy was the said judgment of appellants, and that they received due notice of the filing of said petition; that after due notice to the creditors of complain-

ant, including Bluthenthal & Bickart, said petition came on to be heard, and on the ——— ³⁹⁸ day of ———, 1903, the complainant was adjudged a bankrupt under the acts of Congress relating to bankruptcy, and within the time required by law he filed his application for final discharge, notice being given to the creditors, including appellants, and on the 7th of November, 1903, complainant was discharged from all debts and claims, including that of appellants, which existed on the 3d of August, 1903, excepting such debts as were by law excepted from the operation of a discharge in bankruptcy, as will more fully appear by a copy of the order attached to the bill, and that the claim of Bluthenthal & Bickart was a provable debt against appellant's estate and did not come under any of the exceptions of the law relating to bankruptcy. The bill alleges that since the 7th of November, 1903, the date of his discharge, complainant has acquired title to certain real estate, describing it, and that appellants have caused an alias execution to be issued upon their judgment, and the sheriff levied the same on the described lands on the 19th of May, 1905, as the property of complainant, and that said lands are now being advertised for sale under said execution, to be sold on the first Monday in July, 1905, for the alleged purpose of satisfying said execution and costs. The bill alleges that said lands are not subject to levy and sale under said execution by reason of complainant's discharge, and that if Bluthenthal & Bickart are permitted to continue said proceeding and sell said lands under said execution, a cloud will be cast on the title, and complainant will be put to annoyance and expense in having same removed. The bill alleges that complainant is without remedy save in equity, and prays an injunction against said sale and general relief. The copy of the order of discharge in bankruptcy is as follows:

³⁹⁹ "THE UNITED STATES OF AMERICA.

"In the District Court of the United States, for the Southern District of Florida, Middle Division.

"In the Matter of MILES C. JONES, Bankrupt—No. 223.

"In Bankruptcy.

"Southern District of Florida,—ss.

"Whereas, Miles C. Jones of Polk, in said district, has been duly adjudged a bankrupt under the acts of Congress relating

to bankruptcy, and appear to have conformed to all the requirements of law in that behalf; it is therefore ordered by this court that said Miles C. Jones be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the third day of August, A. D. 1903, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

"Witness the Honorable James W. Locke, judge of said district court, and the seal thereof, this seventh day of November, A. D. 1903.

"(Seal of Court.)

EUGENE O. LOCKE,

"Clerk."

The defendants below, appellants here, answered the bill. They admit the bankruptcy proceedings, and discharge of complainant as alleged in the bill, that whether or not their judgment was scheduled in said proceedings, they only know as alleged in the bill, as they had nothing to do with the said proceedings as to scheduling said debt or judgment; that they did not participate in any way in said proceedings or prove their judgment, or ask any benefit of said proceedings. They admit notice of his application for a discharge. They deny that their debt or judgment was in any way affected or discharged by reason of the discharge of complainant which he obtained in Florida. They admit that complainant ostensibly acquired for a nominal consideration the lands as described by quitclaim ⁴⁰⁰ deed shortly after his discharge, as shown by the records of Polk county. They admit that they levied on them as alleged. The answer then alleges that in the year 1900 complainant was a resident of Georgia, and there began bankruptcy proceedings in said state in the district court of the United States for the southern district of Georgia, and that they participated in said proceedings, being then creditors upon the same cause of action upon which they obtained their judgment against complainant in Florida, as alleged in the bill; that when complainant applied for a discharge in the proceedings in Georgia, they resisted it, and the court refused, and the order refusing it is attached to the answer, and made a part of it. The answer then alleges that as they did not participate in the subsequent bankruptcy proceedings in Florida, that their debt or judgment against the complainant was in no manner affected by the discharge in bankruptcy obtained

in Florida, and that the lands levied on are subject to their execution.

The order refusing the discharge in the United States court in Georgia, is as follows:

"In the District Court of the United States for the Western Division of the Southern District of Georgia.

"In re M. C. JONES, Bankrupt.

"In Bankruptcy.

"OBJECTIONS TO DISCHARGE.

"Upon considering the objections to the discharge of the bankrupt filed in the above matter by Bluthenthal & Bickart, and the evidence in support thereof, it is ordered that said objections be sustained and said application for discharge be denied and refused. This December 3d, 1900.

"EMORY SPEER,
"Judge."

The foregoing contains the substance of the bill and answer.

401 The cause was set down for hearing and heard on bill and answer, no replication having been filed. The chancellor decreed that the lands of complainant were not subject to levy and sale under the judgment and execution of the defendants, and enjoined them from selling or attempting to sell thereunder. From this decree the defendants appealed to this court.

The only question here is one of law. The contention of the appellants Bluthenthal & Bickart is that because they participated in the bankruptcy proceeding in the United States court in Georgia, in the year 1900, and proved their account against Jones in that proceeding, and resisted his discharge there, that the order of the United States district judge refusing to grant him a discharge rendered their claim "res adjudicata," and that as they did not participate in the bankruptcy proceedings in the United States district court of Florida in 1903, the order of the district judge in the last proceeding, discharging Jones from his debts, did not apply to their claim or judgment. We have examined all the decisions referred to in the able briefs of the respective parties, but no one of these authorities present facts which are analogous to the one at bar. Neither have we been able to find an analogous case in our library. The case of *In re Drisko*, 2 Low.

430, Fed. Cas. No. 4090, cited by appellants, turned largely upon the construction of the bankruptcy law in force in the year 1875, and there too the question of the effect of a previous refusal to discharge the bankrupt was raised in the second proceeding ⁴⁰² by a creditor, and in that second proceeding the effect of the former action was adjudicated.

In the case of *Kuntz v. Young*, 65 C. C. A. 477, 131 Fed. 719, it was held that "a failure of the bankrupt to apply in due time for, or a refusal by the court to grant, a discharge from debts provable in proceedings under one petition in bankruptcy, renders the question of the right of the bankrupt to a discharge from those debts in a proceeding under a subsequent petition *res adjudicata*." But in this case both petitions were filed in the same district court and the question of the right to a discharge seems to have been raised by the report of the trustee showing all the facts. The district court itself passed on the question of the effect of the second petition, and dismissed it.

In the case of *In re Fiegenbaum*, 57 C. C. A. 409, 121 Fed. 69, the question of the bankrupt's right to a discharge under a second petition, he having been denied a discharge in the first, was also raised in and determined by the court in which the second question was pending.

In the case of *In re Hermann*, 102 Fed. 753, the question presented was whether one who had been refused a discharge under the bankruptcy law of 1867 was debarred by the bankruptcy law of 1898 from obtaining a discharge under the last act, embracing debts proven against him under the first. The court held he was not barred. In this case also, the question of the effect of the discharge was raised by creditors in the United States district court which was asked to grant the discharge. The Massachusetts cases turn somewhat on the insolvency laws of Massachusetts, and we think it unnecessary to review them at length.

It appears from all the decisions we have seen that the question here raised is one of *res adjudicata*; that is to say, whether when a debt was proved under the first ⁴⁰³ bankruptcy proceeding, and a discharge refused in that proceeding, the right to a discharge from this debt was thereby settled and adjudicated, and could not be affected by the second proceeding. We are of opinion that such a question was one which the creditor himself should have raised in the second proceeding in bankruptcy in the United States district court,

and that court then having jurisdiction of the whole matter should have been requested to adjudicate the effect of the proceeding and of the general discharge which it granted. It will be observed that the record does not show why the discharge was refused in the first proceeding, nor does it show that the debt in this case comes within any of the exceptions of section 17 of the bankrupt act approved July 1, 1898; nor is it contended here that it does. Bluthenthal & Bickart were notified of the last proceeding in bankruptcy, refused to participate in any way in it, and to raise the question of *res adjudicata* in the said proceeding. It is true that a discharge in bankruptcy is general in its terms, and its effect is generally left to be determined by the court where it is pleaded. But we do not think that in a case like the one at bar it would be prudent or proper for this court to do more, in giving effect to a discharge, than to determine whether the debt was embraced in the exceptions of the statute, leaving all other questions to be determined by the federal courts, where they properly belong.

The decree appealed from is affirmed at the cost of appellants.

Taylor and Parkhill, JJ., concur.

Cockrell and Whitfield, JJ., concur in the opinion.

Shackleford, C. J., disqualified.

The Principal Case was carried by writ of error to the supreme court of the United States and there affirmed: See *Bluthenthal v. Jones*, 28 Sup. Ct. Rep. 192. Mr. Justice Moody delivered the opinion of the court as follows:

"This is a writ of error to the supreme court of the state of Florida. The plaintiffs in error were judgment creditors of Miles C. Jones, the intestate of the defendant in error. The creditors sought to enforce the judgment by a levy of execution. The question in the case is whether Jones was discharged from the debt by a discharge in bankruptcy granted to him on November 7, 1903, by the district court for the southern district of Florida, on proceedings which were begun on August 3, 1903. The debt was one provable in the bankruptcy proceeding, and, it is conceded, would be barred by the discharge, were it not that there had been a prior proceeding in bankruptcy in another district court, which, it is contended, had the effect of exempting the debt from the operation of the discharge. In the year 1900, Jones filed his petition in bankruptcy in the district court

for the southern district of Georgia. Bluthenthal & Bickart, the plaintiffs in error, objected to the discharge in that proceeding, and it was refused on December 3, 1900. Bluthenthal & Bickart, at the time of the first proceeding, were creditors of Jones in respect of what may be assumed, for the purposes of this case, to be the same indebtedness now in question. The ground of the refusal does not appear. It may be assumed to have been, however, one of the two grounds specified in section 14 of the bankruptcy act (30 Stats. at Large, 550, c. 541; U. S. Comp. Stats. 1901, p. 3427) before it was amended by the act of February 5, 1903 (32 Stats. at Large, 797, c. 487; U. S. Comp. Stats. Supp. 1907, p. 1026); that is to say, either that the bankrupt has committed an offense punishable by imprisonment, or, with fraudulent intent and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of accounts. Though Bluthenthal & Bickart were notified of the proceedings on the second petition for bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings.

"Section 1 of the bankruptcy act defines a discharge as 'the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act.' Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless he has committed one of the six acts specified in that section. Section 17 of the amended act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with four specified exceptions, which do not cover this case. The discharge appears to have been regularly granted, and, as the debt due to Bluthenthal & Bickart is not one of the debts which, by the terms of the statute, are excepted from its operation, on the face of the statute the bankrupt was discharged from the debt due to them. There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the district court for the southern district of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified

in section 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection.

"Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the district court of Florida, and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge. The supreme court of the state of Florida so held, and its judgment must be affirmed."

ALLEN v. STATE.

[52 Fla. 1, 41 South. 593.]

CRIMINAL LAW—Former Jeopardy—Improper Discharge of Jury.—The silence of a person on trial, accused of crime, or his failure to object or protest against an unlawful discharge of the jury before verdict, does not constitute a consent or waiver of such discharge, or of his constitutional right not to be put twice in jeopardy for the same offense. (p. 189.)

CRIMINAL LAW—Former Jeopardy—Wrongful Discharge of Jury.—The power of the court to discharge a jury after it has been sworn in chief, before verdict, should be exercised only in case of a manifest, urgent, or absolute necessity, and if the jury is discharged for a reason illegally insufficient and without an absolute necessity for it, and without the defendant's consent, the discharge is equivalent to an acquittal, and may be pleaded in bar to any further trial, or to any subsequent indictment. (p. 190.)

CRIMINAL LAW—Former Jeopardy.—A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is thus charged when it has been impaneled and sworn. (p. 190.)

G. C. Bedell, for the plaintiff in error.

W. H. Ellis, attorney general, for the state.

² TAYLOR, J. The plaintiff in error as defendant below was informed against in the criminal court of record for

Duval county for the crime of forgery, was tried, convicted and sentenced, and seeks relief here by writ of error.

On March 7, 1906, the defendant was arraigned and entered a plea of not guilty, whereupon a panel of six jurors were examined on their voir dire, and were challenged for cause both to the array and individually, which challenges were overruled by the court and a complete jury of six was sworn in chief to well and truly try and true deliverance make between the state of Florida and the defendant. Thereupon the defendant's counsel called the attention of the court to the fact that one of the witnesses named Harrison indorsed on the back of the information as a state witness was also a witness for the defense, and that such witness, who lived a few miles out from Jacksonville, where the trial was proceeding, was absent from the courtroom, and moved for time to get said witness. The court then ordered the facts so stated to be set forth in the form of an affidavit. The county solicitor thereupon moved the court that the jury be discharged from further consideration of the case, and that said cause be continued * until the 16th of March. This motion of the county solicitor was granted by the court and the jury discharged.

On March 21, 1906, when the cause was again called for trial, the defendant, by leave of the court, withdrew his plea of not guilty and interposed a plea of former jeopardy, setting up the former proceedings above recited. To this plea the state interposed a demurrer, which demurrer was sustained by the court, upon which the defendant was put to trial before another jury, who returned the verdict of conviction to which the writ of error is addressed. The order sustaining the demurrer of the state to the defendant's plea of former jeopardy is assigned as error.

In this ruling the court below erred. The discharge of the former jury who had been charged with the defendant's case upon the arbitrary motion of the state's solicitor without any necessity or legal reason therefor, and without the consent of the defendant, amounted to an acquittal for the defendant, and his plea of former jeopardy should have been sustained, the state's demurrer thereto overruled, and the defendant discharged without delay. It is true that the defendant had asked the court for time to procure the attendance of an absent witness who resided a few miles from the court, but he did not ask for a continuance of the cause or for a discharge of the jury, and an arbitrary discharge of the jury under

these circumstances without his consent amounted to his acquittal. His silence or failure to object or protest against the discharge of the jury did not constitute a consent or a waiver of his constitutional right: *State v. Richardson*, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238. The power of the court to discharge a jury who have been sworn in chief before verdict should be exercised only in case of a manifest, urgent, or absolute necessity. If the ⁴ jury are discharged for a reason legally insufficient and without an absolute necessity for it, and without the defendant's consent, the discharge is equivalent to an acquittal, and may be pleaded as a bar to any further trial or to any subsequent indictment: 12 Cyc. Law & Proc., p. 270, and citations; *Grant v. People*, 4 Park. Cr. Rep. 527; *State v. Wamire*, 16 Ind. 357; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Helm v. State*, 66 Miss. 537, 6 South. 322; *State v. McKee*, 1 Bail. (S. C.) 651, 21 Am. Dec. 499, and cases cited in notes; Cooley's Constitutional Limitations, 7th ed., p. 467, where this great author says: "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn": 1 Bishop's New Criminal Law, secs. 1013, 1014 et seq.; *State v. Robinson*, 46 La. Ann. 769, 15 South. 146; *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Ex parte Clements*, 50 Ala. 459; *Bell v. State*, 44 Ala. 393; *Ex parte Maxwell*, 11 Nev. 428; *Commonwealth v. Fitzpatrick*, 121 Pa. 109, 6 Am. St. Rep. 757, 15 Atl. 466, 1 L. R. A. 451; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *Miller v. State*, 8 Ind. 325; *McCorkle v. State*, 14 Ind. 39; *State v. Callendine*, 8 Iowa, 286; *Hines v. State*, 24 Ohio St. 134.

Many other errors are assigned and argued, but as the error found completely disposes of the case, it becomes unnecessary to notice any other assignment. The judgment of the court below is hereby reversed with directions to overrule the state's demurrer to the defendant's plea of former jeopardy and to discharge the defendant without day at the cost of Duval county.

An Accused is in Jeopardy when a jury is impaneled and sworn to try him; and if the jury is unnecessarily or improperly discharged

without his consent, it has been affirmed that he cannot again be put on trial for the same offense: *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213; *State v. Nelson*, 19 R. I. 467, 61 Am. St. Rep. 780, and see the cases cited in the cross-reference note thereto.

EX PARTE KNIGHT.

[52 Fla. 144, 41 South. 786.]

HABEAS CORPUS to Test Validity of Statute.—The writ of habeas corpus cannot be used to review a judgment of conviction under which a prisoner is held if the judgment is merely erroneous, but if the judgment is assailed on the ground that it is void because it is based on a charge made under an invalid provision of a statute, and the charge constitutes no offense under the law of the state, the validity of the provision of the statute defining the offense may be determined on habeas corpus. (pp. 192, 193.)

CONSTITUTIONAL LAW—Title of Acts—Subject Matter.—The effect of a constitutional requirement that "each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title," is to render inoperative any provisions contained in the body of an act that is not fairly included in the subject expressed in the title, or not matter germane to, or properly connected with, that subject. (p. 193.)

CONSTITUTIONAL LAW—Title to Acts—Subject Matter.—Under a constitutional requirement that the subject matter of a statute must be briefly expressed in the title, only such provisions can validly be incorporated in the body of an act as are fairly included in one subject and matter properly connected therewith, which subject is the one that is expressed in the title of the act, and may be as restrictive as the legislature desires to make it. (p. 193.)

CONSTITUTIONAL LAW—Restricted Title to Act—Subject Matter.—When the subject expressed in the title to a legislative act is restricted, only those provisions that are fairly included in such restricted subject and matter properly connected therewith can legally be incorporated in the body of the act, even though other provisions besides those contained in the act could have been included in one act having a single broader subject expressed in its title. (p. 193.)

CONSTITUTIONAL LAW—Title and Subject Matter of Statutes—Interpretation.—In determining whether provisions in an act are embraced in one subject and matter properly connected therewith, the subject to be considered is the one expressed in the title of the act, and every fair intendment and reasonable doubt should be yielded in favor of the validity of the act, but when it contains provisions which, after yielding all fair intendments and reasonable doubts, are clearly not embraced in the subject matter of the act, as expressed in the title or in matter properly connected with that subject, such provisions are inoperative and without effect. (p. 193.)

CONSTITUTIONAL LAW—Title and Subject Matter of Statutes.—If the subject of a legislative act as expressed in its title is restricted to the subject of preventing "the cutting or moving of

any timber" from certain lands, a provision in such act to prevent "the gathering or removing any turpentine extracted from the pine timber so cut or boxed" on such lands cannot be said to be fairly included in the subject of the act as expressed in its title and matter properly connected therewith, and it is inoperative and void. (p. 195.)

HABEAS CORPUS—Void Statute.—If a statute on which a charge of crime is made is inoperative and void, a judgment of conviction thereon is void, and persons held in custody under such judgment are entitled to be discharged on habeas corpus. (p. 196.)

R. McConathy and H. M. Hampton, for the petitioners.

W. H. Ellis, attorney general, and E. W. Davis, for the state.

¹⁴⁶ **WHITFIELD, J.** A petition for a writ of habeas corpus was presented to one of the justices of this court, in which it is alleged, in substance, that the petitioners were convicted in the court of the county judge of Citrus county, Florida, upon a charge that Robert J. Knight and W. C. Knight, not being the owners of certain described lands in Citrus county that had been sold for taxes and had not been redeemed, did "cause and procure divers persons . . . to enter said lands and gather and remove turpentine extracted from the pine timber standing and growing thereon"; that upon appeal in a trial de novo the petitioners were likewise convicted in the circuit court for Citrus county, and a judgment of conviction was entered against them imposing a fine of two hundred and fifty dollars each, or imprisonment for six months; that said last trial and judgment are final and the petitioners are being restrained of their liberty thereunder, without due process of law, in that the court was wholly without jurisdiction, since the charge under which they were convicted is not a crime under any valid law of this state. The writ of habeas corpus was issued by the justice as prayed for, and made returnable before the supreme court.

It is claimed that the charge under which the convictions were held is not an offense under the laws of this state, because that portion of the act on which the charge is founded is invalid in that it is not embraced in the subject expressed in the title of the act, and is not matter properly connected therewith.

While the writ of habeas corpus cannot be used to review a judgment of conviction under which a prisoner is held, if the judgment is merely erroneous, yet if the judgment is as-

sailed on the ground that it is void because it is based on a charge made under an invalid provision of a ¹⁴⁷ statute, and the charge constitutes no offense under the laws of the state, the validity of the provision of the statute defining the offense may be determined on habeas corpus: See *Ex parte Bowen*, 25 Fla. 214, 6 South. 65; *Ex parte Hays*, 25 Fla. 279, 6 South. 64; *Bronk v. State*, 43 Fla. 461, 99 Am. St. Rep. 119, 31 South. 248.

Section 16 of article 3 of the constitution ordains that "each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

The purpose and effect of this constitutional requirement is to render inoperative any provision contained in the body of an act that is not fairly included in the subject expressed in the title, or that is not matter germane to or properly connected with that subject. Only such provisions can validly be incorporated in the body of an act as are fairly included in one subject and matter properly connected therewith. The subject is one that is expressed in the title of the act; and such subject may be as restrictive as the legislature desires to make it. When the subject expressed in the title is restricted, only those provisions that are fairly included in such restricted subject and matter properly connected therewith can legally be incorporated in the body of the act, even though other provisions besides those contained in the act could have been included in one act having a single broader subject expressed in its title: See *State v. Palmes*, 23 Fla. 620, 3 South. 171; *Holton v. State*, 28 Fla. 303, 9 South. 716; *Webster v. Powell*, 36 Fla. 703, 18 South. 441; *Wade v. Atlantic Lumber Company*, 51 Fla. 628, 41 South. 72; *Grover v. Trustees*, 45 N. J. L. 339; *Lewis' Sutherland on Statutory Construction*, sec. 120.

In determining whether provisions contained in an act are embraced in one subject and matter properly connected ¹⁴⁸ therewith, the subject to be considered is the one expressed in the title of the act, and every fair intendment and reasonable doubt should be yielded in favor of the validity of the legislative enactments: *State v. Bryan*, 50 Fla. 293, 39 South. 929; but when an act contains provisions, which, after yielding all fair intendments and reasonable doubts, are clearly not embraced in the subject of the act, as expressed in the title or in matter properly connected with that subject, such provisions are inoperative and without effect: See *Carr*

v. Thomas, 18 Fla. 736; Wade v. Atlantic Lumber Co., 51 Fla. 628, 41 South. 72; State v. Palmes, 23 Fla. 620, 3 South. 171.

The charge upon which the petitioners were convicted was made under chapter 4416, acts of 1895, which is as follows:

"An Act to Prevent the Cutting or Removing of any Timber from Lands Heretofore or that may Hereafter be Sold for Taxes.

"Be it enacted by the legislature of the state of Florida:

"Section 1. If any person shall cut or cause or procure to be cut or aid, assist or be employed in cutting any cedar, juniper, cypress, oak, pine, palmetto or other timber standing, growing or being on any lands that have heretofore been sold or may hereafter be sold for taxes, before the lands are redeemed or a tax deed issued for the same; or if any person shall remove or cause or procure to be removed, or aid or assist, or be employed in removing from any of such lands any cedar, juniper, cypress, oak, pine, palmetto or other timber; or if any person shall cut or box or cause or procure to be cut or boxed, or aid, assist or be employed in cutting or boxing any pine timber on said lands for the purpose of extracting and gathering the turpentine therefrom, or shall gather or remove or cause to be gathered or ¹⁴⁹ removed, or aid, assist or be employed in gathering or removing any turpentine extracted from the pine timber so cut or boxed; or if any person shall in any way by cutting, felling, girdling or otherwise destroy or injure any timber standing, growing or being upon said lands, he shall for every such offense be deemed and held to be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars; provided, however, this act shall not apply to the owner or owners of said lands at the time the lands were sold for taxes."

This is a penal statute and should be strictly construed: Ex parte Bailey, 39 Fla. 734, 23 South. 552; Lewis' Sutherland on Statutory Construction, sec. 521. The title is a part of the act and should be construed as such in determining the subject designed to be regulated by the act: See State v. Green, 36 Fla. 154, 18 South. 334.

This act in its body defines several distinct offenses and seeks by a prescribed penalty to prevent (1) the cutting of timber standing, growing or being on any lands sold for taxes before the lands are redeemed or a tax deed is issued for the same; (2) the removing from such lands of any tim-

ber; (3) the cutting or boxing of any pine timber on such lands for the purpose of extracting and gathering the turpentine therefrom; (4) the removing of any turpentine extracted from the pine timber so cut or boxed; (5) the destroying and injuring of any such timber.

The convictions in this case were had upon a charge that the petitioner did "cause and procure divers persons to enter" certain lands "and gather and remove turpentine extracted from the pine timber standing and growing thereon." This charge is based upon the provision of the act set out above, that "if any person ¹⁵⁰ shall cause to be gathered or removed any turpentine extracted from the pine timber so cut or boxed," on certain lands, "he shall be deemed and held to be guilty of a misdemeanor," etc. The question to be determined is whether or not the provision of chapter 4416, on which the charge was based, is included in the subject expressed in the title of the act or matter properly connected therewith so as to validly define the offense.

The subject of the act here considered, as expressed in the title, is restricted to enactments "to prevent the cutting or removing of any timber" from certain lands, and any provisions contained in the body of the act that are fairly included in this restricted subject or matter properly connected therewith, are valid and operative. But if any provision contained in the body of the act is not fairly included in this restricted subject, to wit: "To prevent the cutting or removing of any timber," and is not matter properly connected therewith, such provision is invalid and inoperative. Penal provisions designed "to prevent the cutting or removing of any timber" on certain lands are included within the restricted subject of this act; but a penal provision designed to prevent the "gathering or removing any turpentine extracted from the pine timber so cut or boxed" on the lands cannot be fairly included within such subject and matter properly connected therewith: See *State v. Fields*, 68 S. C. 148, 46 S. E. 771; *Harris v. State*, 110 Ga. 887, 36 S. E. 232; *State v. Great Western Coffee & Tea Co.*, 171 Mo. 634, 94 Am. St. Rep. 802, 71 S. W. 1011; *State v. Silver*, 9 Nev. 227.

As the provision prescribing a penalty for "gathering or removing any turpentine extracted from the pine timber" is not included in the restricted subject, to wit, "to prevent the cutting or removing of any timber" from certain lands, as expressed in the title, and is not matter properly ¹⁵¹ con-

nected with such subject, the provision is inoperative and of no effect.

The provisions of the act on which the charge was founded being invalid and the charge constituting no offense, the judgment of conviction based upon the charge is void, and the persons held in custody under such judgment are entitled to be discharged.

The petitioners will be discharged from custody.

Shackleford, C. J., and Taylor, Cockrell, Hocker and Parkhill, JJ., concur.

The Writ of Habeas Corpus can be used to attack the constitutionality of a statute or ordinance: *Ex parte Kair*, 28 Nev. 127, 113 Am. St. Rep. 817; *Ex parte Lewis*, 45 Tex. Cr. Rep. 1, 108 Am. St. Rep. 929; note to *Koespe v. Hill*, 87 Am. St. Rep. 174; although some courts have thought otherwise: *People v. District Court*, 33 Colo. 328, 108 Am. St. Rep. 98.

The Sufficiency of the Titles to Statutes within the requirements of the constitution is discussed at length in the notes to *Crookson v. County Commissioners*, 79 Am. St. Rep. 456; *Lewis v. Dunne*, 86 Am. St. Rep. 267; *Bobel v. People*, 64 Am. St. Rep. 70.

BOARD OF COUNTY COMMISSIONERS v. BOARD OF PILOT COMMISSIONERS.

[52 Fla. 197, 42 South. 697.]

CONSTITUTIONAL LAW—Taxation for County Purposes.—Legislative authority to a county to pay out for other than county purposes money derived from taxes assessed and imposed by a county is in conflict with a constitutional provision that "the legislature shall authorize the several counties in the state to assess and impose taxes for county purposes, and for no other purposes." (p. 199.)

CONSTITUTIONAL LAW—Construction of Statutes.—It is the duty of courts to construe statutes with reference to the constitution, and if that is clearly violated by a provision of a statute, such provision must be declared inoperative; but if the provision is not clearly in conflict with the constitution, or if there is a well-founded or reasonable doubt as to the constitutionality of the provision, the legislative will as expressed therein will be sustained. (p. 199.)

CONSTITUTIONAL LAW—Expenditures for County Purposes. Whether an expenditure to be made from the funds derived by a county from taxes assessed and imposed by it by virtue of legislation under the constitution is or is not for a county purpose, is to be determined by the courts from the facts of the case, but when an expenditure is authorized by the legislature as being a county purpose, the courts will not interfere except in cases free from all reasonable doubt. (p. 199.)

CONSTITUTIONAL LAW—Expenditures for County Purposes.—If a county purpose has been designated by a statute which directs that the expenses incurred by certain officers for the protection of ports, harbors, bays, and rivers within the county, shall be audited and paid, this designation of a county purpose will, in deference to the legislative department, be recognized and enforced by the courts unless it clearly appears that it is not a county purpose within the meaning of the constitution. (pp. 199, 200.)

COUNTIES—Expenditures by.—If the payment demanded of a county is for a county purpose, the particular officers engaged and methods used under a statute in incurring the expenditure do not affect its character. (p. 200.)

COUNTIES—Protection of Harbors.—It is competent for the state, acting through the counties, to protect the ports, harbors, bays and rivers therein, if the control of the general government within its sphere is not thereby interfered with. (p. 200.)

COUNTIES—Burden of Protecting Harbors.—When a port or harbor is within a county, it is competent for the legislature to impose upon the county the burden of protecting it. (pp. 200, 201.)

COUNTIES—Supervision Over Harbors.—If, under a constitution, the powers and duties of county commissioners are prescribed by statute, and the statute does not give them exclusive police or other supervision over the ports or harbors of the state, the legislature may provide for the exercise of such powers within a county by officials other than the county commissioners. (p. 201.)

CONSTITUTIONAL LAW—County Expenditures.—The constitution does not require that the legislature shall impose a limitation upon expenditures incurred for county purposes, and in the absence of such a limitation the legislature has plenary power within proper county purposes. (p. 201.)

COUNTIES—Protection of Harbors.—The fact that the greater part of a harbor is within the corporate limits of a city, and under the protection of the police department thereof, does not relieve the county of its powers and duties with reference to the protection of such harbor within its territory. (p. 202.)

COUNTIES—Protection of Harbors.—Even if a harbor lies within the corporate limits of more than one county, and is under the police protection of both counties, the state is not thereby precluded from providing for the protection of the portion of the harbor within one of such counties at the expense thereof. (p. 202.)

COUNTIES—Expenditures by—Mandamus to Enforce.—If an expenditure by a county is authorized by a valid law, and the correctness of the amount due by the county is ascertained and approved as the law directs, there being no question as to bona fides, it is the duty of the county commissioners to audit, approve, and pay the same, and such payment may be enforced by mandamus. (pp. 202, 203.)

Appeal from a judgment directing a writ of mandamus to issue.

R. P. Reese, for the plaintiffs in error.

Blount & Blount, for the defendants in error.

209 **WHITFIELD, J.** Section 5 of article 9 of the constitution ordains that "the legislature shall authorize the several counties in the state to assess and impose taxes for county purposes, and for no other purposes."

Section 5 of article 8 of the constitution as amended in 1899 provides that "The powers, duties and compensation of county commissioners shall be prescribed by law."

Section 578 of the Revised Statutes makes it the duty of the county commissioners to "maintain any highway in their respective counties" and "to approve all accounts against the counties." Other sections provide that the county commissioners shall issue warrants on the county treasurer to pay claims against the county from county funds in his hands.

Section 438 of the Revised Statutes as amended by chapter 4171, acts of 1893, provides that "The governor, by and with the advice and consent of the Senate, shall appoint a board of pilot commissioners for each port in this state, to consist of five members, who shall have their offices for four years, unless sooner removed by the governor; the said board is to consist of citizens of said ²¹⁰ port, and the said commissioners shall be empowered to act as port wardens and to perform all the duties of the same. They shall take the usual oath of office."

Section 936 of the Revised Statutes of 1892, as amended by chapter 4370, acts of 1895, provides that "It shall not be lawful for any person to discharge or cause to be discharged, deposit or cause to be deposited, in the tide or salt waters of any bay, port, harbor or river of this state any ballast or material of any kind other than clear stone or rock free from gravel or pebbles, which said clear stone or rock shall be deposited or discharged only in the construction of inclosures in connection with wharves, piers, jetties, or in the construction of permanent bulkheads connecting the solid and permanent portions of wharves."

Section 950 of the Revised Statutes provides that "The board of pilot commissioners of each port shall take such steps as may be necessary to detect any violation in their port or waters within their jurisdiction of the laws for the protection of ports, harbors, bays and rivers; and they shall cause complaint to be made for the arrest of every offender against such laws. And the county commissioners of the county in which such pilot commissioners are appointed shall

audit and pay the expenses of the board of pilot commissioners, which shall be incurred under this section, as other charges against the county are audited and paid."

It is urged that the expenses incurred by the board of pilot commissioners under section 950 of the Revised Statutes in detecting violations of the laws for the protection of ports, harbors, bays and rivers are not for a county purpose and are therefore not a valid charge ²¹¹ upon the county; and that the requirements of said section that the county commissioners shall audit and pay such expenses as other charges against the county are audited and paid, is not valid because the expenses are those incurred by the board of pilot commissioners in the exercise of powers belonging solely to the county commissioners, and because no provision is made by the act for the estimate of such expenses to be submitted to the county commissioners by the board of pilot commissioners.

Under section 5 of article 9 of the constitution, the legislature cannot authorize the counties to assess and impose taxes except for county purposes; and legislative direction to pay out for other than county purposes money derived from taxes assessed and imposed by a county would be in conflict with the manifest purpose and intention of the mentioned constitutional provision. It is the duty of the courts to construe legislative acts with reference to the constitution, and if the constitution is clearly violated by a provision of a statute such provision should be declared inoperative; but if the provision is not clearly in conflict with the constitution, or if there is a well-founded or reasonable doubt as to the constitutionality of the provision the legislative will as expressed therein should be sustained. Whether an expenditure demanded as to be made from the funds derived by a county from taxes assessed and imposed by it by virtue of legislation under the constitution, is or is not for a county purpose, is to be determined by the courts from the facts and circumstances of each particular case; but when an expenditure is authorized by the legislature as being a county purpose, the courts will not interfere except in cases free from all reasonable doubt. When a county purpose ²¹² has been designated by a statute which directs that expenses incurred by certain officers for the protection of ports, harbors, bays and rivers within the county, shall be audited and paid by the county commissioners as other charges against the county are audited and paid, such designation of a county purpose will, in defer-

ence to the legislative department, be recognized and enforced by the courts unless it clearly appears that it is not a county purpose within the meaning of the constitution. If the payment demanded of a county is for a county purpose, the particular officers engaged and methods used under a statute in incurring the expenditure do not affect its character as a county purpose. A river, harbor or bay of a port is a public highway, useful to the people of the county in which it is situated for the purposes of navigation and commerce. The depth of the water therein is one of the chief elements of its value, and its protection from injury of being filled in is within the purposes for which county governments are established, even though the harbor or bay be also and largely used for passage to and from, and commerce with, points beyond the county. It is competent for the state acting through the counties to protect the ports, harbors, bays and rivers herein if the control of the general government within its sphere is not thereby interfered with: See *Cotton v. County Commrs. of Leon County*, 6 Fla. 610; *Stockton v. Powell*, 29 Fla. 1, 10 South. 688, 15 L. R. A. 42; *County Commissioners of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416; *Skinner v. Henderson*, 26 Fla. 121, 7 South. 464, 8 L. R. A. 55; *President and Commissioners, etc. v. State*, 45 Ala. 399.

The alternative writ alleges that the board of pilot commissioners for the port of Pensacola, Florida, has ²¹⁸ from time to time been informed that the harbor of Pensacola is being shoaled and destroyed by the deposition therein by steamships, vessels and individuals, of ashes and ballast and other materials; that said board under section 950 of the Revised Statutes of Florida employed one harbor policeman to detect any and all violations in the port of Pensacola and the waters thereof of section 936 of the Revised Statutes. That section makes it unlawful for any person to discharge or cause to be discharged, deposit or cause to be deposited, in the tide or salt waters of any bay, port, harbor or river in the state, any ballast or material of any kind other than clear stone or rock free from gravel or pebbles used under authority of law for improving the harbor.

It is clearly within the power of the state to make provision for the protection of its ports and harbors by preventing the filling in of waters used for navigation and commerce, and it may do this through officers of the county or

otherwise. When such port or harbor is within a county it is competent for the legislature to impose upon the county the burden of protecting such harbor or port, since it affords a means of carriage and commerce, useful to the people of the county, and is within the purposes for which county governments are established. The fact that the protection is to be had under the direction and control of officers other than the county commissioners does not affect its character as a county purpose. Under the constitution the powers and duties of the county commissioners are prescribed by statute. The statute does not give them exclusive police or other supervision over the ports or harbors of the state and the legislature may provide for the exercise of such powers within a county by officials other than the county commissioners. The ²¹⁴ board of pilot commissioners are given no power to assess or impose taxes or to pay out county funds, but only to supervise the protection of the harbors, the expenses of which are to be paid by the county commissioners from county funds.

The constitution does not require that the legislature shall impose a limitation upon expenditures incurred for county purposes, and in the absence of such a limitation the legislature has plenary power within proper county purposes: See Board of Supervisors of Sangamon County v. City of Springfield, 63 Ill. 66.

The respondents urge that the demand is not a proper charge against the county, (1) because there was no necessity for the employment of the harbor policeman, for the reason that the United States government had charge of the harbor or port of Pensacola, and through its officers furnish patrol and protection of said harbor from violations of the laws of the United States for the protection of harbors; (2) because the greater part of the harbor of Pensacola is within the city of Pensacola and under its police protection; (3) because the harbor of Pensacola is within Escambia and Santa Rosa counties and under their police protection; and further that the county commissioners have exercised their best judgment and discretion in refusing payment, the port or harbor being in Escambia and Santa Rosa counties and the expense having been incurred by the board of pilot commissioners composed of citizens of Escambia and Santa Rosa counties without including Santa Rosa county in the liability, and no crime

is alleged to have been detected or prosecution begun as the result of the service rendered.

The statute requires the board of pilot commissioners to take such steps as may be necessary to detect any violation ²¹⁵ of the laws for the protection of ports, harbors, bays and rivers, and the county commissioners are required to audit and pay the expenses so incurred as other charges against the county are audited and paid. Under this statute the necessity for incurring expenses in detecting any violations of the law for the protection of ports, harbors, bays and rivers is to be determined by the board of pilot commissioners, and no duty with reference to it is imposed upon the county commissioners except that of auditing and paying for such expenses. The statute gives no warrant for the exercise of judgment and discretion in the matter by the county commissioners. The judgment of the county commissioners as to the necessity for local protection of a harbor or port, or that such protection will conflict with the authority of the United States, acting within its proper sphere, is not material when the statute makes it their duty to pay the expenses incurred under a statute for a county purpose. If it be that a portion of the port or harbor is within another county, and that the board of pilot commissioners is composed of citizens of both counties, such facts furnish no ground for the refusal by the county commissioners to obey the plain mandate of a valid statute. The statute provides that steps shall be taken to detect violations of the law and that the expenses hereof shall be paid by the county. A criminal prosecution or the actual detection of a crime is not a prerequisite to the expenditures provided for. If it be true that the greater part of the port or harbor is within the corporate limits of the city of Pensacola and under the protection of the police department of the city, the county is not thereby relieved of its powers and duties with reference to the protection of the port or bay or harbor within its territory. Even if the harbor of Pensacola lies ²¹⁶ within the corporate limits of the counties of Escambia and Santa Rosa, and is under the police protection of such counties, the state is not thereby precluded from providing for the protection of the portion of the port, bay or harbor within Escambia county at the expense of such county.

When an expenditure by a county is authorized by a valid law and the correctness of the amount due by the county is ascertained and approved as the law directs, there being no

question as to bona fides, it is the duty of the county commissioners to audit, approve and pay the same, and such payment may be enforced by mandamus.

The demurrer to the alternative writ was properly overruled, and there was no error in sustaining the demurrer to the answer.

The award of the peremptory writ of mandamus is affirmed.

Shackleford, C. J., and Cockrell, J., concur.

Taylor, Hoeker and Parkhill, JJ., concur in the opinion.

County and Municipal Purposes for which the power of taxation may be exercised are discussed in *Bush v. Board of Supervisors*, 159 N. Y. 212, 70 Am. St. Rep. 538; *Manning v. Devil's Lake*, 13 N. Dak. 47, 112 Am. St. Rep. 652; *Maydwell v. Louisville*, 116 Ky. 885, 105 Am. St. Rep. 245; *Fawcett v. Mount Airy*, 184 N. C. 125, 101 Am. St. Rep. 825.

JANES v. CITY OF TAMPA.

[52 Fla. 292, 42 South. 729.]

MUNICIPAL CORPORATIONS—Defects in Streets—Liability for.—If two causes combine to produce an injury both in their nature proximate, the one being a defect in a city street and the other some accident for which neither party is responsible, such as the accident of a horse running away beyond control, the city is liable, provided the owner of the horse was not at fault, and the injury would not have been sustained but for the defect in the street. But there can be no recovery if the accident be caused by the unskillfulness or want of care of the owner or driver of the horse, or if it can be shown that either of them by any want of care directly caused the accident. (p. 205.)

MUNICIPAL CORPORATIONS—Obstruction in Street—Liability for.—If an injury to a horse would not have been sustained but for an obstruction in a street caused by the negligence of the city, and there was no negligence or fault on the part of the owner of the horse or his servant, the city is liable. (p. 206.)

W. F. Himes, for the plaintiff in error.

200 WHITFIELD, J. The plaintiff in error brought an action in the circuit court for Hillsborough county to recover from the city of Tampa damages for one horse killed and one injured by contact with obstructions in the street of said city. A demurrer to the declaration was sustained and judgment entered for the defendant, to which a writ of error was taken. The declaration alleges that the city "wrongfully and

negligently suffered and permitted divers large quantities of lumber, brick, stone and other building materials to be placed and remain on Florida avenue and Tyler street in said city at about the intersection of said streets, and negligently and wrongfully suffered and permitted said lumber, brick, stone and building materials to extend across and occupy more of said streets than was necessary, to wit, more than one-half of Florida avenue at said intersection and a large portion of Tyler street at said intersection, and to remain and continue therein on, to wit, the twenty-third day of August, 1905, and during the night-time of said day; and that the defendant wrongfully and negligently permitted such lumber, brick, stone and building materials to so remain after the defendant had ²⁸⁴ notice thereof, in and across said streets during the night-time of said day and after dark, without being inclosed with any fence and without any lighted lanterns or other sufficient protection or signals placed thereon or about the same to guard such lumber, brick, stone and building materials or to denote the presence thereof; that on the said date last mentioned a team of the plaintiff, a carriage and two horses, each of the value of one hundred and fifty dollars, managed and driven by a servant of the plaintiff, during the night-time of said day, becoming frightened by the whistle of a locomotive, became temporarily unmanageable, and then passing along on Florida avenue, in consequence of the carelessness, negligence and improper conduct of the defendant and by reason of said lumber, brick, stone and building materials so allowed to be and remain in said streets, as aforesaid, came in contact with and struck upon and against the said lumber, brick, stone and building materials, and by reason thereof one of the horses was then and there instantly killed and the other horse seriously bruised, wounded and injured, without any fault or negligence on the part of the plaintiff." In another count of the declaration similar allegations are made and in addition thereto it is alleged that an ordinance of the said city required that when building material is placed in the street "the portion of the street or sidewalk so allowed to be used shall be inclosed with a sufficient fence and lighted lanterns shall be fixed to said fence and shall be kept burning from twilight through the whole of the night." Under a demurrer it was claimed that the proximate cause of the injury complained of is shown to have arisen from the plaintiff's horses becoming frightened; that

it ²⁹⁵ is not shown that Florida avenue at the place where the injury occurred was so defective that the same was dangerous to travel thereon in the ordinary manner; that it was not incumbent upon defendant to keep and maintain its street in such a condition as to be safe for unmanageable teams but only for ordinary and customary travel thereover; that it was not shown what officer of the city had notice of the defect complained of or that said defect had remained for such a length of time as the defendant would have been presumed to have noticed it. The order sustaining the demurrer is assigned as error.

The question presented is whether the city is liable for injuries sustained under the conditions stated in the declaration.

Where two causes combine to produce an injury, both in their nature proximate, the one being a defect in a city street and the other some accident for which neither party is responsible, such as the accident of a horse running away beyond control, the city is liable, provided the plaintiff was not at fault and the injury would not have been sustained but for the defect in the street. There can be no recovery if the accident be caused by the unskillfulness or want of care of the plaintiff or his driver, or if it can be shown that the plaintiff by any want of care directly caused the accident: See 2 Dillon on Municipal Corporations, 4th ed., sec. 1007; City of Tallahassee v. Fortune, 3 Fla. 19, 52 Am. Dec. 358; 3 Abbott on Municipal Corporations, sec. 1055, and authorities cited in notes; Ring v. City of Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Hull v. City of Kansas, 54 Mo. 598, 14 Am. Rep. 487; City of Atlanta v. Wilson, 59 Ga. 544, 27 Am. Rep. 396; Wilson v. City of Atlanta, 60 Ga. 473; see, also, Baldwin v. Greenwoods Turnpike Co., 40 Conn. 238, 16 Am. Rep. 33; Hunt v. Town of Pownall, 9 Vt. 411; Hey ²⁹⁶ v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733; City of Joliet v. Shufeldt, 144 Ill. 403, 36 Am. St. Rep. 453, 32 N. E. 969, 18 L. R. A. 750; Gilson v. Delaware & H. C. Co., 65 Vt. 213, 36 Am. St. Rep. 802, and notes on page 836, 26 Atl. 70; Campbell v. City of Stillwater, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320; Sturgis v. Kountz, 165 Pa. 358, 30 Atl. 976, 27 L. R. A. 390; Baldrige & Courtney Bridge Co. v. Cartrell, 75 Tex. 628, 13 S. W. 8; Hampson v. Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

The allegation in the declaration that the city wrongfully and negligently permitted lumber, brick, stone and building materials to occupy more than was necessary, to wit, more than one-half of one street and a large portion of another street at the intersection of the two streets, and to so remain after the city had notice thereof and during the night, without being inclosed with any fence and without any lighted lanterns or other sufficient protection or signals placed thereon or about the same to guard such lumber, brick, stone and building materials or to denote the presence thereof, and that plaintiff's team during the night-time becoming frightened by the whistle of a locomotive, became temporarily unmanageable, and by reason of such obstruction of the street, came in contact with and struck upon and against said lumber, brick, stone and building materials, and by reason thereof plaintiff's horse was killed and another injured without fault or negligence on the part of the plaintiff, states a cause of action, since if the injury would not have been sustained but for the obstruction in the street caused by the negligence of the city, and there was no negligence or fault on the part of the plaintiff or his servant, the city is liable. The allegation as to notice of the obstruction is general in its terms, but it is an allegation of notice, and if the character of the allegation is such as to prejudice, ²⁹⁷ embarrass or delay the fair trial of the action, compulsory amendment can be made under the statute. The notice or want of notice of the obstruction is more within the knowledge of the defendant and the general allegation is sufficient in view of the allegation as to the character of the obstruction. The allegations as to the extent and nature of the obstruction and the lack of light or other safeguards at night are sufficient to show the street was in a seriously defective condition even for ordinary travel.

The declaration was sufficient to require a response from the defendant as to the facts alleged.

The judgment is reversed and the cause is remanded for further proceedings.

Shackleford, C. J., and Cockrell, J., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

For Authorities upon the question involved in the principal case, see the note to Dudley v. Flemingsburg, 103 Am. St. Rep. 279; Bell v. Wayne, 123 Mich. 386, 81 Am. St. Rep. 204; Cleveland v. Bangor, 87 Me. 259, 47 Am. St. Rep. 326.

MUGGE v. TAMPA WATERWORKS COMPANY.

[52 Fla. 371, 42 South. 81.]

CORPORATIONS—Waterworks Company—Liability of for Damages Caused by Fire.—If a waterworks company enters into a contract with a city under which it enjoys extensive franchises and privileges, such as the exclusive right to furnish water to the city and its inhabitants for a long period, the right to have special taxes levied on the property of the citizens for its benefit, the right to use the streets with its mains and hydrants, and the right to charge tolls and regulate the use of water, it thereby assumes the public duty of furnishing water for extinguishing fires, and for negligence in the discharge of this duty, whereby a fire department, adequately equipped and prepared, is not furnished with water, and property is, on account of such negligence, destroyed by fire, such water company is liable in an action of tort to the property owner for the damages thus suffered by him. (p. 219.)

Lunsford & Dickenson, for the plaintiff in error.

Sparkman & Carter and P. O. Knight, for the defendant in error.

³⁷¹ **HOCKER, J.** Robert Mugge sued the Tampa Waterworks Company, a corporation organized and existing under and by virtue of the laws of Florida, in the circuit court of Hillsborough county, and in his declaration alleges in substance, that on and before the 23d of May, 1905, the defendant company owned and operated and has ever since owned and operated a plant and waterworks for the public and private supply of water within the city of ³⁷² Tampa, under and by virtue of a franchise granted by the city of Tampa to W. A. Jeter and A. E. Boardman, their associates, successors and assigns, and a contract made and entered into between the city of Tampa and Jeter and Boardman, embraced in an ordinance of said city numbered 7, adopted by the city council, which is made a part of the declaration as Exhibit "A," along with other ordinances marked Exhibits "B," "C" and "D." That the city council was duly authorized to pass said ordinances and make said contract; that said contract was assigned to the defendant company and accepted by it, and it has ever since 1st of January, 1889, operated its waterworks system under it; that under said ordinances and contract the defendant company was granted the franchise and right to lay pipes, erect hydrants, fountains and other structures in and on all the streets and public ways of the

city, the exclusive right and privilege to construct and operate its waterworks for the term of thirty years, the right to receive four thousand nine hundred and fifty dollars per annum from the city as rental for one hundred and ten double nozzle hydrants to be placed on the streets not farther apart than four hundred feet, and forty-five dollars per annum for all additional hydrants to be installed as the city might grow; the right to have sufficient taxes levied and collected annually on all taxable property in the city to meet the payment of hydrant rentals for public fire service, and also a special tax to be levied and collected for such purposes, and the proceeds kept as a separate fund to be exclusively devoted to the payment of such hydrant rentals; and that this special tax for hydrant rentals has been levied annually, collected and paid to the defendant company. That in consideration of these rights, franchises and rentals the defendant company agreed to erect waterworks, with a reservoir capable of holding ³⁷³ one hundred thousand gallons of water, sufficient to give a pressure on the mains and from a hydrant located at the intersection of Washington and Franklin streets, and through one hundred feet of fire hose and a one inch nozzle, to throw a stream of water vertically to a height or distance of fifty feet, giving a first-class fire protection; that it should erect one hundred and ten double nozzle hydrants of the usual pattern with nozzles to fit the fire department hose; that it should maintain a standard pressure of forty pounds to the square inch on the water mains of said waterworks from its stand-pipe or reservoir during the life of the contract; that the waterworks company should assume all liabilities to persons and property arising from constructing or operating the same; that the principal and primary consideration moving the city to grant the franchises and rights aforesaid, as stipulated in the ordinance, was to provide for and secure to the citizens, residents and property owners of the city better protection against fires; that said contract was made and acquiesced in by the defendant company for the benefit of citizens and property owners of the city, including the plaintiff, who was at the time of making the contract, and ever since has been a citizen, property owner and taxpayer in said city; that on the 23d of May, 1905, the defendant company had in use a water plant, mains, hydrants and reservoir or tank, adequate for a first-class fire protection; that prior to that day the city of Tampa had provided and was then maintaining

at great expense a first-class fire department, and thoroughly equipped fire stations in the four wards of the city; that on said 23d of May, 1905, the plaintiff was the owner of a two-story brick building, sixty feet wide by one hundred feet in length, located at the northwest corner of the intersection of Franklin and ³⁷⁴ Caro streets in said city; that said building was occupied by a tenant and caught on fire and was burned on that day; that when the building caught on fire the tenant immediately turned in fire alarm, and in less than ten minutes and before the fire had gained any headway or done any appreciable damage three fire companies, from as many stations, well equipped and ready for action, were on the scene; that the nozzles and hose were in every respect adequate and sufficient, and were attached to hydrants in easy reach of plaintiff's building, and near enough to have afforded water adequate for the ready extinguishing of the fire, if there had been sufficient water in the water mains and forty pounds pressure to the square inch on said mains, or had there been pressure sufficient to throw a stream of water fifty feet high as provided in the contract. In addition, one of the fire companies had at the fire within ten minutes after it broke out a powerful fire engine capable of throwing from eight hundred to nine hundred gallons of water a minute, and of giving a pressure of over three hundred pounds to the square inch, and of generating a head of one hundred pounds of steam in five or six minutes, and with a capacity for coupling three sets of four-inch hose, and of forcing simultaneously a stream from each entirely over or into any portion of said building, which engine was immediately under sufficient steam and coupled to one of the hydrants close to said building, and in short, that every sufficient arrangement was made to extinguish the fire before damage resulted, but that notwithstanding the promptness of the fire department, and the sufficiency of its appliances, the water mains on account of the negligence of the defendant company were found without appreciable pressure and failed to yield any appreciable flow of water, and thus solely by reason ³⁷⁵ of the persistent, careless, willful and wanton negligence on the part of the defendant company in not supplying the water mains and hydrants with water and water pressure as required by the contract, the plaintiff's building was destroyed by fire; that plaintiff, relying on the defendant to comply with its contract, and on the efficiency of the fire de-

partment, had no fire insurance on his building. Plaintiff claims twenty-five thousand dollars. The foregoing contains the substance of the declaration, and exhibits, which occupy thirty-one pages of the record.

It appears from the first ordinance, which contains the contract, that the city guaranteed the interest on eighty thousand dollars of the water company's bonds for thirty years at six per cent, the city agreeing to pay the same and apply the amount to the rental of the hydrants. The amount of the bonds on which interest was to be paid was subsequently increased to one hundred and two thousand dollars and the number of hydrants was increased to meet the necessities of a rapidly growing city.

The declaration was demurred to on the following grounds: 1. Said declaration fails to state a cause of action; 2. It shows there has been no breach of the contract between the city and the defendant; 3. It shows no privity of contract between the defendant and plaintiff so as to give plaintiff a right to sue for a breach of the contract between the defendant and the city of Tampa; 4. The alleged breach of contract was not the proximate cause of the plaintiff's loss; 5. The city, in making the contract with the defendant to supply water for extinguishing fires, was simply performing ³⁷⁶ its public and governmental duty and a breach of the contract on the part of the defendant does not authorize suit by a taxpayer.

On a hearing the demurrer was sustained and a judgment rendered dismissing the suit. The case is here on writ of error from this judgment.

In view of the great importance of this case and of the conflicting views of the courts upon the question involved the facts set up in the declaration have been stated at some length, in order that they may be compared and contrasted with those given in the cases cited in the briefs, and to which we shall allude.

In the case of *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1 (the first American case bearing on the question), it was held: "Where a water company organized for the purpose of supplying the inhabitants of a city with water contracted with the city to supply the city hydrants with water, and by their neglect to do so the fire department of the city was not able to extinguish a fire occurring in the city, it was held that the water company was not liable in

damages to the owner of the property burned, for the neglect to supply the water." An examination of the opinion shows that the court regarded the declaration as exceedingly defective, and as showing no such state of facts as appear in the case at bar.

The next American case is that of *Davis v. Clinton* ³⁷⁷ *Waterworks Co.*, 54 Iowa, 59, 37 Am. Rep. 209, 6 N. W. 126. The waterworks company in that case contracted with the city of Clinton to supply water to be used by the city for the purpose of extinguishing fires. In speaking of the contract the court says: "It is sufficient to state that the parties thereto were the city and the defendant, and the plaintiff in this case in no sense was a party to the contract." In holding that there was no privity of contract between the parties the court further says: "It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets or maintain good order are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect." The court thus treats the water company as an agent or officer employed by the city, and not as a business enterprise organized and operated for the profit and advantage of the water company.

The following cases, and perhaps one or two others, follow in time and are in line with these two, viz.: *Wainwright v. Queens County Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290; *Foster v. Lookout Water Co.*, 3 Lea (Tenn.), 42; *Fowler v. Atkins City Waterworks Co.*, 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; *Wilkinson v. Light, Heat & Water Co.*, 78 Miss. 389, 28 South. 877; *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Bush v. Artesian Hot and Cold Water Co.*, 4 Idaho, 618, 95 Am. St. Rep. 161, 43 Pac. 69; *Ukiah City v. Ukiah Water & Imp. Co.*, 142 Cal. 173, 100 Am. St. Rep. 107, 75 Pac. 773, 64 L. R. A. 231; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Britton v. Green Bay & Ft. H. Waterworks Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; ³⁷⁸ *Howson v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, 23 L. R. A. 146; *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989, 15 L. R. A. 375; *Eaton v. Fairbury Waterworks Co.*, 37 Neb.

546, 40 Am. St. Rep. 510, 56 N. W. 201, 21 L. R. A. 653; *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 18 Am. St. Rep. 377, 4 N. W. 694. The terms and conditions of the various contracts are not always alike, but the doctrine of a want of privity of contract between a property owner and the water company runs through them all. The notion that a water company exercising franchises and enjoying important privileges owes a public duty to the property owner to live up to its contract is generally ignored or denied. For instance, in the case of *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989, 15 L. R. A. 375, the court held that where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, and by the terms of the city ordinance which the water company accepts, the water company agrees that it will pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the company to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the water company, there is no such privity of contract between a citizen or resident and the water company as will authorize him to maintain an action against it for the injury or destruction of his property by fire caused by the failure of the water company to fulfill its contract. In some of these cases the doctrine is advanced that the power to supply water is a governmental one and that as a city is not liable for negligence in exercising the power, therefore a person or corporation who contracts with the city to supply water is not liable for negligence either to the ³⁷⁹ city or an individual: *Ukiah City v. Ukiah Water & Imp. Co.*, 142 Cal. 173, 100 Am. St. Rep. 107, 75 Pac. 773, 65 L. R. A. 231; *Wainwright v. Queens County Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987.

In the case of *Britton v. Green Bay & Ft. H. Waterworks Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84, the contract required the company to supply said city and the inhabitants thereof with water for public and private uses, for public and private consumption and for putting out fires. It was held that there was no contract between the water company and private individuals; that the water company was bound by its contract to the city alone; that the company was not required by law to furnish water to put out fires, and assumed no such duty to the public by its contract; that it contracted

to do so, not because it was its duty to the public, but because it deemed it profitable to itself, and was willing to be thus bound by its voluntary contract. But the doctrine of these cases has not met with universal acceptance. It has been repudiated in *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77; *Duncan's Exrs. v. Owensboro Water Co.*, 12 Ky. Law Rep. 824, 15 S. W. 523; *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725; *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, 32 S. E. 720, 46 L. R. A. 513. In this last case the contract between the city and the water company was very similar to the one at bar so far as the duties of the latter are concerned. Judge Clark rendered the opinion in the case. Among other things it is said: "It is true the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease and security from fire of the people, the citizens of Greensboro. This ³⁵⁰ is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and taken alone, would never have justified the grants, concessions, privileges, benefits and payments made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with adequate supply of water and the protection of their property from fire was the largest duty assumed by the company. One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach (quoting authorities). And even when the beneficiary is only one of a class of persons, if the class is sufficiently designated (quoting authorities). . . . Especially is this so when the beneficiaries are the citizens of a municipality whose votes authorized the contract and whose taxes discharged the financial burdens the contract entails. The officials who executed the contract are technically the agents of the corporation, but the corporation itself is the agent of the people, who are thus effectively the principals of the contract. The acceptance of the contract

by the water company carries with it the duty of supplying all persons along its mains (quoting authorities)." Judge Clark refers to the case of Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, as holding "that where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained ³⁸¹ by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking," and says this opinion is based upon sound reason. He quotes authorities to show that if the city buildings were destroyed by fire through the failure of the water company to furnish water as provided by the contract, the city could recover. Referring to the three Kentucky cases, he says: "The decisions, however, in other states where the question has been presented are the other way. But this is case of the first impression in this state, and decisions in other states have only persuasive authority. They have only the consideration to which the reasoning therein is entitled. They are to be weighed, not counted. We should adopt that line which is most consonant with justice, and 'the reason of the thing.'" He refers to Judge Freeman's note to Britton v. Green Bay and Fort Howard Water Works Co., 29 Am. St. Rep. 863, in which he says: "As none of the courts (the majority) have fairly faced what seems to be the logical result of these decisions, viz., that the injured person is thus left without any remedy at all, it must be admitted that the subject is left in an extremely unsatisfactory position," resulting in a reductio ad absurdum "resting on the narrow technical basis that a citizen, because not a party to the contract, cannot sue, whereas authorities are numerous that a beneficiary of a contract, though not a party or privy, may maintain an action for its breach," quoting 7 American and English Encyclopedia of Law, second edition, pages 105-108. The latter part of this opinion refutes the contention that such a construction of the contract makes the water company an insurer. Such a construction simply requires the water company to do that which it has agreed to do, no more and no less. The contract is the measure ³⁸² of its duty, and the water company was held to be liable in damages to a citizen whose property was destroyed by fire owing to the failure of the water company to supply water for extinguishing fires as it had agreed to do.

In the case of *Fisher v. Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912, it was decided that the water company was liable in an action for tort where it failed to supply water, and damage by fire resulted from such failure to the property of a citizen. These views of the supreme court of North Carolina were tested in the United States circuit court for the western district of North Carolina in the case of *Guardian Trust & Deposit Co. v. Greensboro Water Supply Co.*, 115 Fed. 184. The question arose in this way: The Guardian Trust and Deposit Company filed a bill to foreclose two mortgages against the Greensboro Water Supply Company. Judgment creditors of the Greensboro Water Supply Company intervened and insisted that their judgments under a statute of North Carolina had priority over the mortgages though rendered after the mortgages were given. The statute in express terms provided that mortgages on the property or earnings of incorporated companies should not have power to exempt such property from execution for the satisfaction of any judgment obtained in the state courts for labor, "torts committed by such incorporation, its agents or employes, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding." The judgments of the interveners were obtained for the failure of the water supply company to furnish water to extinguish the fire by which the property of the interveners was destroyed, and recited that the damages were given ³⁸³ for the tortious injury and damage done by the negligence of the defendant.

In the case of *Fisher v. Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912, the supreme court held that the plaintiff was, under the facts of the case, entitled to declare in tort. The question in the United States circuit court was whether the supreme court of North Carolina had decided correctly in holding that the judgments of the interveners were for torts. The federal court says "the question is not whether the judgment be valid, but whether it is a judgment of such a character as to be given priority to the claim of the mortgagees, who were not parties to the suit in which it was obtained," and says that the supreme court of North Carolina had declined to pass upon this question of priority under the statute in *Fisher v. Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912. After stating that the statute gave priority to judgments for torts committed by such incorporation, etc.,

it proceeds: "In the case at bar property was injured because of the alleged negligence of the Greensboro Water Supply Company. Would an action for tort lie? The Greensboro Water Supply Company had assumed the obligation of supplying the city and its inhabitants with water for domestic purposes, and also for the purpose of extinguishing fires. The supreme court of North Carolina had held in the case of *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, 32 S. E. 720, 46 L. R. A. 513, that an action would lie against the corporation as well on the part of the city council as on that of any citizen of the city. The judgments before us establish the fact that such a supply of water for the purpose of fire was not furnished. They also establish the fact that the failure to do so was because of the negligence of the defendants. Is such negligence the foundation for an action in tort?" ³⁵⁴ It then states that notwithstanding the code procedure, the distinction between causes of action *ex contractu* and *ex delicto* still remains. It then proceeds: "The Greensboro Water Supply Company, as has been seen, was under the obligation of a contract to furnish a full supply of water to the city and its inhabitants for sundry purposes, including that of fire. And under this obligation it was its duty to do whenever needed. Besides this—indeed, to facilitate the performance of this obligation and in consideration of this obligation—it was clothed with valuable franchises, under which it used the streets of the city in laying its mains. Under its obligations, it was to furnish the city and its citizens with one of the necessities of life, and was bound to furnish all that desired it, who paid the price imposed. It served the public, and to this extent was a quasi public corporation, bound to the discharge of a public duty" (quoting authorities). "So it was the duty of the water company to furnish the water for fire, a duty arising out of an express contract and out of the franchises granted to it for the purposes of public utility and need. It did not fulfill this duty." The court then quotes Chitty and other authorities to the effect that "while normally a breach of contract gives rise to a cause of action *ex contractu*, a contract may impose a duty on the part of the defendant as party to it for the violation of which the plaintiff may recover *ex contractu* or *ex delicto*, at his option." The court then concludes that the judgments of the interveners were for torts, and that they had priority over the mortgages. This case was then taken

to the United States supreme court on certiorari and the decree of the circuit court was affirmed: *Guardian Trust & D. Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. Rep. 186, 50 L. ed. 367. Justice Brewer delivered the majority opinion of the court and in the course of it ³⁸⁵ discusses the relation of the water supply company to the citizen. He uses this language: "And here we are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct waterworks and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, ³⁸⁶ is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for tort. . . . Even if the water company was under no contract obligations to construct waterworks in the city, or to supply the citizens with water, yet, having undertaken to do so, it comes under an implied obligation to use reasonable care; and if, through its negligence, injury results to an individual, it becomes liable to him for the damages resulting

therefrom, and the action to recover is for a tort, and not for breach of contract."

It is contended by the defendant in error that the only question before the United States courts in these cases was whether the judgments rendered in the North Carolina courts were in tort or on contract, and that the question of the right of the plaintiff to sue at all was not passed on. But it seems to us that both of these courts passed on the question of the right of the plaintiffs to sue in tort, and that they upheld that right. For if the plaintiffs did not have the right to sue in tort, then it follows that their judgment could not have been given priority over the mortgages. It was for the purpose of discovering the nature of the judgments, as being *ex contractu* or *ex delicto*, that these courts entered into an examination of the facts upon which the judgments were predicated, and that examination led to the conclusion that they were properly judgments in tort. Certainly there is nothing in the opinions of these courts that suggests a doubt of the correctness of the reasoning of the supreme court of North Carolina, but on the contrary that reasoning is supported and strengthened.

Upon the question of the liability in damages of a corporation which had undertaken a public duty to be performed ³⁸⁷ for the benefit of the inhabitants of St. Louis, for a negligent performance of that duty, the case of *Lampert v. Laclede Gas Light Co.*, 14 Mo. App. 376, furnishes an instructive examination of some of the conflicting English and American authorities. The opinion is delivered by the eminent Judge Seymour D. Thompson, and the conclusion is expressed in the first headnote, as follows: "A contract with a municipality for the repairing of street lamp posts and lighting the lamps raises a public duty on the part of the contractor to be performed for the benefit of the citizens of the municipality distributively." There is also an interesting discussion of the conflicting cases in 1 *Farnham on Waters and Watercourses*, sec. 160b. The author in reviewing the cases of *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, 32 S. E. 720, 46 L. R. A. 513, and *Duncan v. Owensboro Water Co.*, 12 Ky. Law Rep. 824, 15 S. W. 523, in which it was "held that a contract between a municipal corporation and a water company by which the latter agreed to furnish water direct from the pumps for the use of the fire department whenever an alarm was given, is an agreement for the benefit of the property owners of the

city as well as for the municipality; and as the consideration for the contract was paid by the property owner in the way of taxes he has a right of action against such water company for an injury sustained by him by reason of the neglect of the company to furnish sufficient water for the extinguishment of a fire by which his property was destroyed," says: "These decisions strike at the root of the matter and disclose the contract in its true light. There is no doubt that the taxpayer is the instigator of the contract; that he furnishes the consideration for it, and that he is the one for whom it is made, and that the municipality is merely his agent in executing it. Under such circumstances there ³⁸⁸ is no reason why he should not maintain an action for injuries inflicted on him by the breach. Some courts have attempted to meet and answer this contention. . . . These decisions do not satisfactorily meet the issue raised. The mere assertion that there is no privity of contract does not do away with the facts of the case. . . . The nonliability of the water company depends, not on the liability of the taxpayer to maintain the action, but on the failure of the water company's contract to cover the liability sued for." What we understand from this discussion is that the contract of the water company is the measure of its duty to the property owner, and therefore of its liability. It is impossible to reconcile the conflicting views of the courts and law-writers upon the question at bar. It seems to us that the views expressed by Justice Brewer of the United States supreme court, and Justice Clark of North Carolina presented in the cases mentioned, when applied to facts such as are disclosed in the record before us, are the most logical and reasonable, and most nearly satisfy the sense of justice and right. We are of opinion that the defendant in error, enjoying as it does, extensive franchises and privileges under its contract, such as the exclusive right to furnish water to the city and its inhabitants for thirty years, the right to have special taxes levied on the property of the citizen for its benefit, the right to use the streets with its mains and hydrants, the right to charge tolls and regulate the use of water, not to mention others, has assumed the public duty of furnishing water for extinguishing fires, according to the terms of its contract, and that for negligence in the discharge of this duty, whereby the fire department adequately equipped and prepared was not furnished with water according to the contract, and the ³⁸⁹ property of the prop-

erty owner was, on account of such negligence in furnishing water, destroyed, it is liable to him for the damages suffered, in an action of tort. We are further of opinion that the declaration sufficiently alleges the tort, that it was not amenable to the demurrer, and that the circuit judge erred in sustaining the same.

The judgment is reversed at the cost of the defendant in error, and the cause remanded for further proceedings.

Taylor, and Parkhill, JJ., concur.

Shackleford, C. J., and Cockrell and Whitfield, JJ., concur in the opinion.

If a Municipal Corporation Contracts with a Water Company to furnish water to be used in extinguishing fires, the company is not liable, according to some authorities, at the suit of a taxpayer whose property is destroyed by fire through the company's failure to supply sufficient water: Allen etc. Mfg. Co. v. Shreveport W. W. Co., 113 La. 1091, 104 Am. St. Rep. 525, and cases cited in the cross-reference note thereto. Other authorities, although they are probably in the minority, take a different and more reasonable view: See the note to Baxter v. Camp, 71 Am. St. Rep. 196.

BURTON v. McMILLAN.

[52 Fla. 469, 42 South. 849.]

CONVEYANCE—Avoidance of, for Threats or Undue Influence.—A wife may avoid a deed of her separate property induced and obtained from her by threats of the imprisonment of her husband, no matter whether the threat is of lawful or unlawful imprisonment. (p. 230.)

MAXIM "IN PARI DELICTO" does not Apply to a case where a married woman sues to set aside a deed of her separate property made by her under express or implied threats of the prosecution of her husband for crime, and to save him from prosecution, whether the threatened prosecution is lawful or unlawful, when she was sick at the time of the execution of the deed, and does not appear to have had abundant opportunity for consideration and consultation with disinterested advisers. (p. 231.)

Blount & Blount, for the appellants.

Maxwell & Reeves and Avery & Avery, for the appellee.

⁴⁶⁹ HOCKER, J. On the 8th of July, 1905, Beverly H. Burton and Mary A. Burton, his wife, filed a bill against

A. M. McMillan in the circuit court of Escambia county containing, with an amendment thereto, the following allegations:

"1. That the said Beverly H. Burton is and has been for years, the husband of Mary A. Burton, and that they and ⁴⁷⁰ the said A. M. McMillan are citizens and residents of Escambia county, Florida.

"2. That prior to May 8, A. D. 1905, the said Mary A. Burton was the owner in fee simple of the real estate in the city of Pensacola described in Exhibit 'A' hereto attached and prayed to be made a part hereof, and that on said May 8th, she and the said Beverly H. Burton and their family of children were occupying the same as a homestead.

"3. That also at the said time the said Beverly H. Burton was the owner of certain furniture and other personal property which then was, and still is, in the house described in Exhibit 'A,' which personal property is fully set forth and described in Exhibit 'B,' hereto attached and made a part hereof. The said Exhibit 'B' also describes certain personal property belonging to May Burton, the daughter of the complainants herein, but the property so belonging to her is distinguished in said exhibit from the property belonging to the complainant, Beverly H. Burton, by having the description therein underscored.

"4. That for many years prior to said May 8, A. D. 1905, the said Beverly H. Burton was the deputy clerk of the circuit court of Escambia county, Florida, having been appointed to such position by the defendant, A. M. McMillan; that in the course of the conduct of said business, it became the duty of the said complainant to handle vouchers drawn upon the public funds of said Escambia county, and just prior to said May 8th, the said A. M. McMillan arrived at the conclusion that certain of the moneys belonging to said county had been embezzled, or made away with, or wrongfully obtained by some person in the office of the said A. M. McMillan, clerk of the said circuit court, and the said defendant accused the said ⁴⁷¹ complainant of being such person committing said wrong.

"5. That the said complainant was naturally much disturbed by the making of said charge, and by the stigma that would be cast upon himself and his family if a criminal prosecution should be instituted upon the idea that he was the person guilty of the embezzlement or diversion aforesaid,

and was desirous of avoiding the said prosecution. The said defendant was also desirous of raising money with which to pay the amount of the deficit in the said funds, and the said McMillan, stating to the said complainant, Beverly H. Burton, that he and the state auditor had been schoolmates, promised the said complainant that if he would cause his wife to deed to him the real estate hereinbefore mentioned, and would himself convey to him the personal property hereinbefore mentioned, and would procure his daughter, May Burton, to also convey the personal property described in Exhibit 'B' belonging to her, he, the said McMillan, would so arrange that no criminal prosecution should be instituted against the said complainant, and contracted with the complainant that no such prosecution should occur.

"6. That relying upon the said promise of the said defendant, and solely upon the consideration thereof, the said complainant procured that his said wife should be willing to make a conveyance of the said property, and that his said daughter should be willing to make a bill of sale of her said property, and thereupon the complainants executed and delivered in pursuance of the said agreement between the defendant and the said Beverly H. Burton, complainant, a deed to the said property, a copy of which deed is fully and carefully and accurately set forth in Exhibit 'A' heretofore mentioned, and that the said complainant and his said wife, and his said daughter also, upon the ⁴⁷² said consideration, and relying upon the said contract, executed and delivered to the said defendant the bill of sale for the property mentioned therein, a copy of said bill of sale being Exhibit 'B' hereto attached. And that immediately upon the execution and delivery of the said instruments to the defendant, he caused the same to be recorded in the proper books of record in Escambia county.

"7. That in violation of the said contract and of his said promise, after the defendant had received the said deed and the said bill of sale, he did not procure that there should be no criminal prosecution against the said complainant, Beverly H. Burton, for the said alleged crime, but upon the contrary, he, the said defendant, has himself instituted a prosecution before J. R. Landrum, justice of the peace of the second district of Escambia county, Florida, for the said crime, and has caused the said complainant to be arrested and brought before the said justice of the peace, and to furnish

bond for his appearance for trial upon said charge before the criminal court of record of the said Escambia county.

"8. That the real property hereinbefore mentioned was the homestead of the said Beverly H. Burton and his said wife and family, and not subject to exemption (†) against the complainant, Beverly H. Burton, and that the said complainant was not possessed of more than a thousand dollars of personal property in the state of Florida, and therefore that the said personal property conveyed by him as aforesaid to defendant was exempt from execution against him, the complainant alleging that it was of a value much less than one thousand dollars.

"9. That complainants are advised and believe, and therefore aver that since the sole consideration upon which the said conveyance and the said bill of sale were executed ⁴⁷² was the consideration aforesaid, and since the said consideration has failed, that they are entitled to have the said conveyance and the said bill of sale canceled and annulled, and have a reconveyance of the said property by the said defendant.

"10. That the complainant, Mary A. Burton, only became aware of the charges made by the defendant that her said husband had embezzled the funds of the said county, on the day before the making of the conveyance and the bill of sale aforesaid, by the statement of her husband that such charge had been made, and upon the same day, the defendant came to the house of complainants and remained for a very long time, persuading and influencing him and her to make the said conveyance and bill of sale, promising, as aforesaid, that if they should be made, he would see that no prosecution would be brought against the complainant, Beverly H. Burton; that the said complainant was loth to make the said instruments, because the effect of transferring the property therein mentioned to the defendant would be to leave her and her children (of which she has and then had four) without a home or furniture, and penniless, but she has been sick with a nervous disease for many years, and her nerves were so affected, and her mind so weakened by the shock of the communication to her, and the threatened exposure of her said husband and the consequent imprisonment of him in the penitentiary, that she yielded and consented to execute the said instruments, and did so. That the time elapsing between her first knowledge of the charge against her said

husband and the execution of the said papers was only the time between the late morning of a Sunday and the early morning of the next day, and that during this time, the defendant had two interviews with her and prevailed ⁴⁷⁴ upon her to execute the said papers, and that, finally, when she did so, she was so weak and unstrung that she was compelled to get up from a sick bed to execute them, and that but for her said nervous and shocked condition and the influence of the defendant and his promise aforesaid, she would not have executed the same. And that complainants are advised, believe and aver that the said execution, made under the circumstances aforesaid, was under duress, not binding upon the complainants, and should be set aside by a court of equity.

"To the end, therefore, that the defendant may, to the best and utmost of his remembrance, knowledge, information and belief, but not under oath, his oath being hereby expressly waived, full, true and perfect answer make to the premises, and that this honorable court may decree that the said conveyance and the said bill of sale to the defendant may be canceled and annulled, and that the said defendant shall reconvey the same to the complainants.

"And that the complainants shall have such other and further relief as in the premises unto this court shall seem meet and fit.

"Complainants pray process of subpoena according to law and the usual course of this court, directed to the defendant, A. M. McMillan."

To the bill as amended the defendant demurred, on the grounds: "1. That it does not appear from the allegations of the bill of complaint that the complainants are entitled to any discovery from, or relief against, the defendant; and 2. That the said bill of complaint is multifarious." On the 13th of February, 1906, the circuit judge sustained ⁴⁷⁵ this demurrer generally, and gave leave to the complainants to amend their bill if they be so advised, on or before the rule day in March, 1906. The complainants failing to amend their bill, on application of the respondent, the circuit judge, on the 12th of March, 1906, made a decree dismissing the bill of complaint and the amended bill of complaint; that the complainants go hence without day, and that the respondent recover his costs by execution. From this decree an appeal was taken to the June term of this court.

The appellants assign as errors that: 1. The court erred in sustaining the demurrer to the amended bill; 2. That the court erred in dismissing the bill of complaint as amended; 3. That the court erred in rendering a final decree for the defendant; 4. That the court erred in not dismissing the bill "without prejudice."

The briefs of the respective solicitors of the parties cover the whole range of the law pertinent to the facts of the case and very ably present their respective views of its proper application.

The positions taken by the appellee in support of the decree below are that the bill does not allege that any prosecution was threatened or that any violence or menace of any kind was offered to secure the execution of the instrument attacked; that the bill should have shown clearly that Burton was threatened with unlawful imprisonment, for if he was threatened with lawful imprisonment and the acts of the complainant in procuring the deed amounted to the compounding of a felony, no relief could be granted the complainants under the application of the well-known maxim "In pari delicto, melior est conditio ⁴⁷⁶ defendentis." Many authorities are cited in support of these contentions. Among them *Landa v. Obert*, 45 Tex. 539; *Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551; *Plant v. Gunn*, 2 Wood, 372, Fed. Cas. No. 11,205; *Swartz v. Gillett*, 2 Pinn. (Wis.) 238; *Gregor v. Hyde*, 62 Fed. 107, 10 C. C. A. 290; *Moore v. Adams*, 8 Ohio, 372, 32 Am. Dec. 723; *Eddy v. Herin*, 17 Me. 338, 35 Am. Dec. 261; *Girty v. Standard Oil Co.*, 1 App. Div. (N. Y.) 224, 37 N. Y. Supp. 369; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. 1102; *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511; *Smith v. Rowley*, 66 Barb. (N. Y.) 502; *Weber v. Barrett*, 125 N. Y. 18, 25 N. E. 1068; *Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *Catlin v. Henton*, 9 Wis. 476; *Columbia Lodge v. Manning* (N. J.), 38 Atl. 444; *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508; *Allison v. Hess*, 28 Iowa, 388; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147. These cases sustain the general contention that in order to obtain relief against a contract made under threats of criminal prosecution it must be shown that the threats were of unlawful imprisonment, otherwise the maxim "In pari delicto" applies and the courts give no relief to either party. Granting that the bill as amended sufficiently

alleges that a criminal prosecution was threatened, none of these are based on facts exactly similar to the one at bar. In *Smith v. Rowley*, 66 Barb. 502, *Weber v. Barrett*, 125 N. Y. 18, 25 N. E. 1068, *Girty v. Standard Oil Co.*, 1 App. Div. 224, 37 N. Y. Supp. 369, efforts were made to relieve from the contracts of married women, and the maxim was applied; but in none of these were there allegations that the married women when the contracts were made were in other than normal health. Indeed, we have not been able to find any case where this maxim has been applied either to a woman or man under the conditions alleged in the tenth paragraph of the bill as amended. On the contrary another ⁴⁷⁷ question is presented and there is abundant authority that regard should be had to the age, sex and condition of the parties, and to the circumstances surrounding them at the time of making the contract in order to determine whether undue influence was exercised, whether the act was voluntary or induced by duress; and if conditions existed showing that the parties were not dealing at arms'-length, that there was no equality of situation and the judgment of one was overborne by sickness and apprehensions of disaster and disgrace, the maxim of "In pari delicto" does not apply. Under such circumstances the question is simply one of undue influence. Particularly there are many and very high authorities holding that the maxim does not apply when the relation of father and son, husband and wife, or other near relationship exists. *Williams v. Bayley*, decided by the house of lords of England in 1866, reported in volume 1 Law Reports, English and Irish Appeal Cases, page 200, is a leading case along this line, and is frequently referred to in the American cases sustaining similar view. In this case a son carried to bankers, of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it was lying at the banker's dishonored. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterward discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement

to which the father was to be a ⁴⁷⁸ party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes with the forged indorsements were then delivered up to him. "Held, that the agreement was invalid. A father appealed to under such circumstances, to take upon himself a civil liability, with the knowledge that unless he does so his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as a motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity." The father in this case was relieved of his contract because when he made it he was under pressure of relieving his son from a criminal prosecution, and was not a free and voluntary agent.

In the case of *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188, it was held, "A father may avoid a mortgage which he has been induced to sign by threats of the prosecution and imprisonment of his son." In the opinion by Morton, J., it is said: "At common law, as a general rule, the defense of duress *per minas* must be sustained by proof of threats which create a reasonable fear of loss of life, or of great bodily harm or of imprisonment, of the person to whom the threats are made, and one man cannot avoid his obligation by reason of duress to another. There is a well-settled exception to this rule in the case of husband and wife, all the authorities agreeing that each may avoid a contract if it was made to relieve the other from duress: *Shepherd's Touchstone*, 61, Met. Con. 28, and note; *Robinson v. Gould*, 11 Cush. 55, and cases cited." The opinion proceeds to say the relation of parent and child is within the exception, quoting *Bayly v. Clare*, 2 Brownl. 275, 276; M. 7 Ja. B. per Coke, Id.; 1 Rolle Abr. 687, pls. 4-6; *Bacon's Maxims*, reg. ⁴⁷⁹ 18, and other authorities. The opinion proceeds to say that "the exception in favor of husband and wife is not based solely on the fiction that they are in law one person, but rather upon the nearness and tenderness of the relation."

In the case of *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525, it is held that: "One who reasonably believes that another has committed a crime, and who by threats of prosecution and imprisonment for the crime overcomes the will of the other and induces him to execute a contract which he would not have made voluntarily, cannot enforce the contract if the other attempts to avoid it on the

ground of duress." The opinion is instructive. Among other things, it is said: "It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them." The court admits ⁴⁸⁰ that there are decisions the other way, but holds that this view of the subject rests on sound principles, and is in conformity with the most recent decisions in such cases both in England and America.

In *Mack v. Prang*, 104 Wis. 1, 76 Am. St. Rep. 848, 79 N. W. 770, 45 L. R. A. 407, it is held: "Threats to prosecute a man for embezzlement unless his wife executes a mortgage on her separate property to secure his debt constitutes duress and avoids her mortgage obtained thereby": See note to this case in 76 Am. St. Rep. 850, where other cases are cited to the same effect.

In *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, a suit in equity was brought to set aside a note and mortgage on the ground of duress. It was, among other things, held: "If, in making a contract, one party to the transaction be incapable of exercising his free will by reason of threats made by the other for the purpose of producing such condition, to the end that he may obtain such contract, such party may, at his option, repudiate such contract on the ground of duress." "What constitutes duress is matter of law; whether duress existed in a particular transaction is matter of fact. There is no legal standard of resistance which a person acted upon must come up to at his peril of being

remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The doctrine that in order to produce duress by threats there must be such threats as are reasonably necessary to control by fear the free will power of a person of ordinary firmness and courage is not the true doctrine or the law of this state."

In *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193, it is held: "A mortgage executed by a wife under an implied threat of a criminal prosecution against her husband is obtained by duress and undue influence equally, as if ⁴⁸¹ given under an express threat of prosecution." This was a bill brought by a married woman to set aside a mortgage on the ground that it was executed under duress.

The case of *Leflore County v. Allen* went to the supreme court of Mississippi twice; reported in 78 Miss. 671, 29 South. 161, under the style of *Allen v. Leflore County*, and in 80 Miss. 298, 31 South. 815, under the title of *Leflore County v. Allen*. It is held in that case, "Where the wife of a defaulting county treasurer is threatened by a district attorney with the prosecution of her husband unless she conveys all of her property to the county, and refuses, but subsequently, while her husband is still living and liable to prosecution, conveys a part of her property on a renewal of the application, her deed is void as the result of duress." In the statement of the facts it is said: "It does not appear that the threats were repeated at the time she signed the deed last presented to her," but the court granted her relief.

The case of *Gorringe v. Reed*, 23 Utah, 120, 90 Am. St. Rep. 692, 63 Pac. 902, is somewhat like the one at bar. A suit in equity was brought by a wife to set aside a deed made by her under threats of prosecution of her husband. It is held: "A wife may avoid a contract obtained by threats of imprisoning her husband, and it is of no consequence whether the threat is of lawful or unlawful imprisonment"; and further, "Equity may grant relief from unlawful transactions if public policy so requires when the parties, though in delicto, are not in *pari delicto*." This case is instructive, and many authorities are quoted to sustain the law as stated; among them, 1 Story's Equity Jurisprudence, secs. 288, 300; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Williams v. Bayley*, L. R. 1 E. & I. Eq. 200; *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193, and a great ⁴⁸² many

others giving the modern law: See notes in 76 Am. St. Rep. 850.

In *Adams v. Irving Nat. Bank of New York*, 116 N. Y. 606, 15 Am. St. Rep. 447, 23 N. E. 7, 6 L. R. A. 491, it is held: "In relation to husband and wife, parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of lawful or unlawful imprisonment. The principle which underlies all this class of cases is, that whenever a party is so situated as to exercise a controlling influence over the conduct and interest of another, contracts thus made will be set aside." Many authorities are cited to sustain these principles. To the same effect, see *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912.

In *Heaton v. Norton County State Bank*, 5 Kan. App. 498, 47 Pac. 576, it is held: "When the execution by the wife of a deed of conveyance of the family homestead is obtained by threats of the arrest of her husband, such deed will be held invalid and void on the ground of undue influence, even though the threatened arrest and imprisonment is for an offense of which the husband is guilty. The unlawful use of criminal process, or the threatened unlawful use of criminal proceedings, is itself unlawful, and no advantage will be sustained by the courts." To the same effect, see *Hargreaves v. Korcek*, 44 Neb. 660, 62 N. W. 1086, where many authorities are cited, among them, *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8; *Coffman v. Lookout Bank*, 5 Lea (Tenn.), 232, 40 Am. Rep. 31; *City National Bank of Dayton v. Kusworm*, 88 Wis. 188, 43 Am. St. Rep. 880, 59 N. W. 564, 26 L. R. A. 48, and notes, where numerous authorities are cited; *Bell v. Campbell*, 123 Mo. 1, 45 Am. St. Rep. 505, 25 S. W. 359.

Bentley v. Robson, 117 Mich. 691, 76 N. W. 146, is a ⁴⁸⁸ case where a mortgage was given by an old woman seventy years of age who was told that she would have to sign the mortgage to save her son in law from jail, and the mortgage was held void for duress.

In *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597, it was held: "Equity will not enforce a contract against one who although acting voluntarily, yet in fact appears to have executed the contract with a mind so subdued by harshness, cruelty or extreme distress, or appre-

hensions short of legal duress as to overpower and control the will."

In *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419, it was held: "A security executed by a mother to protect her son from exposure and prosecution for such embezzlement is invalid." In this case the mortgage was executed to one Hanley and assigned to Greene. The court in the opinion says: "It is true there was no direct threat by Hanley, but there was a pressure exerted, which had the effect, and was, doubtless, intended to have the effect of a threat": 1 Story's Equity Jurisprudence, 13th ed., sec. 239; 2 Pomeroy's Equity Jurisprudence, 3d ed., secs. 942, 951.

It is also contended for the appellee that a conveyance of land made in consideration of forbearing a prosecution is an executed contract, and will not be set aside by a court of equity. But the authorities cited to support this contention reach their conclusions under the theory that the maxim "In pari delicto" applies, and it seems to us that in cases where the parties do not stand "in pari delicto," as where one of the parties, under the duress of threats executes a deed of land to save one dear to him from exposure, disgrace and ruin, no such distinction is made: 6 Am. & Eng. Ency. of Law, 2d ed., 416, 417; *Heaton v. Norton County State Bank*, 5 Kan. App. 498, 47 Pac. 576; *Leflore* ⁴⁸⁴ *County v. Allen*, 80 Miss. 298, 31 South. 815. See 1 Page on Contracts, sec. 266; 9 Cyc. 443 to 456, inclusive.

No question is raised here that the bill was obnoxious to demurrer because of any formal defect or technicality, but it is insisted by counsel for appellee that the case was squarely decided on its merits and not upon any technicality, or even upon an inadvertent omission.

We think the foregoing authorities sustain the proposition that the maxim "In pari delicto" should not be applied to a case where a married woman sues to set aside a deed of her separate property made by her under express or implied threats of the prosecution of her husband, and to save him from prosecution, whether the threatened prosecution was lawful or unlawful, when she was sick and nervous, and when she does not appear to have had abundant opportunity for consideration and consultation with disinterested advisers.

The bill as amended shows substantially that Mrs. Burton only became aware that her husband was charged with

embezzling the funds of the county on the day before the deed was made; that the defendant came to her house twice and persuaded and influenced her to make the deed; that she was sick, her nerves affected, and her mind weakened by the shock of the communication, and the threatened exposure of her husband and his imprisonment in the penitentiary; that the defendant promised if she would make the deed he could and would arrange that no prosecution be brought against her husband; that she was loth to make the deed as it would leave her and her four children without a home and penniless; that she had only from late Sunday morning to early Monday morning to deliberate; that she had to get out of a sick-bed to execute the deed, and that she would not have executed the ⁴⁸⁵ deed but for her nervous, unstrung and shocked condition, and the promise of the defendant.

It does not seem to us that Mrs. Burton was simply persuaded by the defendant to execute the deed and yielded to his persuasion. He presented to her the alternative, by the clearest implication, of her husband's prosecution for embezzlement, if she did not execute the deed, for unless she did so he would not be moved to prevent it. We think the allegations of the bill entitle Mrs. Burton to relief.

The decrees sustaining the demurrer to the bill as amended and dismissing it are reversed at the cost of the appellee, and the cause remanded for further proceedings in conformity with law.

Taylor and Parkhill, JJ., concur.

Shackleford, C. J., Cockrell and Whitfield, JJ., concur in the opinion.

The Rule of Pari Delicto is the subject of a note to *Hobbs v. Boatright*, 113 Am. St. Rep. 724.

CASES

IN THE

SUPREME COURT

OF
ILLINOIS.

SUPERIOR COAL AND MINING COMPANY v. KAISER.

[229 Ill. 29, 82 N. E. 239.]

MINING EMPLOYEE, When does not Assume the Risk.—If two experienced miners examine the ribs and face of an entry where one of them is to work, and such ribs and face present an appearance of safety, the jury is justified in finding that he did not assume the risk, and that he exercised due care and caution for his own safety, and had the right to assume that the mine owners had discharged any duty which they owed him in reference to any dangers that might arise from the proximity of a cross-cut to his entry. (p. 235.)

MINE OWNER, When Guilty of Want of Due Care for His Employees.—If a mine owner, by making a thorough examination, would have discovered and might have averted a danger from which an employé was subsequently injured, there is a failure to discharge a duty which rests on the owner of a mine to use reasonable care and diligence to ascertain that the employé is provided with a safe place in which to work. (p. 235.)

MINING EMPLOYEE, Duty of, for His Own Safety.—While a miner is bound to take notice of defects which are patent, he is not required to make an examination for hidden defects, and may act on the presumption that the mine owners have used reasonable care. (p. 235.)

MINE OWNERS, Duty of, to Provide Safe Place for Work Notwithstanding Changing Conditions.—The rule which requires the master to furnish a safe place to work applies, although the servant is employed in constantly producing changes and temporary conditions, as in mining, for the time being more or less dangerous, if the servant has no part in producing the condition which leads to his injury. (p. 236.)

MASTER AND SERVANT—Fellow-servant, Question of, When for the Jury.—Whether a miner working in an entry and the machine runners and shooters working in a cross-cut were fellow-servants is a question for the jury, where the miner did not work in the cross-cut at any time. (p. 236.)

Action by an employé of a coal mine against the owners thereof for injuries received by the plaintiff while working in the mine. Two parallel entries in the mine, known as the fifth and sixth, were being run toward the west, the fifth being extended farther than the sixth. A cross-cut, about nineteen feet wide, was being run from the fifth toward the sixth entry, each entry being about twenty-four feet in width. In

driving the cross-cut through the west entry the intersection went through the south rib of the west entry, leaving a hole or opening from the cross-cut into the entry. The plaintiff charged that the defendant "carelessly and negligently directed, allowed and permitted said cross-cut to be developed in advance of and so close to the rib and face of said sixth west entry as to loose, crack and weaken the rib and face of such west entry at a point where the plaintiff was at work," and that in consequence thereof he was injured, and that the defendant had notice of this condition, or by the exercise of due care and caution might have known of it, and that the plaintiff exercised due care for his safety and did not know of the dangerous condition. The defendant contended that the development in the cross-cut did not extend beyond the south rib of the sixth entry, and that the face of the coal in the cross-cut, when finished, was straight in line with such south rib.

The plaintiff testified that on the morning of November 4, 1905, he went to his place of work, and both he and his "buddy" examined the coal in the face of the entry, and, sounding it with a pick, concluded it was safe, and went to work. About 10 o'clock of the same day, his right foot was injured by the falling of coal from the face of the sixth entry. The defendant's mine manager testified that he was in the cross-cut of the sixth entry on the same morning before plaintiff's arrival at work, and examined the coal and that it looked solid and safe to him. Verdict and judgment in favor of the plaintiff. A motion by the defendant for a new trial was overruled, and an appeal prosecuted to the appellate court, which affirmed the judgment.

Schaefer, Farmer & Kruger, for the appellant.

Webb & Webb, for the appellee.

³² VICKERS, J. It is admitted that appellee was injured by a fall of coal at the time and place alleged in the declaration. He bases his right of recovery upon the theory that his injuries are directly attributable to the carelessness and negligence of appellant in failing to exercise reasonable care and caution to provide him with a reasonably safe place in which to work, by allowing the cross-cut to be developed in advance of and so close to the rib and face of the sixth west entry as to loosen, crack and weaken the rib and face of the entry at the point where he was at work.

At the close of appellee's evidence, and again at the close of all the evidence, appellant asked the court to instruct the jury to return a verdict of not guilty. This the court refused to do, and it is contended that such refusal was error, because the evidence, with all the legitimate and natural inferences which may be drawn therefrom, was insufficient to sustain the verdict for appellee.

It is first insisted that "the appellee assumed the risk of the injury from the negligence charged in the declaration." The evidence shows that appellee, on the day of the injury, examined the coal in the face of the sixth west entry before beginning work and that it appeared to be solid and safe. The appellant's mine manager says that he examined the face of the sixth west entry on the same morning, before appellee arrived, and that it was safe. If, upon examination by two experienced miners, the ribs and face of the entry where appellee worked presented the appearance of safety, the jury were justified in finding that appellee did not assume the risk and that he had exercised due care and caution for his own safety. When he examined the coal in the face of the entry where he was to work and found ³³ it apparently safe, he had the right to assume that appellant had discharged its duty toward him in reference to any dangers that might arise from the proximity of the cross-cut to his entry. Appellant's mine manager had been in the cross-cut on the morning of the injury, but he admits that he did not sound the face of the coal in the cross-cut, and determined from its appearance alone that it was solid. If he had made a thorough examination of the face the danger might have been discovered by him and the injury averted. The failure to do so was a failure to discharge the duty which rested upon appellant to use reasonable care and diligence to ascertain that appellee was being provided with a safe place in which to work. While appellee was bound to take notice of defects which were patent, he was not required to make an examination for hidden defects, and he might properly act upon the presumption that appellant had used reasonable care in developing the cross-cut and that it had examined it for danger before permitting him to go to work: *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225; *Leonard v. Kinare*, 174 Ill. 532, 51 N. E. 688; *City of La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72; *Himrod Coal Co. v. Clark*, 197 Ill. 514, 64 N. E. 282. The rule that the servant assumes the

ordinary risks incident to the work or business in which he is engaged presupposes that the master has performed the duties of care, caution and vigilance which the law places upon him: *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, 64 N. E. 664.

It is insisted that the rule which requires the master to furnish a safe place to work does not apply in the case at bar, for the reason that this rule cannot be invoked in that class of cases in which the servant is employed in constantly producing changes and temporary conditions for the time being more or less hazardous. To this we cannot assent. This rule does not apply here, for the reason that appellee had no part in producing the condition which led to his injury. He watched the condition of the face of the entry where he was employed. The dangerous condition was ³⁴ developed in another locality by the development of the cross-cut. He had not worked upon the face of the entry between the time he examined it in the morning and the occurrence of the injury. He had produced no change in that regard. He was occupied in loading coal that had been cut out by the machine.

Appellant urges that the negligence charged in the declaration in this case is not shown by the proof to have been the proximate cause of appellee's injury. The substance of the charge referred to in the declaration is, that the condition which led to the injury was produced by the development of the cross-cut in advance of the sixth west entry and by the shooting of coal at that point, whereby the face of the entry was weakened so that it fell and produced the injury. We have examined the evidence in the record with reference to this point, and we are unable to agree with appellant that there was no evidence which fairly tends to support the declaration.

Appellant contends that appellee and the machine runners and shooters working in the sixth west entry and the cross-cut were fellow-servants. This statement is not in accord with the facts. The evidence is that appellee did not work in the cross-cut at any time. The only theory on which appellant can invoke the fellow-servant rule is, that appellee, working in the sixth west entry, and the machine runners and shooters working in the cross-cut were fellow-servants. Under the evidence in this case the question of fellow-servants is one of fact to be determined by the jury. There-

fore the judgment of the trial court, and its affirmance by the appellate court, are conclusive upon us on this point.

We find no error in the record and the judgment of the appellate court is affirmed.

The Duty of Mine Owners to Prevent Injury to Their Employés is the subject of a note to Wellston Coal Co. v. Smith, 87 Am. St. Rep. 557.

The Doctrine of Assumption of Risks in the law of master and servant is discussed at length in the notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 886; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 314.

WINN v. BLACKMAN.

[229 Ill. 198, 82 N. E. 215.]

ELECTIONS—Tampering with Ballots, When not Presumed.—

Although it appears that a number of tickets were counted as straight for a particular party by the officers of an election, and no one noticed a cross on any of them indicating a vote for a candidate of another party, yet if it appears, on a recount, that such ballots did not have a cross on them indicating a vote for such candidate, it will not be presumed that they have been tampered with in the meantime, and he should be given the benefit of them. (p. 242.)

ELECTIONS—Distinguishing Marks on Ballots, What are not.—

The fact that a cross is so marked that, upon examination of the back of a ballot, the marking can be traced does not establish the existence of a distinguishing mark on account of which the ballot can be rejected, there being no evidence tending to show how or for what purpose the marking was made. (p. 244.)

ELECTIONS—Indorsing Initials of a Judge upon the Ballots.—

The provision of statute requiring the indorsement of the initials of one of the judges on ballots is mandatory, and without it the ballot cannot be counted. (p. 245.)

ELECTIONS—Ballots, Indorsing of, must be in the Judge's Own Handwriting, and One Judge cannot Indorse for Another.—

Under a statute providing that the judge of election who hands a ballot to a voter shall indorse his initials thereon, and that no ballot without such indorsement shall be allowed to be deposited in the ballot-box, one judge cannot authorize another to indorse his initials, and if such indorsement, though so authorized, is made on a ballot, it cannot be counted. (p. 245.)

ELECTIONS—Ballot, When not so Marked that It cannot be Counted.—If there is nothing on the face of a ballot to show that it has ever been counted, except that there is a slight roughing of the surface inside the party circle, indicating that something has been erased by a rubber, the ballot should be rejected. (p. 246.)

ELECTIONS—Ballots having a V-Shaped Mark Instead of a Cross.—If in the square of a ballot opposite the name of a candidate there is no cross, but instead a marking resembling a V appears, the ballot should be rejected. (p. 246.)

ELECTIONS—Defective Marking in the Party Circle.—Where the marking in a party circle, though not a cross, may be designated

as two crosses, yet if it appears to have been properly made by one who is very nervous, the ballot should be counted for the candidate of the party in whose circle the marking appears. (p. 247.)

ELECTIONS—Marks Which will not be Held to be Distinguishing.—If a ballot is properly marked in the party circle and has also upon it other marks made by a pencil, forming a figure not resembling any known object and very difficult to be described, it will not be treated as a distinguishing mark, requiring the rejection of the ballot. (p. 247.)

ELECTIONS.—A Distinguishing Mark Prohibited by the Law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of mark put upon a ballot to indicate who cast it, and to furnish means of evading the law as to secrecy. (p. 248.)

ELECTIONS—Distinguishing Marks.—Whether a Given Mark upon a Ballot is or is not a Distinguishing Mark is largely, if not wholly, a question of fact to be determined from the original ballot itself, and where that ballot is certified to an appellate court, it has as good an opportunity to determine this question as had the trial court. (p. 249.)

ELECTIONS.—To Warrant the Rejection of a Ballot Because of a Distinguishing Mark, the court should be able to say that such mark was placed on the ballot by the voter for the purpose of distinguishing it from the others. (p. 249.)

ELECTIONS—Distinguishing Marks, Marks Made by a Voter, When are not.—It is not every mark or blot placed upon a ballot by a voter that is a distinguishing mark, nor should the ballot be rejected because there is upon it some mark which the court believes would enable the voter who cast the ballot to identify it as the one made by him. (p. 249.)

ELECTIONS—Distinguishing Mark.—A Small “t” near the bottom of a ballot made near an ink blot warrants the court in rejecting the ballot, on the ground that such letter may have been intended as a distinguishing mark. (p. 251.)

ELECTIONS—Distinguishing Mark—Writing the Name of a Candidate Already Printed on a Ballot.—Where a ballot having the candidates of three parties appears with a cross in a party circle and a cross in the squares opposite the name of each of the candidates of that party, and with the name of one of such candidates erased by drawing several lines through it, and in its place the name is written of a candidate whose name appears among the candidates of another party, there is nothing amounting to a distinguishing mark or otherwise unlawful on this ballot, and it should be counted for the person whose name appears to be so written. (p. 252.)

BALLOTS—Distinguishing Marks—Writing of Names on a Ballot.—The writing of a name on a ballot, not directly in connection with any office, does not constitute a distinguishing mark, when, from attending circumstances, it is probable that the object of the voter was to vote for the person named for an office respecting which one of the parties had no name printed on the ballot. (p. 253.)

ELECTION—Distinguishing Marks.—The fact that three small strokes of a pencil appear near the margin of a ballot does not require that it be excluded as containing a distinguishing mark. (p. 253.)

ELECTIONS.—The Marking of Two or More Party Tickets in the Circle nullifies the ballot only so far as both tickets bear names of candidates for the same office. (p. 254.)

ELECTIONS—Mutilated Ballots, When Properly Rejected.—A ballot mutilated by being cut across one end, taking off a part of

the names of all the candidates for that office of one party with a single exception, and also the circle opposite the name of that party and all squares opposite to names of its candidates, and having a cross in the circle of the other party, and a cross near the name of certain candidates, neither cross appearing within the square, is properly rejected. (p. 254.)

ELECTIONS—Index Hand Pointing to a Name.—If a ballot is marked in a party square, but has also a cross in the square opposite the name of a candidate of the other party, and below an index hand pointing to such name, the object of the voter is apparently to call the attention of the election officers to his vote for such candidate, and not to use a distinguishing mark, and the ballot should be counted. (p. 254.)

ELECTIONS—Distinguishing Marks.—The fact that a marking in a party circle is by three straight lines crossing in the middle and forming a six-pointed star does not require the ballot to be rejected as bearing a distinguished mark. (p. 255.)

ELECTIONS.—Ballots Picked Up Off a Floor after the voting was over and marked "void" are properly excluded. (p. 255.)

ELECTIONS.—A Ballot Which does not Bear the Initials of Any of the Judges on its back is properly rejected. (p. 255.)

ELECTIONS.—A Ballot on Which the Whole Face of Several Squares is blackened by a lead pencil, but which has no cross in any of its circle or squares, is properly rejected. (pp. 255, 256.)

J. E. Dyas and F. K. Dunn, for the appellant.

H. S. Tanner, Frank T. O'Hair, James K. Lauher and Stewart W. Kincaid, for the appellee.

²⁰¹ VICKERS, J. At the election in November, 1906, Howard M. Winn was the Republican and John I. Blackman was the Democratic candidate for sheriff in Edgar county. By the official canvass of the votes Winn received three thousand four hundred and forty-eight votes and Blackman three thousand four hundred and twenty-two. Blackman filed a petition to contest the election, alleging errors in the count of the votes in the various precincts of the county. Winn answered the petition and denied the alleged errors, charged counter-errors, and alleged that in the second precinct of Young America township the ballots had been fraudulently changed so as to show a greater number of votes for Blackman and a less number for Winn than were cast for them, respectively, and counted by the judges. On the trial of the contest in the county court of Edgar county the court found that Blackman had received three thousand four hundred and twenty-one votes and that Winn had received three thousand three hundred and ninety-six votes and declared Blackman duly elected, and rendered judgment against Winn for costs, from which he has prosecuted this appeal.

On the hearing the ballots were all produced and recounted, and there were three thousand three hundred and forty-eight votes counted for appellant and three thousand three hundred and forty-six for appellee without objection. Included in appellee's three thousand three hundred and forty-six votes are eight votes from the second precinct of Young America township which appellant charges were ²⁰² changed after the ballots had been cast, so as to increase the vote of appellee eight votes and decrease the vote of appellant eight votes. There were one hundred and seventy-four ballots that were objected to by one or the other of the parties. Of these one hundred and seventy-four ballots the court counted forty-eight for appellant and seventy-five for appellee, making the total vote, as finally determined by the court, three thousand three hundred and ninety-six for appellant and three thousand four hundred and twenty-one for appellee. The remaining fifty-one ballots of the one hundred and seventy-four that were objected to, the court held illegal and refused to count them for either party. The errors and cross-errors assigned bring up for review the rulings of the court on substantially all of these various ballots.

Appellant insists that the evidence shows that eight ballots counted by the court for appellee were shown to have been tampered with and marked for the appellee when they should have been counted for appellant. These ballots were marked in the Republican circle and were straight Republican ballots except that a distinct cross appears on each of them opposite the name of appellee. There is nothing on the face of any of these ballots that tends to discredit them or to raise a suspicion that they were not in the same condition when opened in court that they were in when they left the hands of the voters. The evidence upon which appellant relies to prove that these eight ballots had been changed after they were voted is the testimony of the three election judges in the township where they were cast and the Republican and Prohibition challengers who were present, together with the fact that the returns from that precinct showed that these eight ballots had been counted by the election judges for appellant. There were one hundred and ninety-five votes cast in the second precinct in the town of Young America, of which, by the returns of the election judges, the appellant received eighty-five and appellee ninety-four. The remainder of the voters either cast their ballots for the Prohibition candidate

or did not vote for sheriff. On the final count by the county court appellant's vote was reduced to seventy-seven and appellee's was increased to one hundred and two.

²⁰³ The testimony of the witnesses upon which the appellant relies shows that when the judges were ready to commence the canvass of the votes the ballots were first taken out of the ballot-box, unfolded and examined, and the straight Republican ballots were placed in one pile on the table, the straight Democratic ballots in another, the straight Prohibition ballots in a third, and the mixed or scratched ballots were placed in a fourth pile. One of the judges, Mr. Stone, drew the ballots from the ballot-box and passed them to Mr. Bren, another of the judges, who unfolded them and determined which of the piles they belonged to, and placed them accordingly. After the ballots were all drawn from the ballot-box and classified, as above stated, they were then counted three times, in order to determine whether the number of ballots corresponded with the number of names on the tally sheet. The eight votes in question were placed in the pile of straight Republican ballots. After the ballots had all been canvassed they were then strung on a wire, the Republican ballots first, Democratic second, Prohibition next and then the mixed or scratched ballots, the ballots going on face down. The ends of the wire were then brought together and fastened and the ballots placed in a sack and sealed up and put in charge of one of the judges of the election. It is not contended that the sack had been opened or the ballots disturbed in any way after they were sealed up by the judges on the night of the election. When the sack was opened in court the ballots were taken off in the reverse order from which they were placed on the wire, the Republican ballots coming off first, the Democratic ballots second, the Prohibition next and the mixed ballots last. The ballots came off face upward. This is accounted for by the fact that the ballots were taken off of the opposite end of the wire from where they were put on. Upon an examination of the so-called straight Republican ballots the eight ballots in question were found plainly marked in the Republican circle and a plain, distinct cross opposite appellee's ²⁰⁴ name on the Democratic ticket. These eight ballots were not found in a group, but were scattered promiscuously through the Republican straight ballots.

Appellant's contention is, that if these ballots had been marked for appellee at the time the canvass was made, the persons present making the canvass would necessarily have discovered it, and the fact that they did not see a cross opposite the name of appellee in any of these ballots is sufficient to warrant the court in finding that the ballots were not so marked at the time the canvass was made. It must be admitted that it was very extraordinary that these judges and the two challengers would overlook this number of scratched ballots. Such a mistake could not happen except through the gross carelessness and inattention of these election officers. A glance at the ballots is all that is necessary to see a cross opposite appellee's name, and still there is not a particle of evidence that anyone had any opportunity to falsify these ballots unless it was some one of the persons who were in the room during the time the canvass was being made. There is some evidence that other persons than the challengers and the election officers were in the room occasionally when the canvass was being made (persons who were admitted to make inquiry as to the result), but it is not pretended that any of these persons handled any of the ballots or had any opportunity to do so. If the ballots were fraudulently tampered with, it must have occurred during the canvass and in the presence of the election judges. It is not to be presumed that any of the election officials would be guilty of committing a criminal offense by tampering with these ballots, nor can it be supposed that they would be so utterly indifferent to the discharge of their duties as to permit any unauthorized person to handle the ballots, whereby an opportunity would be afforded to perpetrate such a fraud. The most charitable view, and to our minds the most reasonable, is, that the election officials overlooked these ballots, and when they saw the cross in the ²⁰⁵ Republican circle they did not make an examination further, but concluded that the ballots were straight Republican ballots and classified them accordingly. We more readily come to this conclusion when we consider that in the counting of the ballots that occurred after they had been separated into piles the ballots were not handled, but they were counted by turning up the corners of the ballots as one would count the leaves in a book. Mr. Bren testifies that while he did not see any cross opposite the name of appellee on these ballots, yet he says that such crosses might have been there and he overlooked them. Bren is the

election judge who unfolded the ballots and determined which class they belonged to. The other witnesses did not examine them as much as Bren did. In our opinion the county court properly counted these eight ballots for appellee.

Appellant next insists that the court erred in rejecting twenty-three ballots (being exhibits 11 to 33) in the second precinct of Embarrass township. These ballots were all very similar and were all straight Republican ballots, and they were all rejected for the same reason—that they had distinguishing marks on them. These twenty-three ballots were each marked with a proper cross in the Republican circle and by a cross opposite the name of each candidate for a county office on the Republican ballot. There were no other marks of any kind or character upon any of these ballots, except in ballots 17 and 29 a cross was placed opposite each of the candidates for the General Assembly, and in ballot 24 a cross was placed in the square opposite the name of Charles A. Allen, candidate for representative. In all other respects these ballots are regular and free from any marks or blemishes. The ballots, when examined from the back, show a trace of the pencil mark—that is, there is a slightly raised or embossed appearance on the back of the ballots, indicating that the marking had been done with a somewhat heavier hand than was necessary or that a hard lead pencil had been used, so as to make the imprint of the marking visible from the back. Appellee contends that marking a ballot in this way is a distinguishing mark, and the county court sustained that view. To this we cannot assent. Upon an examination of a large number of other ballots, we find that it is possible to locate the cross from the imprint of the pencil on the back of the ballots. In fact, there are many ballots in the record on which one can locate the marking by simply rubbing the fingers over the surface of the back of the ballot, without looking at it at all. The paper upon which the ballots are printed is a white, soft, cheap book paper, and by placing a sheet of blotting paper under the ballot an ordinary stroke of a lead pencil will be plainly traceable on the back. It is true that it was not necessary that the voter should mark both the circle and the squares in order to vote a particular ticket, but it is well known that many voters do so mark their tickets. It is not shown or claimed that the persons who voted these tickets did not intend to vote them exactly as they were marked, and there

is no evidence that these ballots were marked in this particular manner in order to distinguish them from other ballots.

Appellee contends that because twenty-three of these ballots were voted in the same precinct, marked in substantially the same way, it is evidence that there was some one on the outside interested for appellant who was buying these votes and some one on the inside watching for the appearance of the crosses on the back of the ticket, and that in some way information would be conveyed to the purchaser on the outside that the ballot had been delivered according to contract, so that the voter could receive the consideration that was agreed to be paid. The most serious objection to appellee's contention on this point is, that there is no evidence in this record to support it. We are of the opinion that it would be a very dangerous rule to hold that a ballot is to be rejected and the voter deprived of his constitutional right to vote, if, upon an examination of the back of the ballot, the marking of the ballot can be traced. If such rule were ²⁰⁷ applied in this case it would deprive appellant of twenty-three votes and appellee would lose as many for the same reason, and perhaps more. In fact, our attention is called to sixty-five ballots which were counted for appellee, the markings of which are discernible from the back of the ballot. While it is true a distinguishing mark which will justify the rejection of a ballot may appear upon the back as well as upon the face of the ballot, still the mere fact that the imprint of the pencil with which the voter marks the face of his ballot may be discernible upon examination of the back of the ballot, and which occurs through mere inadvertence and without the knowledge of the voter, cannot be held to be such distinguishing mark. There is no contention that these twenty-three Republican ballots were cast by Democrats or that there was any corresponding decrease from the normal Democratic vote in this precinct.

The court erred in rejecting the twenty-three ballots for appellant in the second precinct of Embarrass township, and they should be counted for appellant.


It is next urged by appellant that the court erred in refusing to count five ballots for appellant (being exhibits 166 to 170, inclusive) cast in the first precinct of Young America. The objection that appellee makes to these five ballots is, that they did not have the initials of one of the judges indorsed on the back thereof by the same judge whose in-

initials appeared thereon. The judges of this township were T. J. Coffman, S. S. Gough and William Turley. The evidence shows that when the polls were opened it was agreed among the judges that Coffman should indorse his initials on the ballots, that Turley should take them from the voters and place them in the ballot-box and that Gough should attend to the register. This method was followed. When Coffman went to dinner some question was made as to whether he had signed up enough ballots for use in his absence. Before he went to his dinner Coffman said to the other judges, "If you need any more, go ahead and sign ²⁰⁸ them yourselves." One of the other judges, in the absence of Coffman, signed Coffman's initials "T. J. C." on the five ballots in question and they were handed out to voters and were voted. The county court sustained the objection to these ballots. They were all cast for appellant. Section 22 (paragraph 186) of the Australian ballot law (2 Starr & Curtis' Statutes, p. 1688) provides that "one of the judges shall give the voter one, and only one, ballot, on the back of which such judge shall indorse his initials in such manner that they may be seen when the ballot is properly folded"; and section 26 of the same chapter provides, that "no ballot without the official indorsement shall be allowed to be deposited in the ballot-box and none but ballots provided in accordance with the provisions of this act shall be counted." The indorsement of the initials of one of the judges under these sections of the statute is mandatory, and without it the vote cannot be counted: *Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837; *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012. The statute contemplates that the judge who passes the ballot to the voter should indorse his initials on the ballot in his own handwriting: *Choisser v. York*, 211 Ill. 56, 71 N. E. 940. In the case last above cited, in condemning the use of a rubber stamp for indorsing the ballots, this court said: "The statute is, not only that the initials of one of the judges shall be placed upon the ballot, but that the particular judge who hands the ballot to the voter shall indorse his initials thereon. Every man's handwriting possesses certain peculiarities which tend to distinguish it from every other handwriting. By writing his initials upon ballots the judge doing so should be able to distinguish those which are genuine, and could generally do so." If the judge who passed out these five ballots had indorsed his own initials upon


them there would be no question about the regularity of the ballots, but the statute was not complied with by his indorsing the initials of Coffman thereon. There was no error in refusing to count these five ballots for appellant.


²⁰⁰ We have thus far disposed of twenty-eight of the fifty-one rejected ballots, leaving twenty-three yet to be considered. Of the remaining twenty-three ballots that were not counted for either party by the court, appellee insists that Nos. 95, 103, 104, 110, 111, 118, 119, 121, 161 and 173 should have been counted for him, while appellants insists that these ballots were properly rejected by the court, and that Nos. 96, 97, 101, 102, 106, 107, 164 and 172 should have been counted for appellant and that Nos. 35, 94, 116, 117 and 120 should not have been counted for appellee. Appellee objects to forty-three other ballots that were counted for appellant but has not insisted upon his objections in his brief, and for that reason these objections will be considered as waived. We will now consider appellant's specific objections to individual ballots.

Ballot No. 96 is a blank ballot. There is nothing on the face of it to indicate that it had ever been voted, except there is a slight roughing of the surface inside the Republican circle, indicating that something might have been erased by the use of a rubber. It is impossible to say what mark or sign may have been erased from this circle. The closest investigation does not disclose a trace of a cross. The court properly rejected No. 96.

Ballot No. 97 was rejected by the court because there is no cross either in the circle or opposite the name of appellant. This ruling appellant insists is erroneous. The ballot is marked with a cross opposite the name of each candidate on the Republican ticket for which the voter intended to vote on that ticket. Opposite the name of appellant, inside the square, is a pencil mark like this . There is no point inside the square where there is an intersection of the lines which can be called a cross. The character seems to have been made by a short stroke of the pencil, followed by another short stroke at right angles with the first. There does not appear to have been any attempt on the part of the voter to make a cross, and this ballot was properly rejected under the authority of *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227.

²¹⁰ Ballot No. 101 was rejected by the court on the ground that there was a distinguishing mark upon it. This ballot has one line drawn across the circle of the Republican ticket and then it has a cross in each of the squares of the Republican ticket. It is this pencil line drawn across the circle which led the court to reject the ballot. In this we think there was error. Evidently the voter, knowing the two methods by which he could vote a straight Republican ticket, first concluded to make a cross in the circle and drew one line, then changed his mind and concluded to mark each of the squares, and accordingly put a cross in all of the Republican squares of the ticket, thereby voting a Republican ticket by that method. We reach this conclusion from the fact that the ballot shows an intention to vote a straight Republican ticket. A mark of this character, which can reasonably be explained consistently with the honest purpose of the voter and which was manifestly made through mistake, inadvertence or because he changed his mind as to the method by which he intended to mark his ballot, is not a distinguishing mark, within the meaning of the law. This ballot, in our opinion, should have been counted for appellant.

Ballot 102 was rejected by the court for the alleged reason that it also had distinguishing marks upon it. This ballot was marked in the Republican circle in this way . There is in this ballot a perfect cross in the Republican circle, and the only irregularity is in the semi-circle which connects three points of the cross together. This was evidently simply a little flourish of the pencil, and not made as a distinguishing mark. We think this ballot should have been counted for the appellant under the authority of *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227.

Appellant insists that ballot 106, which was rejected by the court, should have been counted for him. The only mark upon this ballot is found in the Republican circle, and is like this . The court rejected this ballot, either because there was no cross in the circle or because the marking ²¹¹ in the circle was a distinguishing mark. There are two crosses in the Republican circle. We think the ballot should have been counted. The character found in the Republican circle indicates to our minds that it was probably put there by some one who was very nervous—so much so that it was with great difficulty that a cross was made. We think that the marking on this ballot belongs to the same class as

two ballots passed on in *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227, and under the authority of that case the manifest intention of the voter should prevail and the ballot be counted as it was manifestly intended by the voter. This ballot should be counted for appellant.

Ballot 107 was rejected by the court because in the opinion of the court there was a distinguishing mark upon it. This ballot is properly marked in the Republican circle with a cross. On the lower right-hand corner, on the face of the ballot, there is a light pencil line almost straight, about one inch and a quarter long; the line then turns almost at right angle and runs in a curve about one inch; there is then a little jog or fork and the line runs back toward the first stroke almost parallel with the second line, forming a sort of triangular figure that does not resemble anything with which we are acquainted. The lines of this character are very lightly and somewhat irregularly drawn. We are of the opinion that this mark ought not to be held as a distinguishing mark. It is true that it is possible that it might have been placed on the ballot by the voter for the purpose of distinguishing it from other ballots, yet it is also possible that such a character might have gotten on the ballot through inadvertence or mistake. It is a mark that is very difficult to describe, and we do not see how a voter could with any certainty describe such mark so that another person would be able with certainty to identify the ballot. The distinguishing mark prohibited by the law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of ²¹² a mark put upon the ballot to indicate who cast it, and to furnish the means of evading the law as to secrecy: *Pierce v. People*, 197 Ill. 432, 64 N. E. 372; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 420. In the case last above cited, on page 100, this court said: "Therefore, not every mark made by a voter on his ballot which may separate and distinguish the particular ballot from other ballots cast at the election will necessarily result in the declaration that the ballot is invalid. If it appears from the face of the ballot that such marks or writings were placed thereon as the result of an honest effort on the part of the voter to indicate his choice of candidates among those to be voted for at the election, and that the voter did not thereby intend or attempt to indicate who voted the ballot, the ballot should not be rejected as to candidates for whom

there is thereon a choice expressed in compliance with the requirements of the statute."

Whether a given mark upon a ballot is or is not a distinguishing mark, within the meaning of the Australian ballot law, is largely, if not wholly, a question of fact: *Kelso v. Wright*, 110 Iowa, 560, 81 N. W. 805; *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315, 61 N. E. 405. This question must be determined from an inspection of the original ballot itself. The original ballots in this case have been certified to this court and we have examined them, consequently the trial court did not have any better opportunity for determining these questions than is afforded this court by an inspection of the original ballots. In order to warrant the rejection of a ballot because of a distinguishing mark, the court should be able to say that such mark was placed there by the voter for the purpose of distinguishing his ballot from others: 3 Current Law, p. 1172; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240. It is not every mark or blot that may be placed on the ballot by the voter himself that is a distinguishing mark, nor should a ballot be rejected because there appears upon it some mark which the court believes would enable the voter who cast the ballot to identify it as the ballot voted by him. The Australian ballot ²¹³ law does not contemplate that the voter will ever see his ballot again after it is deposited in the ballot-box. By carefully studying the face of his ballot the voter could readily recognize the ballot he had voted by the manner in which the crosses had been made, or by an almost inconceivable number of things which might be upon the ballot or be placed there by the voter without any thought that he was marking it for the purpose of identification. The title of the act, as well as the general scope of its various provisions, indicates that one of the main purposes sought to be accomplished by the Australian ballot law is to preserve the secrecy of the ballot. There is no express provision in our statute that a ballot containing a distinguishing mark is to be rejected, and the ground upon which such a ballot is rejected is that it violates both the letter and the spirit of the law intended to guard the secrecy of the ballot. In many of the states having a similar election law there are express provisions declaring all ballots illegal and void which bear any distinguishing marks, and where the courts have had occasion to construe such provisions the evil sought to be remedied has entered into the construction given and influ-

enced the conclusion reached. Thus, the supreme court of Indiana, in *Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204, 27 L. R. A. 468. in discussing the subject of distinguishing marks under the statute of that state, said:

"So that the statute was the outgrowth of the desire of all to rid the state of the burning disgrace and ominous danger to popular government, and the leading idea and thought of the whole act was, not to afford relief against the fraud of vote buying and bribery at elections after its commission, but it was to devise a plan by which the honest voter could not only be freed from intimidation by making his vote a secret known only to himself and his God, but it was to absolutely shut the door against making merchandise of his vote by the corruptible voter, as near as human ingenuity could devise such a plan. That the plan has proven eminently ²¹⁴ successful is evidenced by the fact that all political parties warmly approve of the law and that thirty-odd of our sister states have since substantially adopted it. The idea was not, as appellant's counsel seem to think, to so provide as to render it impossible for the purchased or bribed voter to afterward identify the ticket he voted by looking at and inspecting it, because other provisions of the act provide for a destruction of the ballots after they are counted and before anybody except the officers can see them, but it was to guard against the possibility of the vote seller indicating to the buyer in advance how his ballot would be distinguished from the other ballots in the box, so that the buyer or his agent, who may be one of the election officers, could tell, when the bribed voter's ballot was reached in the count, that such bribed voter had carried out his contract. It was believed that if it could be rendered impossible for the buyer or his agent to identify the ballot voted by the purchased voter from a mere indication beforehand how it should be marked the desired end would be reached, because it was believed that, as a general thing, a vote buyer would not risk his money on a vote seller without some assurance other than the mere word of the bribed voter."

In the *American and English Encyclopedia of Law*, second edition, volume 10, page 728, it is said, that unless the ballot has been marked intentionally, and so as to enable a third person to determine from an inspection of it, without other aid, that it was deposited by a particular person, the judges

of the election should presume that the marking was inadvertently done and count the ballot.

In our opinion ballot 107, being otherwise fair and free from suspicion, should not have been rejected on the ground that it contained a distinguishing mark, and that the ballot should have been counted for appellant.

Ballot 164 was rejected by the court because it had a distinguishing mark upon it. The mark upon this ballot is ²¹⁵ a small letter "t" near the bottom of the ballot and to the right of the center. The letter bears evidences of having been made carefully and is placed near an ink blot. A careful examination of this mark leads us to conclude that it might easily be a distinguishing mark. While it is not at all clear to our minds that it was so intended, still we are inclined to agree with the court below that the ballot was properly rejected.

The court refused to count ballot 172 for appellant, and this is assigned as error. This ballot is marked with a cross in the Prohibition circle and with a cross in each of the squares on that ticket. Marion Clark's name was printed on the ballot as the Prohibition candidate for sheriff. The square opposite Clark's name was marked with a cross. The name "Marion Clark" was erased by several lines of lead pencil being drawn through it. The paper near the name "Marion Clark" is slightly torn, which was evidently done by the voter in his attempt to erase Marion Clark's name from the ballot. Below the name "Marion Clark" the name of appellant is written in lead pencil. The ballot in all other respects is free from objection. We are satisfied that in the erasing of Clark's name and the writing of "Howard M. Winn" below it was done by the voter in attempting to express his choice for sheriff. The voter adopted a rather clumsy method of casting his vote for sheriff, but there is nothing illegal in the method adopted.

Appellee insists that by writing the name of appellant in the Prohibition ticket, thereby making his name appear under both the Republican and Prohibition appellations, the amendatory act of 1903 is thereby violated, and for that reason this ballot should be rejected. The amendatory act referred to, which is found in Starr & Curtis' Statutes, volume 5, page 200, prohibits any candidate from having his name printed under more than one party appellation, and provides that in case a candidate has been nominated by two

or more political parties he may withdraw his name from all ²¹⁶ but one of said nominations and elect upon which ticket he desires to have his name appear, and if he fails to exercise his right of selection then his name cannot be printed upon either ticket. This statute deals with the right of the candidate to have his name printed upon more than one ticket, but does not purport to deny the voter the privilege of writing the name of any person for whom he desires to vote upon the ticket. In *Pierce v. People*, 197 Ill. 432, 64 N. E. 372, it was decided that every legal voter has a right to vote for the candidate of his own selection, and if the name of such candidate is not printed on the official ballot he has the right to insert it in some blank space on the ticket and vote for the candidate of his choice: See, also, *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290. And in the late case of *Smith v. Reid*, 223 Ill. 493, 79 N. E. 148, it was held that the writing in of names on a ticket and voting for them on that ticket was not illegal, even though the names so written in were printed in other places on the ballots as those of candidates for the same office for which the names were written in, and that the names so written in were not distinguishing marks. Under the authority of these cases ballot 172 should have been counted for appellant. The fact that his name is not written in immediately opposite the square does not affect the legality of this vote. The erasure of the name of the Prohibition candidate for sheriff and writing the name of appellant immediately below it clearly indicate the intention of the voter to cast this vote for appellant, and it should be so counted: *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227.

Ballots 35 and 94 were counted by the court for appellee. These ballots are objected to by the appellant on the ground that they contain distinguishing marks. They may be considered together. Ballot 35 has the name "George Meyers" written in ink on the face of the ballot, about one-half inch from the lower edge of the ticket. There is no office designated in connection with the name of George Meyers, and George Meyers' name is not printed upon any ²¹⁷ of the tickets as a candidate for any office. Ballot No. 94 has the name "George Mares" written above the Democratic ticket. The Democratic tickets had no name printed on them under the title of representative in the General Assembly. A blank space was left under the title of that office,

in which a large number of persons who voted that ticket wrote the name of George Meyers. By referring to those tickets the conclusion must be reached that by some sort of concert of action or common understanding the Democratic party was trying to elect said George Meyers to the lower branch of the state legislature. To vote for him it was necessary to write his name under the title of that office in the space left for that purpose. In view of the fact, which is clearly shown by the ballots introduced in evidence, that George Meyers was being voted for, generally, by persons who voted the Democratic ticket, the writing of the name of George Meyers on ballot 35 and George Mares on ballot 94 was no doubt the result of an effort to vote for him. At all events it seems probable that such was the purpose of the voter, and we are not inclined to disturb the decision of the court below in regard to these two ballots.

Ballot 116 is objected to by appellant on the ground that it contains distinguishing marks. This ballot has three small strokes of the pencil near the margin below the Prohibition ticket. It belongs to the same class as ballot 107, already discussed, and what is there said with respect to that ballot will apply to 116. The ballot was properly counted for appellee.

Ballot 117 was counted for appellee, over appellant's objection. The objection is that it bore a distinguishing mark. The mark on this ballot was a letter "V" on the back of it, in imitation of a printed "V." This ballot should have been rejected for the reasons heretofore given in discussing ballot 164.

Ballot 120 was objected to by appellant but was properly counted for appellee. The small mark on the back of the ²¹⁸ ballot cannot be regarded as a distinguishing mark within the rules heretofore laid down by the authorities cited.

We now come to consider ballots that were objected to by appellee. Ballot 95 was a straight Democratic ballot, marked with a cross in the circle. There was also a cross in the circle opposite the Socialist party name and another cross in the circle opposite the Socialist Labor party, and there was a small check-mark in the circle opposite the Prohibition party appellation but there is no cross in this circle. Neither the Socialist nor Socialist Labor party had any candidates' names printed on its ticket for county officers. The cross in the Democratic circle indicated a vote for all the

candidates on that ticket. This vote, however, was neutralized for all the candidates except the county candidates by the crosses made in the Socialist and Socialist Labor party tickets, but these crosses could have no effect on the vote for county officers. The marking of two or more party tickets in the circle only nullifies the ballot in so far as both tickets bear the names of candidates for the same office: *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227. The little check-mark in the Prohibition circle will not justify the rejection of the ballot as a distinguishing mark. The court erred in not counting this ballot for appellee.

Ballot 103 was rejected by the court. The ballot is mutilated by being cut across the left-hand end of the ballot, taking off a part of the names of all the candidates for state officers on the Democratic ticket, with one exception. The Democratic circle is gone entirely and all the squares opposite the names of the Democratic candidates are gone. There is a cross in the Republican circle and a cross above the name of Walter S. Lamon, candidate for county judge, and a cross to the left of the name John I. Blackman, on the Democratic ticket, but neither of these crosses, nor any part of the lines thereof, is within the squares. This ballot was properly rejected because it was plainly distinguishable from other ballots, and was properly not counted for either party.

²¹⁹ Ballot 104 is a straight Democratic ballot, marked in the circle of that party ticket, except there is a cross in the square opposite the name of Clay F. Gaumer, candidate for member of the General Assembly. To the right, and below the name of Gaumer, is an index hand pointing to the name of Gaumer, made in pencil. Undoubtedly the purpose of the voter was to call the attention of the judges to the fact that he had voted for Gaumer, to prevent his ballot being counted as a straight Democratic ballot. While such a character might be a distinguishing mark, still we are satisfied that the index finger pointing to the vote for the Prohibition candidate for the legislature was placed there with an honest purpose and out of an abundance of caution lest the vote should be overlooked. In our opinion the court erred in refusing to count this ballot for appellee.

Ballot 110 was thrown out by the court. This is a straight Republican ticket except for William Morton, Democratic candidate for county treasurer. There is a cross in the square opposite the blank space on the Democratic ticket for member

of the legislature, and there are two pencil marks in the square opposite appellee's name. The character is more like a check-mark, the points of which come together outside the square, the points extending up into the square, than it is like a cross. This mark is not a distinguishing mark and the ballot should have been counted for appellant. But appellant has not saved his exception to this ruling of the court on this ballot, but concedes that the court properly ruled thereon, and therefore the ballot will not be counted for either party.

Ballot 111 is marked in the Republican circle by three straight lines crossing in the center, forming a six-pointed star. There is a cross in the square opposite appellee's name on the Democratic ticket. This ballot should have been counted for appellee, and the court erroneously threw it out. The marking of the circle on this ballot is like the marking of the circle shown on page 373 of *Tandy v. Lavery*, 194 Ill. 220 372, 62 N. E. 774. Under the authority of that case this ballot should not have been rejected, and it will accordingly be counted for appellee.

Appellee insists that ballot 118 should have been counted for him. To this we cannot assent. This ballot stands on the same footing as ballot 110. We think it might properly have been counted for appellant, but he does not claim it. It certainly cannot be counted for appellee. It is a Republican ticket, and there is no cross in the square opposite the appellee's name.

Ballot 119 stands in the same class with 110 and 118. It might have been counted for appellant, but he has not insisted upon it and appellee is not entitled to it.

Ballot 121 was marked "void" by the judges of the election and was not strung or counted by them for either party. The evidence of the judges shows that this ballot was picked up off the floor after the count was over and marked "void," and it never was in the ballot-box. The court properly refused to count it for either party.

Ballot 161 was properly rejected, because it does not bear the initials of any of the judges on the back of it: *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012.

Ballot 173 was properly rejected for the reason that there are no crosses in any of the circles nor in any of the squares on the entire ballot. It was not a vote for anyone. Instead of making a cross the voter has undertaken to blacken the whole

face of several squares with a lead pencil. The voter either did not know how to vote or did not try to vote. There is no attempt to comply with the law, and the ballot was properly rejected.

The result reached by us after going through this record very carefully and considering every ballot separately to which objection has been made by either party may be summarized as follows: Appellant has three thousand three hundred and forty-eight votes that are unquestioned. The trial court gave appellant forty-eight votes out of the one hundred and seventy-four, which we find he was entitled to. We also find ²²¹ that appellant was entitled to twenty-three votes in the second precinct of Embarrass township, and that he is entitled to ballots 101, 102, 106, 107 and 172, making his total vote as ascertained by this court three thousand four hundred and twenty-four. Appellee had three thousand three hundred and forty-six votes which were unquestioned and the trial court properly gave him seventy-two out of the one hundred and seventy-four ballots that were in question. The trial court improperly gave him ballot No. 117 and improperly refused to count for him ballots Nos. 95, 104 and 111, making his total vote as ascertained by this court three thousand four hundred and twenty-three. It therefore follows that appellant, Howard M. Winn, was duly elected sheriff of Edgar county by one vote, and that the county court erred in finding that John I. Blackman had been elected and in rendering judgment against appellant for costs.

The judgment of the county court of Edgar county will be reversed and the cause remanded to that court, with directions to enter a judgment in favor of appellant.

CARTWRIGHT, J., Concurring. I agree with the conclusion that appellant was elected sheriff of Edgar county, but think the county court erred in refusing to count the five ballots cast for him in the first precinct of Young America which bore the initials of one of the judges indorsed thereon by another judge. I do not think a voter should be deprived of his vote by a mistake of the election officers where the voter is not at fault and the ballot itself shows that it is a genuine official ballot delivered to the voter by the judges. That, I think, is the purport of the decision in *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012. In the case of *Choisser v. York*, 211 Ill. 56, 71 N. E. 940, the initials of one of the judges

were stamped upon the ballots with a rubber stamp, which could be used by any person, and such initials afforded no means of identifying the ballots. The decision was upon the ground that the statute contemplates an indorsement in the handwriting of one of the judges, for ²²² the very good reason that every man's handwriting possesses certain peculiarities which distinguish it from every other, and if the initials are written by one of the judges the genuine ballots delivered to the voters may be distinguished from spurious ones. In this case the initials of one of the judges were written by another judge in his own handwriting, and the purpose of the statute was accomplished. The ballots were the genuine official ballots delivered to the voters who cast them, and I think they should have been counted.

CARTER, J. I concur in the views of Justice Cartwright.

SCOTT, J., Specially Concurring. I concur in the conclusion stated in the opinion delivered by Mr. Justice Vickers, but not in all that is said therein. I deem it necessary to state my adverse views only in so far as the five ballots cast in Young America precinct, which are exhibits 166 to 170, inclusive, are concerned. It is my judgment that these five ballots should be counted for the Republican candidate. In *Choisser v. York*, 211 Ill. 56, 71 N. E. 940, it was held that the use of a rubber stamp by one of the election judges for the purpose of indorsing his initials on the ballots was improper, and that all ballots so indorsed were unlawful and should be rejected, even where they were otherwise free from legal objection. I was not in accord with the majority of the court in that case, and my views are fully stated in the dissenting opinion therein. If the opinion of Mr. Justice Vickers as to the five ballots here in question should ever become the opinion of the majority of this court, the doctrine of *Choisser v. York*, in this regard, would be extended, which I think should not be done.

Mr. Justice Dunn took no part in the consideration or decision of this case.

Distinguishing Marks Invalidating Ballots are discussed in the note to *Taylor v. Bleakley*, 49 Am. St. Rep. 246; and in the recent case of *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315, and cases cited in the cross-reference note thereto.

An *Election Ballot Indorsed* by the clerk at an improper place cannot, for that reason, be rejected: *Parvin v. Wimberg*, 130 Ind. 561, 30 Am. St. Rep. 254. Neither will a ballot be rejected because of marks made by election officers after it has been cast by the voter: *State v. Sodler*, 25 Nev. 131, 83 Am. St. Rep. 573.

The Indorsement on a Ballot of only one of the initials of a judge of election is a substantial compliance with the law; and a ballot should be counted though indorsed by him in his full name instead of his initials: Perkins v. Bertrand, 192 Ill. 58, 85 Am. St. Rep. 315.

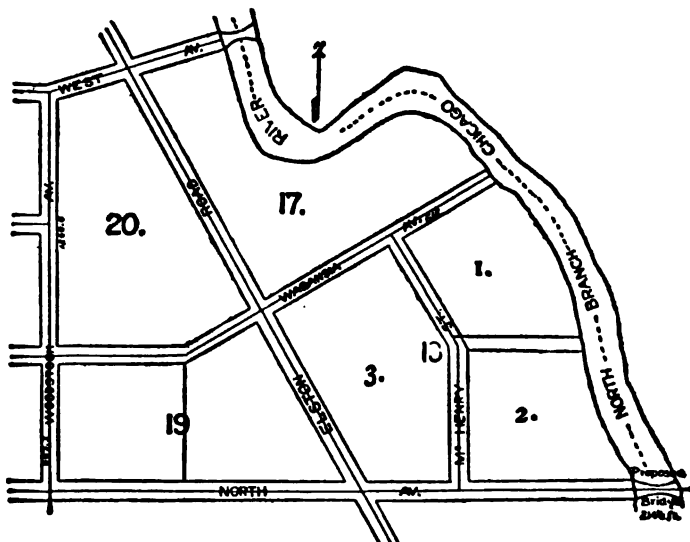
CITY OF CHICAGO v. ILLINOIS STEEL COMPANY.

[229 Ill. 303, 82 N. E. 296.]

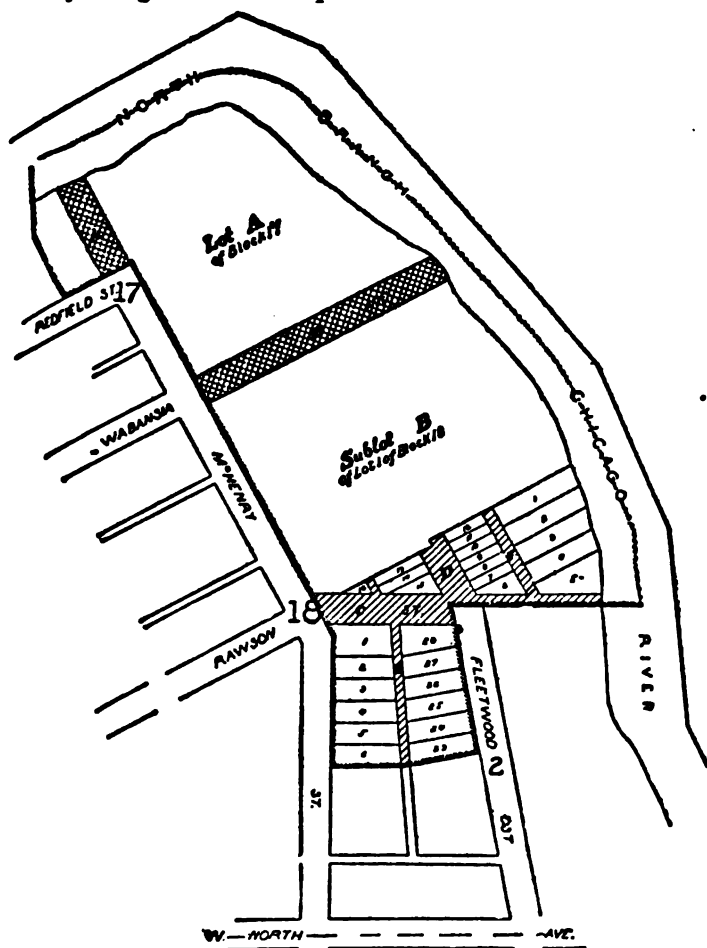
MUNICIPAL CORPORATIONS, Estoppel of, to Insist upon the Existence and Opening of Public Streets.—Although property has by its owners been designated upon recorded plats as constituting part of public streets, and they have by such plats dedicated it as such streets, yet if a municipal corporation of which they are parts stands by, and by its silent acquiescence in the occupation of the land including such streets, knowing that large sums of money are being invested on the faith and in the belief that no streets existed, or, if any existed, that they have been abandoned, the municipality becomes estopped from insisting that the buildings and other structures on such streets obstruct a highway. (p. 262.)

MUNICIPAL CORPORATIONS are not Within the Statute of Limitations except as to private rights, but courts of equity will prevent the operation of this rule by enforcing an equitable estoppel, where to permit the assertion of a right in the street after long acquiescence in the expenditure of money in the erection of buildings would work a gross injustice to private persons. (p. 263.)

In 1853, Joseph E. Sheffield, then being the owner of a tract of land, recorded a plat thereof, which he called Sheffield's Addition to the city of Chicago. This plat, so far as material, was as follows:



Three years later, the Chicago Land Company, having become the owner of blocks 17 and 18 as represented on such plat, made and filed for record another plat, on which McHenry street was represented as extending northerly from Wabansia avenue to the river, and another street designated as Rawson street was also represented. In January, 1876, Fredrick Siebold, having become the owner of lot 1 of block 18 as represented on such plat, filed for record a plat showing certain subdivisions of it. In December of the same year, the North Chicago Mill Company, having become the owner of parts of blocks 17 and 18, filed a deed purporting to vacate such parts thereof as it owned, and followed this deed by filing for record a plat as follows:



In September, 1898, the appellee filed for record a deed vacating so much of the plats as lay within its property. In January, 1903, the city of Chicago, by its officers, entered upon the land and commenced tearing down certain structures, with the object of asserting a right to use the property as a public street, and within a few days thereafter the present suit was commenced to enjoin the city from removing buildings and materials from the property. The master to whom the case was referred reported in favor of the defendant, but exceptions having been made to such report, they were sustained by the court, and a decree was entered in favor of the complainant as to the greater part of the property claimed by it. The city appealed.

James Hamilton Lewis, A. L. Gettys and D. R. Levy, for the appellant.

Knapp, Haynie & Campbell, for the appellee.

³⁰⁹ VICKERS, J. The city of Chicago claims to be the owner in fee of the locus in quo by virtue of a dedication of the land for streets by the plats set out in the foregoing statement. It is admitted that the plats in question were properly executed under the statute and constituted a valid offer to dedicate the premises designated as streets on said plats. Sheffield's plat was made in 1853, and the Chicago Land Company's subdivision in 1856. There is no proof in the record of a formal acceptance of the offer to dedicate under either of these plats. Whether there was an implied acceptance by the city is a question upon which both parties have offered much testimony and have argued that issue elaborately in their briefs. The validity and effect of the vacation deed of appellee on September 17, 1898, is also a question which is the subject of extended argument by both parties in this court. In the view that we take of this case it will not be necessary to consider any of the foregoing questions.

In 1857 these additions were not inside the corporate limits of the city of Chicago. The territory was open, unimproved prairie, and there were no houses or other improvements in that vicinity. Up to this time the execution and filing of the two plats of 1853 and 1856 was all that had been done looking toward building up the addition. In ³¹⁰ 1857 O. W. Porter, representing E. D. Ward of Detroit, commenced the construction of a rolling mill on the west side of

the Chicago river on the property designated as lot A of block 17 or subplot B of lot 1 of block 18. The exact location of this building is not clearly pointed out by the evidence. For the convenience of the mill owners in getting material to construct the mill a dock was constructed at the end of Wabansia avenue. The building material was brought to the dock on scows. When the mill was completed it became necessary to construct dwelling-houses for the mill employes. The houses, and also a boarding-house for the convenience of the mill employes, were erected along the extension of Wabansia avenue between McHenry street and the mill, and a sidewalk was built in front of these houses. These buildings were constructed by the mill company for its own benefit, and neither the city nor the public appears to have had anything to do with them. Later, when the lots occupied by the houses were required for extensions of the mill property, they were torn down and moved away by the company and the plant was extended west to McHenry street. After the extension of the plant to McHenry street the mill premises were inclosed by a fence, and a sign was erected at the west end of tract B warning all persons other than employes to keep out, and the mill company kept a watchman stationed there to enforce this warning. The evidence shows that the mill company and its successors have had exclusive, open and uninterrupted possession of all of the premises lying east of McHenry street to the Chicago river and north of the south line of lot 1 in block 18 to the river. After the removal of the cottages and extension of the plant to McHenry street the strips of land representing the extension of Wabansia avenue east to the river and the extension of McHenry street north to the river, designated B and A, respectively, have been occupied and used by the company under a claim of right in the same manner and to the same extent that it ³¹¹ used other portions of its millsite. Railroad tracks have been laid wherever the convenience of the mill company required them, regardless of whether they were in or out of the supposed streets. There appear to be some eighteen or twenty railroad tracks and spurs that traverse some portion of Wabansia avenue east of McHenry street. The south end of the north rail mill extends practically to the center of Wabansia avenue, and the south mill, another extensive building of the mill company, is immediately south of the north rail mill but not upon any portion of the street. The evidence shows that

the blast furnaces, the rail mill, the Bessemer steel mill and other parts of the plant were located in close proximity to each other, some upon one side and some upon the other of the alleged street, and that the location of the different mills is such that if Wabansia avenue were opened up and used as a public highway the plant would be rendered inoperative. The space in Wabansia avenue between the rail mill and the south mill is occupied by railroad tracks, weighing-offices, rail-loading docks, turntable, and other things pertaining to the finishing and delivery end of the rail mill. The rail mill and the south mill were both operated from the same steam supply. The conditions are such that it would be utterly impossible to operate the plant without reconstructing it if Wabansia avenue should be opened up as a street to the river. We have no means of knowing the amount invested in these various buildings and appurtenances in connection with this plant, or how much it would cost to reconstruct the same if the street in question were opened up. It is stated by counsel for appellee that the plant represents an investment of millions of dollars. It is apparent that appellee's plant represents a very large amount of money, and it is not pretended by appellant that the opening up of the proposed street will not entail upon appellee a very heavy loss. During all of these years, from about 1859 to the beginning of this suit, the municipality of Chicago has stood by and by its silence acquiesced in the occupation ³¹² by the appellee and its predecessors of the street in question, knowing that appellee was investing large sums of money on the faith and belief that there was no street there, or that if there ever had been one it had been abandoned by the city. Under these facts appellant is equitably estopped from insisting that appellee's buildings and other structures constitute an obstruction to the highway.

The case of *Reichert Milling Co. v. Village of Freeburg*, 217 Ill. 384, 75 N. E. 544, is a case very much like the case at bar, and announces the principle that must control here. The same principle has been applied in many other cases in this court: *Village of Winnetka v. Prouty*, 107 Ill. 218; *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Village of Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *City of Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E.

383; *People v. City of Rock Island*, 215 Ill. 488, 106 Am. St. Rep. 179, 74 N. E. 437. In the case last above cited this court said: "It has frequently been decided that the doctrine of estoppel in pais is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such extensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence the public authorities may prevent encroachments upon public right, and if they do not, any citizen may take the necessary steps to do so, and if there is not only a failure to act by either, but affirmative action by the public authorities with ³¹³ the apparent approval of everyone interested, under which the situation is changed and permanent improvements are made, the principles of equity require that the public should be estopped."

Municipal corporations are not within statutes of limitation except as to private right, but courts of equity will prevent the operation of this rule by enforcing an equitable estoppel where to permit the assertion of a right in a street after long acquiescence in the expenditure of money in the erection of buildings there would work a gross injustice to the rights of private persons. The facts bring this case within this rule, and there was no error in granting a perpetual injunction by the court below.

The decree is affirmed.

The Doctrine of Equitable Estoppel can, according to the better rule, be invoked against a municipal corporation only when it is acting in its private, as distinguished from its public or governmental capacity: *Philadelphia Mtg. etc. Co. v. Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442; *Mobile Transportation Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 494. A contrary view, however, is entertained in some jurisdictions: *People v. Rock Island*, 215 Ill. 480, 106 Am. St. Rep. 179; *Davenport v. Boyd*, 109 Iowa, 248, 77 Am. St. Rep. 536.

LININGER v. HELPENSTELL.

[229 Ill. 369, 82 N. E. 306.]

A HOMESTEAD may Exist in Lands Held by a Husband and Wife as Joint Tenants. (p. 265.)

HOMESTEAD—Joint Tenancy.—If lands held as a homestead belong to a husband and wife as joint tenants, either may, as against the other, insist that such property is a homestead, and not subject to transfer except in the manner provided for the conveyance of homesteads. (p. 266.)

HOMESTEAD.—A Conveyance by a Husband to His Wife of a Homestead, not joined in by her, is inoperative. (p. 268.)

HOMESTEAD.—A Conveyance by a Wife of Homestead Property, not joined in by her husband, though he has previously executed a deed purporting to convey the property to her, is void. (p. 268.)

HOMESTEAD.—Upon the Decease of a Wife, a homestead owned by her and her husband as joint tenants vests in him exclusively. (p. 268.)

Searle & Marshall, for the appellant.

S. R. Kenworthy, for the appellee.

³⁷⁰ SCOTT, J. Appellee, as administrator of the estate of Jacob Deis, deceased, filed his petition in the county court of Rock Island county, praying for an order directing him, as such administrator, to sell certain real estate alleged to have been ³⁷¹ owned by said deceased, to pay the debts of said estate. Incidentally it was also sought to have certain deeds of record in that county delivered up and canceled of record as clouds upon the title to said real estate. The only defense interposed to the petition was that Jacob Deis was not, at the time of his death, the owner of said real estate.

Upon the hearing appellee introduced in evidence a deed from Moses Heidelberg and wife, dated August, 1872, conveying the premises described in the petition to Jacob Deis and Caroline Deis, his wife, as joint tenants and not as tenants in common. It was stipulated by the parties that said premises were used and occupied by Jacob Deis and Caroline Deis, his wife, as a residence continuously from the date of that deed up to the death of Jacob Deis; that Caroline Deis departed this life intestate on February 21, 1904; that Jacob Deis departed this life intestate on March 10, 1904, and that said premises have not, at any time since August, 1872, been worth more than one thousand dollars.

Appellant, to maintain his defense, offered in evidence a warranty deed from Jacob Deis to Caroline Deis dated April 22, 1899, and executed by Jacob Deis alone, which purported to convey said premises to the grantee therein named; also a warranty deed from Caroline Deis to Dorotha Singleman, dated February 27, 1903, and executed by Caroline Deis alone, which purported to convey said premises to Dorotha Singleman, and a warranty deed from Dorotha Singleman to Conrad H. Lininger, the appellant, dated September 25, 1905, which purported to convey to him the premises in controversy.

Caroline Deis left her surviving Jacob Deis, her husband, William Keip, her son by a former marriage, and Dorotha Singleman, the child of a deceased daughter by the former marriage, as her only heirs at law; and Jacob Deis left him surviving Mary Studer, a daughter, and George Deis, a son, both by a former marriage, as his only heirs at law. The heirs of Jacob Deis and the heirs of ³⁷² Caroline Deis, together with Conrad H. Lininger, were made defendant to the petition.

The county court found that the deed from Jacob Deis to Caroline Deis, the deed from Caroline Deis to Dorotha Singleman and the deed from Dorotha Singleman to Conrad H. Lininger, were clouds upon the title descended from Jacob Deis, deceased, and ordered that they be set aside and declared null and void, and that the petitioner proceed to sell said real estate to pay the debts of the estate of said deceased and the costs of administration. Conrad H. Lininger has prosecuted an appeal to this court.

The deed from Jacob Deis to Caroline Deis was declared void by the county court on the ground that it attempted to convey the homestead of the grantor and was not signed and acknowledged by his wife, as required by section 4 of the homestead act.

In *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394, and *Wike v. Garner*, 179 Ill. 257, 70 Am. St. Rep. 102, 53 N. E. 613, this court held that a homestead may exist in lands held in cotenancy in favor of the occupying tenant as against creditors of that tenant. Appellant contends, however, that if a homestead can be asserted in lands held in cotenancy by one cotenant as against the creditors of that cotenant, it cannot be asserted as against or to the prejudice of the other cotenants. Appellant does not, however, indicate in what manner that

proposition is of controlling effect in the case at bar. The statute creates the estate of homestead for the benefit of the householder and his or her family, and requires any release, waiver or conveyance of such estate to be in writing, subscribed by the householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, unless possession is abandoned or given pursuant to the conveyance. The statute gives the wife of the householder the power to prevent a sale of the homestead in case she desires so to do, and by its terms it is equally applicable whether the husband is the ³⁷³ owner of the realty in fee simple absolute or is merely one of several joint tenants owning the land.

It is said, however, that "where the joint tenants are husband and wife, if one may assert a homestead in the joint estate which can be conveyed only in the manner prescribed by the statute, then the other joint tenant is powerless to destroy or sever the joint tenancy, and thus defeat the right of survivorship, except with the consent of the other joint tenant, who by dissenting has the possibility of profiting thereby," and it is urged that this affords a reason for holding that no homestead attaches in such cases as that at bar, as between the husband and wife. This reasoning, if carried to its logical conclusion, would defeat the homestead exemption in all cases. If the wife can prevent the husband conveying any interest in the homestead when he is the owner of all the title therein, it would not seem a good objection to the assertion of the homestead right to say that if it be held to exist it would prevent the husband conveying his interest in the realty covered thereby when his interest was merely that of a joint tenant. In either event the wife may profit by his inability to convey. The condition of the husband in this regard is the same whether he owns the entire title to the property or is merely a joint tenant with his wife. The wife, here, could assert a right of homestead as against her cotenant, not alone because she occupied the premises as a homestead, but because, in addition to that fact, the cotenant was her husband. Had the person owning the property jointly with her been some person other than her husband, the question whether she could assert a homestead to the prejudice of that joint owner would be determined upon different considerations entirely.

The respective interests which husband and wife have in property owned by them in common and occupied by them as a residence are discussed in *Capek v. Kropic*, 129 Ill. 509, 21 N. E. 836. There the husband and wife have been tenants in common of the property. The wife died, leaving her surviving ³⁷⁴ her husband, and also leaving minor children by a former marriage. The surviving husband sought to have his homestead set off in the whole of said premises. In considering the relative rights of the husband and wife in the property, and the rights of her children therein after her death, this court said: "Appellant and his wife were seised as tenants in common of the lot in question, and, each occupying the same as a residence for themselves and family, were jointly seised of an estate of homestead in such lot. Upon the death of the wife the fee to the moiety owned by her descended to and vested in her heirs at law, subject to the homestead interest of the surviving husband and her minor children, and the dower right of the husband in the residue of the premises after the allotment of the homestead estate. Upon her death, as before, the husband, by virtue of the statute, was entitled to homestead in one-half of said lot in his own right, as owner of the fee, and the homestead interest in the moiety of which the wife died seised was by the statute continued for his benefit and for the benefit of the minor children of the wife until the youngest attained the age of twenty-one years, each moiety of the fee contributing to the homestead estate. . . . It is apparent that the right of occupancy is not divisible, and although the minor step-children could only have homestead in the moiety of which their mother died seised, yet the right of occupancy, so long as the homestead continues, must necessarily continue for their benefit in the whole of the land constituting the homestead—that is, no allotment of the homestead could be made except by setting off by metes and bounds, or otherwise, the dwelling-house, etc., of the value of one thousand dollars; and it necessarily follows that any allotment of homestead made to appellant must require that each moiety of the fee contribute its share thereto. It was not, therefore, error for the court, upon the prayer of complainant that his homestead be set off, to find and declare the homestead to exist in the whole of said premises."

³⁷⁵ In the case last cited the husband and wife were tenants in common of the property, while in the case at bar they

were joint tenants. That difference, however, is not material in considering the nature of the estate held by the husband and wife during the lifetime of both. If they are "jointly seised of an estate or homestead" in the property held by them as tenants in common, it necessarily follows that they are jointly seised by them as joint tenants.

The deed from Jacob Deis to Caroline Deis, his wife, was inoperative and void because it attempted to convey the homestead of the grantor and was not signed and acknowledged by his wife, as required by section 4 of the homestead act: *Kitterlin v. Milwaukee Mechanics' Mut. Ins. Co.*, 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220; *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983. The deed from Caroline Deis to Dorothea Singleman was likewise void because it attempted to convey the homestead of Caroline Deis and was not signed and acknowledged by the husband of the grantor. The deed from Dorothea Singleman to the appellant depended upon the validity of the deed from Caroline Deis. That deed being void, the deed from Dorothea Singleman to the appellant passed no title. Upon the death of Caroline Deis, her husband, Jacob Deis, became seised of the entire title to the premises in controversy by the right of survivorship. So far as this record shows, he died seised in fee of those premises and they descended to his heirs, subject, however, to the right of his administrator to resort to them for the payment of the debts of the estate.

The decree of the county court was therefore the proper one in the case, and it will accordingly be affirmed.

A Homestead may be Held by a husband and wife as tenants in common: *Grace v. Grace*, 96 Minn. 294, 113 Am. St. Rep. 625, and see the cases cited in the cross-reference note thereto. A contrary rule seems to prevail in some states: See the notes to *Wolf v. Flischacker*, 63 Am. St. Rep. 122; *McCoy v. Breenan*, 1 Am. St. Rep. 594.

A Conveyance of a Homestead by a husband to his wife need not be joined in by her: *Kindley v. Spraker*, 72 Ark. 228, 105 Am. St. Rep. 32. Some courts, however, have held to the contrary: *Robertson v. Tippie*, 209 Ill. 38, 101 Am. St. Rep. 217; note to *Jerdees v. Turbush*, 95 Am. St. Rep. 923.

SHEDD v. SEEFELD.

[230 Ill. 118, 82 N. E. 580.]

RECEIVERS—Jurisdiction of Equity to Adjudicate Claims.—

The jurisdiction of a court of equity, having attached by the appointment of a receiver to protect the equitable rights of creditors of a concern, will be retained to do complete justice and fully administer upon the property; and in so doing the court may, if it sees proper, adjust claims against the property, arising either out of contract or tort, and make all proper orders in respect to the time and manner of their payment. (p. 275.)

JURY—Right to, in Equity.—The right of trial by jury, considered as an absolute right, does not extend to cases of equitable jurisdiction. (p. 276.)

RECEIVERS—Enforcement of Claims for Torts.—A court of equity that has appointed a receiver has jurisdiction to entertain an intervening petition presenting a claim for damages occasioned by an alleged tort of the receiver, adjudicate the claim, and make a final order for its payment. (p. 277.)

APPEAL.—In Chancery Proceedings Errors in the exclusion or admission of evidence are not grounds for a reversal, if there is competent evidence in the record sufficient to support the decree, and the evidence which should have been considered would not, if considered, change the result. (p. 277.)

APPEAL.—While the Finding of the Trial Court, and its approval by the appellate court, are not, in a chancery proceeding, binding upon the supreme court, the latter will not reverse the decree unless it is clearly against the evidence. (p. 277.)

Oliver & McCartney, for the appellants.

Atwood, Pease & Loucks, for the appellees.

¹¹⁸ VICKERS, J. On May 22, 1899, and prior thereto, John Druecker was conducting a warehouse business on certain premises situated in the city of Chicago. On the above date he executed a conveyance in fee of said premises to E. A. Shedd, of Chicago, and Benjamin F. Harris, Jr., of Champaign, Illinois, for an expressed consideration of seventy thousand dollars. Afterward John Druecker filed his bill in chancery to have said deed declared a mortgage, and on May 23, 1901, F. A. ¹¹⁹ Smith and others, creditors of Druecker, filed a bill for the same purpose, theirs being in the nature of a creditors' bill. The two cases were afterward consolidated. The property has been described in these proceedings and in said deed as wharfing lots 3 and 4 in block J, opposite lots 4 and 5 in block 8, in the original town of Chicago, also forty feet south of and adjoining said lot 4 in block J.

On June 11, 1901, E. J. Piggott was appointed receiver for said property known as the Druecker warehouse. On November 21, 1902, Piggott resigned and Rawson Waller was appointed receiver in his stead. Waller conducted said warehouse business until March 21, 1903, when, pursuant to decree and order of court, the said property was turned over to Shedd and Harris. The order of the court entered March 21, 1903, provided as follows: "It is further ordered that the receiver file his account within thirty days, and shall on March 23, 1903, turn over the possession of said premises, and the business thereon, to said Shedd and Harris on reasonable request, the same to be subject to the receiver's certificate, and all indebtedness, liquidated and unliquidated, incurred by him or them, and said property shall be held by said E. A. Shedd and B. F. Harris, Jr., subject to all existing liens against said receiver and ex-receiver and subject to claims and liens to be hereafter adjudicated, which shall be paid by said Shedd and Harris when and as established by this court, and said receiver shall make full report to the court, and the court reserves all matters relating to the receivership and administration thereof for further consideration and disposition."

On March 21, 1903, Joachim Seefeld and Charles F. Seefeld, appellees herein, by leave of the court, filed an intervening petition in said cause, naming E. J. Piggott, receiver, Rawson Waller, receiver, E. A. Shedd (one of the appellants herein) and B. F. Harris, Jr., as defendants.

On December 29, 1903, Albert M. Johnson (the other appellant herein) filed his petition in said cause, alleging ¹²⁰ that he had succeeded to all the rights and interest of said B. F. Harris, Jr., in the property in question by virtue of a certain quitclaim deed to the same from said Harris and wife, and prayed for leave to intervene in this suit and to answer the petition of J. Seefeld and C. F. Seefeld, instantan.

The intervening petition of the Seefelds alleged that on September 20, 1902, they entered into a contract with E. J. Piggott, receiver, to store four thousand barrels of apples in cold storage, at a specified rate; that pursuant to such contract they shipped twenty-one carloads, or three thousand six hundred and ninety-three barrels, of apples to said receiver for storage; that said receiver received notice of the arrival of each of said cars in Chicago; that it then became the duty of the receiver to place said apples in cold storage

within twenty-four hours of receipt of such notice; that it was also his duty to keep said apples at a temperature of thirty to thirty-three degrees (Fahrenheit) above zero; that said receiver disregarded his duty in these matters; that he allowed said apples to remain in the railroad yards more than twenty-four hours before placing them in cold storage, thereby allowing said apples to go into what is called a second sweat, which blisters them, so that their market value is reduced and they become what is known as second grade peddler's stock; that the receiver failed to keep the temperature between thirty and thirty-three degrees, Fahrenheit; that the said receiver carelessly and negligently conducted said warehouse by allowing water to accumulate and stand on the floors and by allowing the building to become damp and foul, so that the barrels of apples were covered with mud and dirt; that by reason of being allowed to stand on the railroad tracks until they were blistered and burned by going into said second sweat before being placed in cold storage, and by reason of the temperature not being kept between thirty and thirty-three degrees, said apples became badly rotted, and it was necessary to resort and repack each of said barrels before they could be sold; that the apples were from the best orchards, carefully ¹²¹ selected and packed; that the natural shrinkage in apples is ten per cent, but the shrinkage in these apples was twenty-five per cent.

An accounting and general relief are prayed for in the petition. Answers and replications were filed and the issues were tried upon the oral testimony of witnesses heard in open court, together with documentary evidence submitted, and the deposition of one witness who was too sick to appear in open court. On February 18, 1905, the court rendered a decree in favor of the appellees for the sum of three thousand eight hundred and eighty-eight dollars and thirty-four cents, and made the same a lien upon the warehouse property described in the pleadings. The case was taken to the appellate court for the first district under a writ of error, and that court affirmed the decree of the court below. The case now comes here on appeal from the appellate court.

¹²² Appellants' first and most serious contention is, that the circuit court of Cook county sitting in chancery had no jurisdiction to try this cause, for the reason that appellees' claim is for alleged damages growing out of a tort and is cognizable only in a court of law. The precise question

presented by this assignment of error has not been decided by this court, so far as we have been able to find, and no case is cited by either side which we regard as an authoritative decision of the question. Appellants insist that the case of *Brown v. Wabash R. R. Co.*, 96 Ill. 297, is an authority supporting their contention. We do not so regard it. The Toledo, Wabash and Western Railway Company was being operated by Jacob D. Cox as receiver, appointed by the concurrent orders of the court of common pleas of Lucas county, Ohio, the circuit court of Cass county, Indiana, and the circuit court of Vermilion county, Illinois, and while so operating, Roberts, a fireman, was killed through the alleged negligence of the receiver. Under an order of the court the railroad, and all of its property and equipment, had been sold and passed into the ownership of the Wabash Railway Company. A provision in the decree under which the property was sold required the purchaser to assume and pay all liabilities incurred in respect to said railroad or its business by the receiver during the pendency of the legal proceedings relating to the receivership and the subsequent sale. Assuming that this provision in the decree created a lien upon the property in the hands of the Wabash Railway Company, the administrator of Roberts filed an original bill in equity against the Wabash Railway Company in the Sangamon county circuit court to ascertain and establish his damages resulting from the death of Roberts ¹²⁴ and for an order requiring the Wabash Railway Company to pay it. This court, while conceding the existence of the lien, held that a court of equity would not by an original action take jurisdiction of a case involving a question of unliquidated damages arising from a tort. That case decides the familiar doctrine that a court of chancery is not the forum in which to settle purely legal questions. No question was there presented or decided as to the jurisdiction of a court of chancery, under whose direction a trust fund is being administered by its receiver, to determine any legal matter that may arise ancillary to the due administration of the trust property. A careful examination of that case shows that it has no application to the question involved in the case at bar.

Knickerbocker v. Benes, 195 Ill. 434, 63 N. E. 174, relied on by appellees, is a case substantially like the case at bar in its facts, and this court upheld a judgment growing out of a tort against a receiver where the damages had been ascer-

tained and assessed by the chancellor, but no question was there raised or decided in respect to the procedure. It appears to have been conceded by the parties that the circuit court wherein the receivership was being administered properly took jurisdiction to determine the claim for damages. While this case is not a direct authority on the question here involved, it at least shows that a court of chancery did in that case take jurisdiction to hear and determine a matter sounding in damages growing out of a tort, and that its judgment has been affirmed by this court.

Appellants rely with great confidence on *Palys v. Jewett*, 32 N. J. Eq. 302, as supporting their position. That case was a suit against the receiver of a railway company for damages alleged to have been sustained by the plaintiff by reason of the negligence of the employes of the receiver in the management of a train of cars. The case was heard before the vice-chancellor, who found for the receiver. The report of the case which we have seen does not show how¹²⁸ the case was brought into court. The decision of the vice-chancellor is reversed on the merits and the cause is remanded, with directions to enter a judgment in favor of the plaintiff for three thousand dollars. From the report of the case it appears that the plaintiff, and not the receiver, was protesting against the trial of the case without a jury. In the course of the opinion, on page 317, it is said: "These observations constitute a pointed reaffirmation of the proper rule of practice as promulgated by Lord Eldon, establishing plainly, as they do, that in this class of cases the chancellor will not undertake to decide a purely legal question against the person who demands from him a trial at law."

From this quotation we infer, though the report does not so show, that the petitioner or plaintiff in that case had applied to the chancellor for leave to bring his action at law, which being denied, he was compelled to submit his case to the vice-chancellor. We reach this conclusion more readily from the fact that in *Potter v. Spa Spring Brick Co.*, 47 N. J. Eq. 442, 20 Atl. 852, that court, in commenting on its earlier decision of *Palys v. Jewett*, 32 N. J. Eq. 302, said: "*Palys v. Jewett* was a proceeding by a person who had been injured by a railway train run by a receiver of the court, for redress in damages for such injury, and the opinion of the learned chief justice in the court of errors and appeals

was based on the supposed fact (5 Stew. Eq. 318, 319) that the petitioner had asked this court for leave to proceed at law, or at least for a trial by jury, and had been refused, and so was forced, against his will, to submit his case, in all its parts, to the determination of this court."

There are other expressions in the Palys case from which it is clear that the learned chief justice had in mind cases where the party was drawn, against his will, to litigate legal questions in a court of chancery. It is stated in that case as a reason why the court would consider the case on its merits, that no appeal had been taken from the order refusing a trial by jury. Further commenting on the Palys ¹²⁶ case, the court wherein it was decided, ten years later, in Potter v. Spa Spring Brick Co., 47 N. J. Eq. 442, 20 Atl. 852, said: "These cases (Palys and others) do not apply to a case where a party who has a cause of action against a receiver of this court comes voluntarily into the court and by his petition asks the court, not to permit him to sue at law, but to do him justice according to his own notion of what is just, submitting himself to the jurisdiction of the court and offering to do what the court deems equitable. And I am of opinion that in such a case it is competent for this court to hear and deal with his complaint, and that it does not lie in the mouth of its receiver to object to such assumption of jurisdiction."

It thus appears that Palys v. Jewett, 32 N. J. Eq. 302, when carefully examined in the light of the subsequent case by the same court, cannot be regarded as an authority supporting appellants in the case at bar. Here, appellees voluntarily came into the court of chancery, not demanding a jury, but offering to submit their cause to the court for decision. No question as to the jurisdiction of the court to hear the case was made by either party in the court below and no request was made for a jury. Under such circumstances the practice has been, so far as we are able to ascertain from the adjudicated cases, for the court wherein the receiver was appointed to take jurisdiction and determine all matters ancillary to the proceeding, regardless of the character, importance or complexity of the questions involved. When a court of chancery appoints a receiver to take charge of the property and affairs of a corporation or other person, the receiver becomes, in a sense, the mere ministerial agent of the court. His possession of the property is the court's

possession, and it has often been adjudicated a contempt of court to bring a suit, or otherwise interfere or intermeddle with the receivership affairs, unless leave is obtained for that purpose from the court wherein the receivership is being administered. So complete and exclusive is the jurisdiction of the court appointing the receiver, that it is held ¹²⁷ by many high authorities, among them the United States supreme court (Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672), that a judgment rendered against a receiver by another court without leave to bring the suit is void for the want of jurisdiction. This court has not gone to that extent. The rule established by this court in Mulcahey v. Strauss, 151 Ill. 70, 37 N. E. 702, is, that while it is a contempt of court to bring suit against a receiver without leave and the court appointing the receiver may attach for contempt or enjoin the proceeding, the failure to obtain leave does not oust the other courts of the state of jurisdiction. This rule is, however, subject to an exception in cases where the purpose of the suit is to deprive the receiver of his possession of the property of the receivership. In such cases the judgment is void unless leave is obtained to prosecute such suit: St. Louis etc. R. R. Co. v. Hamilton, 158 Ill. 366, 41 N. E. 777. When, in furtherance of justice, it becomes necessary for a court of equity to lay hold of the affairs of an insolvent or failing debtor and appoint a receiver to manage, operate or wind up his affairs, it would be a strange restriction upon the powers of such court if it could adjust only such questions arising in the course of the administration as are ordinarily cognizable in a court of equity. The jurisdiction of the court of equity having attached in the first instance to protect the equitable rights of creditors, it will be retained to do complete justice and fully administer upon the property, and in so doing a court of chancery may, if it sees proper to do so, adjust claims against the property arising either out of tort or contract and determine the amount thereof, and make all proper orders in respect to the time and manner of their payment.

We perceive no reason why the practice in this state should not conform to and be governed by the same principles that are applied in the federal courts, and especially as the practice existed in those courts prior to the passage of the act of Congress approved March 3, 1887, which act permits ¹²⁸ suits at law to be brought against a receiver appointed

by a federal court without obtaining leave from the court making the appointment. The rule adhered to by the supreme court of the United States is thus stated by Mr. Justice Woods in *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672: "Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver or any other fact upon which his liability depends, or in regard to the amount of damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law or direct the trial of a feigned issue to settle the contested facts. The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while traveling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way." We find nothing in the adjudicated cases in this state opposed to the doctrine of *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, and it is supported by the weight of authority outside this state and seems to be well grounded in sound reason.

- Appellants insist that the effect of sustaining the jurisdiction of chancery in cases of this character is to deprive the party of the constitutional right to a trial by a jury. The answer to this contention is, that the right of trial by jury, considered as an absolute right, does not extend to cases of equitable jurisdiction: 5 Pomeroy's Equity Jurisprudence, sec. 171, and cases there cited. If appellants' argument is sound on this point there would be many cases of equitable jurisdiction that courts of equity could not settle, because, as an incident to the main controversy, some matter would arise in which the parties would be entitled to a jury if the same ¹²⁹ matter should arise as a distinct transaction in a court of law. In bills to foreclose mortgages, for an accounting and relating to partnership affairs, and in many others, matters frequently arise for determination which, if they stood alone and disconnected with other circumstances which give a court of equity jurisdiction, would be properly cognizable in a court of law and triable by a jury. But it is the con-

stant practice of courts of chancery to adjust all questions arising between the parties relating to the subject matter of the litigation which are brought into issue by the pleadings, regardless of whether such matter is legal or equitable in its character. We have no doubt of the jurisdiction of the circuit court of Cook county, sitting as a court in chancery, to hear the evidence and adjudicate upon appellees' claim and to make a final order for its payment.

The other assignments of error do not require elaborate discussion. It is urged that the court erred in the exclusion and admission of testimony. This being a chancery proceeding, any error in this regard is unimportant if there is competent evidence in the record sufficient to support the decree and the evidence which ought to have been considered would not, if considered, change the result: *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189, and cases there cited. Without intimating any dissatisfaction with the rulings of the trial court in this regard, we are content to rest our conclusion on the ground that the competent evidence in the record is quite sufficient to support the decree, and that no evidence excluded could have led to any different result.

Other assignments of error relate to questions of fact, such as that the decree is excessive and that there is a failure of the evidence to support the findings. While the finding of the court below, and its approval by the appellate court, are not, in a chancery proceeding, binding on this court, still we will not reverse a decree unless it is clearly against the evidence. After a careful examination of the evidence, aided by the exhaustive briefs and the oral arguments ¹³⁰ of counsel, we are unable to find any reason for disagreeing with the trial and appellate courts on the questions of fact involved.

Finding no error in this record the judgment of the appellate court for the first district is affirmed.

ENFORCEMENT AGAINST A RECEIVER OF LIABILITIES SOUNDING IN TORT.

I. Liability to Persons Interested in Estate.

- a. In General, 278.
- b. In the Case of Bank Deposits, 278.

II. Liability to Persons not Interested in Estate.

- a. In General, 279.
- b. In Case of Trespass or Conversion, 279.
- c. In Case of Wrongs Done Prior to His Appointment, 279.

III. Liability for Acts of Agents and Employees.**a. In His Individual Capacity, 280.****b. In His Official Capacity, 280.****IV. Manner of Enforcement of Liability, 281.****I. Liability to Persons Interested in Estate.**

a. In General.—A receiver, in caring for the property or managing the business over which he has been appointed, is bound to proceed with at least ordinary care and prudence. When he uses ordinary care and prudence, that is, the care and diligence which an ordinarily prudent man uses in handling his own estate, he has fulfilled the measure of his official duty, and is not answerable for losses which occur to the property and assets in his charge; but when he fails to exercise this degree of care and diligence, he becomes answerable for the consequences of his neglect or dereliction. He is not an insurer of the safety of the property; ordinary care is the test of his responsibility. The measure of his responsibility, therefore, is analogous to that of an administrator or guardian: *Eskridge v. Rushworth*, 3 Colo. App. 562, 34 Pac. 482; *Pangburn v. American Vault etc. Co.*, 205 Pa. 93, 54 Atl. 508; *Groesbeck Cotton Oil Gin etc. Co. v. Oliver* (Tex. Civ. App.), 97 S. W. 1092; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548; *United States Blowpipe Co. v. Spencer*, 61 W. Va. 191, 56 S. E. 345; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Gutterson v. Lebanon Iron etc. Co.*, 151 Fed. 72.

In *Heffron v. Rice*, 149 Ill. 216, 41 Am. St. Rep. 271, 36 N. E. 562, a receiver acting as manager of a hotel is held not answerable for a small sum of money loaned to a guest. And in *Hamm v. J. Stone & Sons Livestock Co.*, 13 Tex. Civ. App. 414, 35 S. W. 427, a receiver is held not responsible for the loss of cattle simply because he permitted them to remain on the range, nor for property destroyed by fire merely because he did not insure it.

b. In Case of Bank Deposits.—A receiver may deposit the funds of the estate coming into his hands in a bank of good standing and repute; and in determining the character of the bank, that degree of care and prudence is exacted which ordinarily is exercised by reasonably cautious men in transacting their business of like importance. If he uses this degree of care and prudence, he is not responsible for any loss, due to a failure of the bank. The same is true in reference to continuing the deposit: *State v. Corning State Sav. Bank*, 128 Iowa, 597, 105 N. W. 159; *Ficener v. Bott* (Ky.), 47 S. W. 251; *Groesbeck Cotton Oil etc. Co. v. Oliver* (Tex. Civ. App.), 97 S. W. 1092. Compare, however, *Ricks v. Broyles*, 78 Ga. 610, 6 Am. St. Rep. 280, 3 S. E. 772; *State v. Gooch*, 97 N. C. 186, 2 Am. St. Rep. 284, 1 S. E. 653. But the rule is otherwise where he does not deposit the money as trustee, but mingles it with his own funds and makes the deposit in his own name, deriving profit therefrom: *Schwartz v. Keystone Oil Co.*, 153 Pa. 283, 25 Atl. 1018.

II. Liability to Persons not Interested in Estate.

a. **In General.**—A receiver in charge of the property of a corporation and of the management of its business is bound to the same degree of care as the corporation would be under the control of its board of directors, and is liable in his official character for his negligence and the negligence of his agents and employes, whereby injury results to the person or property of persons other than those directly interested in the estate. This rule is, perhaps, most frequently applied to receivers of railroad companies. Claims founded upon such negligence have been classed as operating expenses, and allowed priority: *Bartlett v. Cicero Light etc. Co.*, 177 Ill. 68, 69 Am. St. Rep. 206, 52 N. E. 339, 42 L. R. A. 715; *Knickerbocker v. Benes*, 195 Ill. 434, 63 N. E. 174; *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101; *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587; *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; *St. Louis S. W. Ry. Co. v. Holbrook*, 73 Fed. 112, 19 C. C. A. 385; note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 425.

b. **In Case of Trespass or Conversion.**—A receiver is liable personally as for a trespass or conversion where he takes possession of property not included in the trust, notwithstanding he takes possession under an order of court. His official character is no defense: *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303; *Kenney v. Rauney*, 96 Mich. 617, 55 N. W. 982; *Kirk v. Kane*, 87 Mo. App. 274; *Curran v. Craig*, 22 Fed. 101; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. ed. 357; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; note to *Malott v. Shimer*, 74 Am. St. Rep. 289. It is the duty of a receiver to demand goods fraudulently transferred to a third party, and, upon a refusal, to bring suit for their recovery; and if he takes the property from one not a party to the proceedings in which he received his appointment, against the will of such party, he does so at his own personal risk, and will not be protected by the court when not acting for it: *Tappscott v. Lyon*, 103 Cal. 297, 37 Pac. 225. A receiver who disobeys an order of court, and thereby converts to his own use property in his possession as receiver, may be imprisoned for contempt of court, both for the direct contempt of disobeying the order, and for refusal to restore the property so converted by him: *Tindall v. Nisbett*, 114 Ga. 224, 39 S. E. 849.

c. **In Case of Wrongs Done Prior to His Appointment.**—A receiver is not liable for a tort committed by the corporation prior to his appointment, and hence is not a proper party in an action to recover damages therefor: *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; *Finance Co. v. Charleston etc. R. R. Co.*, 46 Fed. 508; *Northern Pac. R. R. Co. v. Hefin*, 83 Fed. 93, 27 C. C. A. 460; *McDermott v. Crook*, 20 App. D. C. 465. His duty and liability commence with his appointment, and his assumption of the control of the business of the corporation. He is then substituted for the corporation,

and assumes toward the public the duty and liabilities of the corporation. If the property is out of repair, and a due regard for public safety demands it to be put in repair, the duty devolves upon him to take proper steps to this end, and for a neglect of this duty he becomes liable to any person injured through such neglect: *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114.

III. Liability for Acts of Agents and Employés.

a. *In His Individual Capacity.*—A receiver who is himself free from fault is not personally liable for the negligence of his employés in operating the business in his charge: *McGhee v. Willis*, 134 Ala. 281, 32 South. 301; *Bartlett v. Cicero Light etc. Co.*, 177 Ill. 68, 69 Am. St. Rep. 206, 52 N. E. 339, 42 L. R. A. 715; *Ersline v. McIlrath*, 60 Minn. 485, 62 N. W. 1130; *Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 669, 12 Atl. 188; *Keating v. Stevenson*, 21 App. Div. 604, 47 N. Y. Supp. 847; *Cardot v. Barney*, 63 N. Y. 281, 20 Am. Rep. 533; *McNulta v. Lockridge*, 141 U. S. 327, 12 Sup. Ct. Rep. 11, 35 L. ed. 796. "A receiver, as such, upon principle and authority, is not personally liable for the torts of his employés. Were he so liable, few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceedings against him as receiver, for the wrongs of his employés, is in the nature of a proceeding in rem, and renders the property in his hands, as such, liable for compensation for such injuries": *Davis v. Duncan*, 19 Fed. 477.

b. *In His Official Capacity.*—The liability of a receiver for the torts of his employés and agents, when he himself is free from fault, is in his official capacity. In such capacity he is answerable for their torts: *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587; *Murphy v. Holbrook*, 20 Ohio St. 137, 5 Am. St. Rep. 633; *International etc. R. R. Co. v. Bender*, 87 Tex. 99, 26 S. W. 1047; *Memphis & C. R. R. Co. v. Hoechner*, 67 Fed. 456, 14 C. C. A. 469. The judgment, therefore, should not be rendered against him individually, but as receiver, payable out of the funds held by him in that capacity, in due course of administration of his receivership: *McNulta v. Ensich*, 135 Ill. 46, 24 N. E. 631; *Robinson v. Kirkwood*, 91 Ill. App. 54; *Louisville Southern R. R. Co. v. Tucker's Admr.*, 105 Ky. 492, 49 S. W. 314; *Camp v. Barney*, 4 Hun, 373; *Eddy v. Prentice*, 8 Tex. Civ. App. 58, 27 S. W. 1063.

"A receiver of a railroad company, who is exercising the franchises of such company and operating its road, is, in his official capacity, amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the railroad under his management, he is responsible upon the principle of respondeat superior. The liability, however, is not a personal liability, but a liability in his official capacity only; and the damages for such torts are not to be recovered in suits against him personally,

and collected on executions against his individual property, but recovered in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the fund or property which the court appointing him has placed in his possession and under his control": *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452.

"The sole liability of a receiver, except in cases in which he is personally at fault, is official; and when his official character ceases, and the property, through which alone his official liability may be discharged, has passed from his hands, and he has been by the court discharged from his trust, then no judgment can be rendered against him, for with the termination of his official existence ends his official liability": *Averill v. McCook*, 86 Mo. App. 346; *Ryan v. Hays*, 62 Tex. 42. But when it does not appear that the receivership is terminated, a mere averment that the property and funds have passed out of his possession and beyond his control will not constitute a good defense in an action against him for personal injuries: *Erb v. Popritz*, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871.

Statutes abolishing or modifying the fellow-servant rule in the case of railway corporations bind the receivers of such concerns and make them officially answerable to their employes for the negligence of coemployes, under circumstances where the corporation itself would have been liable if under the control of its board of directors: *Hunt v. Connor*, 26 Ind. App. 41, 59 N. E. 50; *Sloan v. Central Iowa Ry. Co.*, 62 Iowa, 728, 16 N. W. 331; *Rouse v. Harry*, 55 Kan. 589, 40 Pac. 1007; *Mikkelson v. Truesdale*, 63 Minn. 137, 65 N. W. 260; *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 485; *Hornsby v. Eddy*, 56 Fed. 461, 5 C. C. A. 560. A contrary rule, however, seems to prevail in Georgia: *Henderson v. Walker*, 55 Ga. 481; *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 69 Fed. 353.

IV. Manner of Enforcement of Liability.

In those cases where a receiver may be sued without leave of the court which appoints him, it is doubtless competent for a person injured by his negligence or misconduct to pursue him at once in a court of law by an action for damages: *Malott v. Shiner*, 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. 101. The judgment recovered against him, unless the case is one where he can be held individually liable, is rendered against him as a receiver, payable out of the funds held by him in that capacity, in due course of administration of his receivership: *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631; *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; *Camp v. Barney*, 4 Hun, 373.

But the remedy at law seems not exclusive, whether or not leave of the appointing court is a condition precedent to the right to sue. The court of equity which appointed the receiver may, in its discretion, permit the aggrieved party to sue at law, or it may itself take cognizance of the liability when the injured party comes voluntarily into

such court by petition for redress, and the receiver cannot successfully object to its jurisdiction. The jurisdiction of the court of equity having once attached to protect the equitable rights of creditors, it may be retained to do complete justice and fully administer upon the property. In so doing, the court may, if it sees proper to do so, adjust claims against the property sounding in tort, determine the amount thereof, and make all proper orders in respect to the time and manner of their payment, thus obviating any necessity for the aggrieved party resorting to another forum: See the principal case; *Klein v. Jewett*, 26 N. J. Eq. 474; *Potter v. Spa Springs Brick Co.*, 47 N. J. Eq. 442, 20 Atl. 852; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672.

COAL BELT ELECTRIC RAILWAY COMPANY v. PEA-BODY COAL COMPANY.

[230 Ill. 164, 82 N. E. 627.]

CORPORATIONS—Estoppel.—One Who Purchases All the Stock in a corporation does not acquire the ownership of the corporate property so that representations made to him at the time of the purchase in regard to the right of the corporation to draw its water supply from a pond can create an estoppel in favor of the corporation itself. (p. 286.)

ESTOPPEL.—Clear, Precise, and Unequivocal Evidence is requisite to establish an estoppel. (p. 286.)

Forman & Whitnel and William H. Warder, for the appellants.

Arthur W. Underwood and Denison & Spiller, for the appellees.

¹⁶⁵ DUNN, J. In 1889, and later, the Egyptian Prospecting Company purchased the coal underlying certain lands in Williamson county and began the sinking of a mine and the construction of a coal-washer, near which was constructed a pond for the purpose of collecting water necessary for use in said mine and washer. On March 21, 1901, all the rights of the Egyptian Prospecting Company were conveyed to the Southern Illinois Coal Mining and Washing Company, which continued to own and operate the mine and washer until January 7, 1905, when it conveyed all its interests to the Peabody Coal Company of Illinois. In 1901 the Coal Belt Electric Railway Company built an electric railroad passing near the said mine and constructed its power-house near said

pond. The water supply for this power-house was first obtained from the pond above mentioned under a verbal arrangement between the presidents of the two companies, the railway company paying nothing for the privilege and having no right beyond the oral consent of the president of the Southern Illinois Coal Mining and Washing Company. The water was used in this way for some time but with much controversy between the superintendents of the two companies, the superintendent of the mining company demanding, when the water was low in the pond, that the railway company should cease using it. Finally the railway company laid a pipe to the shaft of another mine and for a few weeks used the water from that mine, until a deep well was driven near the power-house. The water obtained from the well was not good for use in the boilers, and while ¹⁰⁰ it could be used and was used to some extent, the railway company continued to use the water from the pond whenever it was permitted to do so and at times without the knowledge of the mining company. The stock of the railway company at first was owned equally by Francis S. Peabody, Arthur W. Underwood and Frank P. Reed, the latter being president of the company. Later Mr. Reed sold his stock to the other two, and in 1902 or 1903 they sold all the stock to the Peabody Coal Company of New Jersey. The stock of the Southern Illinois Coal Mining and Washing Company originally belonged to Mr. Peabody, Mr. Reed, Mr. Armstrong and Mr. Morris. The Peabody Coal Company of New Jersey owned all the capital stock of the Peabody Coal Company of Illinois, which was a distinct corporation, and Francis S. Peabody was president of both companies. The Peabody Coal Company of Illinois owned all the capital stock of the Southern Illinois Coal Mining and Washing Company in 1904. On December 12, 1904, the Peabody Coal Company of New Jersey sold to George J. Gould all the shares of the capital stock of the railway company for a consideration amounting to seven hundred and ten thousand dollars, and the parties executed a written contract of sale, whereby the Peabody Coal Company guaranteed the existence of certain facts in regard to the indebtedness, property, franchises and other conditions of the railway company, and made certain agreements not necessary to be specifically stated, in regard to the traffic of said railway company and the mines controlled by the Peabody Coal Company. After the transfer of the

stock to Mr. Gould, the railway company continued using water from the pond. The superintendent of the mining company notified the superintendent of the railway company that the water was not sufficient for both and that the railway company must make some other arrangement for water. Finally, on September 22, 1906, the Peabody Coal Company notified the railway company to remove its intake pipe from the pond within two days, or on failure to do so ¹⁶⁷ the coal company would remove it. Thereupon the railway company, George J. Gould and the other appellants filed their bill in the circuit court of Williamson county, alleging that the individual appellants were the owners of all the stock of the railway company, and that in the sale of said stock to Gould the Peabody Coal Company and F. S. Peabody showed him the property of said railway company, and, as a part thereof, said pond, and stated that the railway company had a proprietary interest in said pond and in the water therein, and that said pond was a part of the plant of the railway company. The bill prayed that the Peabody Coal Company be enjoined from removing the railroad company's intake pipe from said pond, and from interfering in any way with the taking by the railway company of water from said pond for its power-house. A temporary injunction was issued, an answer was filed, and on a hearing the temporary injunction was dissolved and the bill was dismissed for want of equity. The complainants thereupon prosecute this appeal.

The Coal Belt Electric Railway Company had no easement in the pond and could not itself maintain this bill. It is claimed that the circumstances of the purchase of the stock of the railway company by Mr. Gould create in his favor an equitable estoppel against the Peabody Coal Company's denying that the railway company has an easement to take its supply of water from the pond. Appellants claim that Mr. Gould, by his purchase of the stock of the railway company, acquired all the property of the railway, and, in addition, the right to a supply of water for the power-house from the pond. The Peabody Coal Company of New Jersey had no direct ownership of the property of the railway company, but was the owner of its stock, and it was the latter which was the subject matter of the contract with Mr. Gould. By its purchase Mr. Gould did not acquire the ownership of the property of the railway company. The ownership of that property remained in the Coal Belt Electric ¹⁶⁸ Railway

Company as before, unaffected by the sale. Mr. Gould merely became a stockholder of the railway company but not the owner of its property in a legal sense, though he could control its action by the selection of its officers: *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, 35 L. ed. 473; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; 2 Cook on Stock and Stockholders, sec. 709. After the transfer of the stock the Coal Belt Electric Railway Company sustained the same relation to its property as before. It neither acquired nor lost any right, by estoppel or otherwise, for it was no party to the transaction. It drew water from the pond by sufferance before the change in the ownership of its stock, and it had no greater right afterward.

But if the sale had been of the property of the railway company the evidence is insufficient to support the bill. The allegation is that the defendants showed the pond as a part of the property owned by the Coal Belt Electric Railway Company, and stated that said company had a proprietary interest in said pond and the water therein, and that said pond was a part of the plant of said company. Mr. Middleton was Mr. Gould's representative to inspect the physical property of the company before the purchase of the stock, and he testified that Mr. Peabody told him the supply of water was from the pond; that it was a part of the power plant and that the supply was sufficient to operate the plant. Mr. Burns testified that Mr. Peabody said the supply of water came from the pond, and that "we" have a proprietary interest in the pond. Mr. Peabody testified that he said the supply of water came from the pond, but that he did not say that the railway company had a proprietary interest in the pond or that it was a part of the railway company's property. This is all the evidence on this point. It was true that the supply of water came from the pond. The coal companies which Mr. Peabody represented had a proprietary interest in the pond, and if he made the statement Mr. Burns testified to, "we" could as well refer to the coal ¹⁰⁰ companies as to the railway company. As to the statement that the pond was a part of the plant of the railway company, one witness asserts and the other denies that it was made. This testimony falls short of that clear, precise and unequivocal evidence requisite to establish an estoppel. In the written contract which was prepared after Mr. Middleton had inspected and reported upon the property nothing

is said about the water supply, though all other items of property are mentioned in detail. If the parties understood that the pond was a part of the plant of the railway company, it is strange that so important an item should have been omitted from the guaranty which was required of the defendant in the contract for the sale of the stock.

Since neither the Coal Belt Railway Company nor the Coal Belt Electric Railway Company had any easement in the pond, a conveyance of all the property would have carried no right to draw water from the pond as appurtenant to the property. The warranty of the Peabody Coal Company that the Coal Belt Electric Railway Company owned a power-house with machinery therein, a theater, also a pump-house and machinery connected therewith, also a battery-house, and other appurtenances, all of which property was to be mentioned in an inventory then being made up by the representatives of the parties, could not apply to an easement for drawing water, which was not mentioned in the warranty or the inventory, and did not, in fact, belong to the railway company.

The evidence did not entitle the appellants to the relief prayed for, and the bill was properly dismissed.

Decree affirmed.

A Corporation and Its Stockholders are, in contemplation of law, distinct from each other: *First Nat. Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904; *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 108 Am. St. Rep. 716. As to the effect, on this rule, of a concentration of all the stock of the corporation in the hands of one shareholder, see *First Nat. Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904; *Swift v. Smith*, 65 Md. 428, 57 Am. St. Rep. 336; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131.

PEOPLE v. MACAULEY.

[230 Ill. 208, 82 N. E. 612.]

ATTORNEYS—Grounds for Disbarment.—Where an attorney, upon discovering a defect in the charter of a corporation, conspires to harass the company and to embarrass its business by organizing a corporation of the same name ostensibly for the purpose of conducting a similar business, but really for the sole purpose of injuring its business and extorting money from it, his conduct warrants disbarment proceedings, although he acts openly and under a claim of right. (p. 290.)

ATTORNEYS.—The Standard of Personal and Professional Integrity which should be applied to persons admitted to practice law is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law. (p. 290.)

ATTORNEYS.—Youth or Inexperience does not extenuate the offense of fraudulent conspiracy to extort money that is inconsistent with the common honesty which should be an attribute of every attorney having the license of this court. (p. 291.)

John L. Fogle, for the relator.

Cantwell & Roth and Charles H. Soelke, for the respondent.

²⁰⁸ DUNN, J. The state's attorney of Cook county filed an information in this court for the disbarment of the respondent, Charles P. R. Macauley, who was enrolled as an attorney ²⁰⁰ on June 7, 1900. The cause was referred to a commissioner to take the evidence and report his conclusions of law and fact, and this has been done.

For several years prior to the year 1900 the Colliery Engineer Company, a Pennsylvania corporation, had been conducting a school under the name of "The International Correspondence Schools of Scranton, Pennsylvania." Instruction was by correspondence through the mails and the students were furnished text-books by the corporation. The school had agents in all parts of the country soliciting students and had built up a large business. An active competitor of this school was the American School of Correspondence of Boston, of which Romanta F. Miller, Jr., was president. Soon after respondent's admission to the bar he was employed as a solicitor by the American School of Correspondence, and sought to induce students of its competitor to abandon their contracts and make new ones with him. He succeeded in inducing one Charles Peacock to abandon his contract with the Scranton corporation upon promise that the respondent would defend him without charge in case a suit was com-

menced for the violation of the contract. Suit was brought and respondent appeared for the defendant, for which he received twenty-five dollars from Miller. The defense was that the Pennsylvania corporation was illegally doing business in this state. After the trial the respondent induced the state authorities to begin an action against the Pennsylvania corporation to recover the penalty provided by statute in case a foreign corporation illegally does business within this state. In August, 1901, he went to Scranton, Pennsylvania, and induced certain citizens to apply for a charter under the laws of that state for a corporation to be known as "The International Correspondence Schools," with its principal office at Scranton. He represented that he would make a good sum of money for himself and those who joined him, as the Colliery Engineer Company would pay him well to give up the charter which he was applying ²¹⁰ for. Upon learning the object of the respondent some of the signers requested to have their names erased from the application. Other names were substituted and notice of the application published. While the application was pending, the officers of the Colliery Engineer Company made application for a charter for the International Correspondence Schools and for a change of the name of the Colliery Engineer Company to the International Text Book Company. Respondent opposed these applications and the Colliery Engineer Company opposed respondent's application for a charter. While these contests were pending respondent obtained a charter from the state of Illinois for a corporation to be known as "The International Correspondence Schools of Scranton, Pennsylvania," and made application to the Pennsylvania authorities for a license for it to do business in that state as a foreign corporation, which application was opposed by the officers of the Colliery Engineer Company. Respondent then formed what was known under the laws of Pennsylvania as a limited partnership, using the name "The International Correspondence Schools, Limited." He also formed another limited partnership under the name of "The Colliery Engineer Company, Limited." His applications for a charter and for a license for his Illinois corporation to do business in Pennsylvania were refused and the application of the officers of the Colliery Engineer Company for a charter and a change of name was allowed. Respondent then applied for a charter under the Pennsylvania law for a corporation to be known as "The

Colliery Engineer Company," and thereupon a bill was filed by the International Text Book Company, successor to the Colliery Engineer Company, claiming to be the owner of all of the capital stock of the International Correspondence Schools, to restrain the respondent and his associates from conducting schools or doing any other business under the names "International Correspondence Schools" and "Colliery Engineer Company"—the names of the two limited ²¹¹ partnerships formed by him—and also to prevent the Illinois corporation known as the Illinois Correspondence Schools of Scranton, Pennsylvania, from using any of said names. While the bill was pending respondent was arrested on a charge of conspiracy and held to bail. He finally agreed with the manager of the International Text Book Company to abandon all proceedings inimical to the Colliery Engineer Company or its successors, not to further annoy or harass said International Text Book Company, to surrender all his rights and papers connected with said proceedings and to permit the injunction prayed for in said bill to be made perpetual. He also signed a written statement setting forth his object and purpose in the business in which he had been engaged. The commissioner found that the respondent originated and devised the scheme aforesaid to annoy and injure the Colliery Engineer Company in its business by instigating prosecutions against said company on the charge of violating the statutes of the several states concerning foreign corporations, advised the American School of Correspondence of such scheme, sought the conduct thereof as its attorney, and was employed for such purpose by Romanta T. Miller, Jr., its president. It was while employed by such attorney that respondent made the efforts above mentioned to secure the various charters of incorporation. Miller contributed over six hundred dollars to the scheme, but about August 24, 1901, advised respondent that the American School of Correspondence was unwilling to have its name used in that connection, and that the remittances already made and thereafter to be made in aid of said scheme should be treated as Miller's personal investment in said business. He also suggested that respondent should sever all official relations with the American School of Correspondence, but that this would make no difference in the personal relation of Miller to the business.

All the acts of the respondent in these transactions were done with the approval and concurrence of Romanta T.

²¹² Miller, Jr., and their motive was to harass and annoy the Colliery Engineer Company and by causing it large expense and injuring its business, to induce it to pay the respondent and his associates a large amount of money to desist from further annoyance and injury. The respondent and his associates at no time intended to conduct the business of a correspondence school, but they conspired to take the name of the Colliery Engineer Company in order to cause it to pay a large sum of money to be relieved from their attacks upon and injury to its already established business, the sole purpose being to compel that company to buy its peace from respondent's attacks by the payment of his demands.

The substance of the charge against the respondent is, that having discovered what he regarded as a defect in the charter of the Colliery Engineer Company, he organized a conspiracy to harass that company and to embarrass its business by organizing corporations having its name or the name in which its business was transacted, apparently for the purpose of conducting a similar business but really for the sole purpose of injuring the business of the Colliery Engineer Company and extorting money from it. The commissioner has found that charge is proved, and no exception having been taken to bring the evidence or any of his rulings before us, it is to be taken as true. The statement of the charge made and proved sufficiently characterizes the moral quality of the respondent's acts. His counsel seek to justify them for the reason that what he did was done openly, under a claim of right, and that his action was ²¹³ praiseworthy because he gave the Colliery Engineer Company an opportunity to test the question at the start. This argument would carry weight if the respondent had been in good faith attempting to organize a corporation for a lawful purpose, but while pretending to do so his sole object was the dishonest and unlawful purpose of extorting money by interfering with the established business of a corporation already organized. He did not intend to engage in the business for the purpose for which he pretended to organize his corporation, but he intended to demand money for not doing so.

The standard of personal and professional integrity which should be applied to persons admitted to practice law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law. The statute and

the rules of this court require a good moral character as a condition precedent to a license as an attorney. This includes at least common honesty, and is not consistent with an effort to obtain a part of the wealth of another by any means not denounced by the criminal statutes. The predatory instinct which led to respondent's raid upon the Colliery Engineer Company is accompanied with an obtuse moral discernment which seems not to realize that the respondent's use of the forms of law in that matter was not proper. Youth or inexperience does not extenuate the offense of a fraudulent conspiracy to extort money that is inconsistent with the common honesty which should be an attribute of every attorney having the license of this court.

No reason is apparent why the lapse of time in this case makes it unjust or unfair to require the respondent to answer this charge.

The rule will be made absolute and respondent's name stricken from the roll of attorneys of this court.

Grounds for the Disbarment of Attorneys are discussed in the notes to *In re Philbrook*, 45 Am. St. Rep. 71; *In re Thresher*, 114 Am. St. Rep. 839. An attorney may be disbarred whenever he ceases to have a good moral character: *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206.

DEADMAN v. YANTIS.

[230 Ill. 243, 82 N. E. 592.]

WILLS—*Creation of Life Estate and Remainder.*—A devise to the wife of the testator for and during her natural life, and at her death to the daughter of the testator and her two children, creates in the latter a vested remainder, subject only to a life estate in the widow. (p. 297.)

PARTITION.—*Reversioners and Remaindermen owning interests in fee in land subject to an unexpired life estate are entitled to partition.* (p. 297.)

EXECUTION.—*A Vested Remainder is Subject to levy and sale on execution against the remainderman.* (p. 298.)

EQUITY—*Laches—Stale Demands.*—A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands when the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. (p. 299.)

EQUITY—*Laches—Statute of Limitations.*—In administering their remedies, courts of equity, while sometimes adopting the stat-

utory period of limitation, by analogy, have never regarded themselves bound down by any hard-and-fast rule, but, looking at the parties, their relation to each other, and the surrounding circumstances, have determined the question of diligence, in each case, according to equity, having due regard for those elementary principles upon which their jurisdiction rests. (p. 300.)

EXECUTION SALE—Absence of Bona Fide Debt.—The Purchaser at the execution sale is not required to look beyond what is disclosed upon the face of the record to ascertain whether the judgment was founded upon a bona fide debt. (p. 301.)

JUDGMENT—Absence of Bona Fide Debt.—A judgment fraudulently obtained because no bona fide debt existed is not void, but merely voidable, at the instance of the party aggrieved when he promptly seeks relief. (p. 301.)

MORTGAGE—Deed Absolute.—The Burden of Proof is upon the party alleging that a deed absolute on its face was intended as a mortgage, to establish such fact by clear and convincing evidence. (p. 302.)

MORTGAGE—Deed Absolute—Right to Redeem.—When the legal title is, by deed absolute in form, conveyed to secure a loan, no action is necessary to divest the right to redeem. Such right may be lost by laches. (p. 303.)

MORTGAGE—Deed Absolute—Subsequent Grantee.—Where one having the right to redeem under a deed absolute, intended as a mortgage, makes a sale and directs the holder of the legal title to convey the premises to the purchaser, the latter takes the title divested of the condition of defeasance. (p. 303.)

R. M. Peadro and Braz D. Tull, for the appellants.

Walter C. Headen, George B. Rhoads and Dove & Dove, for appellees.

244 VICKERS, J. This is an appeal from a decree of the Shelby county circuit court dismissing, for want of equity, a bill for partition filed by Elzina Deadman against Cordelia Yantis and others. Mary J. Dixon, who was a defendant in the original bill, was by amendment made complainant. John W. Dixon, another defendant, filed an answer confessing the material allegations in the bill, and subsequently filed a cross-bill setting up certain facts and praying relief, which will be more fully stated hereinafter.

The original bill alleged that William Claridge was the owner of the north half of the southeast quarter of section 15, the north half of the southwest quarter of section 14 and the southeast quarter of the southwest quarter of section 14, township 12 north, range 4 east, in Shelby county, at the time of his death, which occurred May 29, 1880; that said Claridge died testate and that his will was duly probated in Shelby county; that by his last will William Claridge devised the

two hundred acres of land above described to his widow, Elizabeth M. Claridge, during her ²⁴⁵ lifetime, with remainder in fee to his daughter, Mary Jerusha Dixon, and her two children, John William Dixon and Elzina Dixon (now Elzina Deadman), in equal parts, as tenants in common. The clause of the will which is supposed to vest the above interests in the parties is the third, and is as follows:

"Third—I do give, devise and bequeath unto my wife, Elizabeth M. Claridge, for and during her natural life, my home farm on which I now live, consisting of two hundred acres, described as follows, to wit: The north half of the southeast quarter of section 15, and the north half of the southwest quarter of section 14, and the southeast quarter of the southwest quarter of section 14, all in township 12 north, range 4 east, in Shelby county, in the State of Illinois; and it is my will and desire, and I do direct, that during the life of my said wife my said daughter, Mary Jerusha Dixon, and her children, William Dixon and Elzina Dixon shall live upon said home place and enjoy the use and rents and profits thereof, and at the death of said wife I will and devise said home place to my daughter, Mary Jerusha Dixon and her said children, William Dixon and Elzina Dixon, and the survivors of them, and to their heirs and assigns forever."

The bill alleges that on the 9th of January, 1905, the widow, Elizabeth M. Claridge, died, and that by virtue of said will the title to the real estate thereupon became vested in Mary Jerusha Dixon and her two children, John W. Dixon and Elzina Deadman, as tenants in common, each owning one-third undivided interest; and it is averred that the title in fee did not vest in Mary J. Dixon and her two children prior to the death of the life tenant. Cordelia Yantis, John W. Yantis, E. A. Richardson, George D. Chafee, and others, were made defendants, and as to the interest or claim of defendants above named it is charged that "they claim some interest in or to said premises, or a part thereof, as grantees, mortgagees, judgment creditors ²⁴⁶ or tenants, which said interests, and each of them, if any there are, are illegal and void and constitute a cloud upon the title" of the parties in interest. There is no other averment in the original bill respecting the interests or claims of the defendants than the general statement above quoted. The bill concluded with the usual prayer for partition.

Cordelia and John W. Yantis filed a joint and several answer to said bill, admitting the ownership and death of William Claridge and that the lands were devised as stated in the third clause of the will. These defendants, however, contended for a somewhat different construction of the clause of the will devising the lands in question. The answer denies that the title did not vest under the will until the death of the life tenant, and charges that by the will the fee vested in Mary J. Dixon and her two children subject to the life estate of Elizabeth Claridge. The answer denies that Mary J. Dixon and her children, or either of them, have any interest whatever in said real estate, and avers that Cordelia Yantis owns all of said real estate in fee simple; that the title of Cordelia Yantis was obtained in the following manner: On February 17, 1890, John W. Dixon and wife conveyed, by warranty deed, his undivided interest in said premises to George D. Chafee, and that on February 17, 1892, Chafee conveyed the same premises to Cordelia Yantis; that on October 2, 1891, the said John W. Dixon conveyed, by quitclaim deed, all his interest in the premises to E. A. Richardson, and on May 19, 1892, said Richardson conveyed the said premises to Cordelia Yantis. The answer then alleges a recovery of a judgment in favor of J. J. Chrissenberry against John W. and Mary J. Dixon, and, by virtue of an execution on said judgment levied upon the interest of Mary J. Dixon, Cordelia Yantis obtained a sheriff's deed, under said sale, September 29, 1894, to the interest of Mary J. Dixon in the premises. By the conveyance aforesaid it is alleged that Cordelia Yantis became the owner in fee simple of a two-thirds interest in said land, ²⁴⁷ subject only to the life estate of the widow, Elizabeth Claridge. The answer then avers that on October 1, 1894, Cordelia Yantis, as owner of a two-thirds interest in fee, filed her bill for partition against Elzina Deadman, and avers that such proceedings were had in that case as resulted in a decree of the circuit court of Shelby county finding that Cordelia Yantis was the owner of two-thirds and Elzina Deadman the owner of the remaining one-third. The answer shows that commissioners were appointed in that proceeding, who found the lands not susceptible of division and partition and assigned the northeast quarter of the southwest quarter of section 14 and the northwest quarter of the southwest quarter of section 12, being eighty acres of the two hundred acres, to Elizabeth

Claridge in full of her interest in the whole. The answer shows that the lands were appraised in separate tracts at three thousand two hundred dollars and that the sale was had on November 30, 1894, and that Cordelia Yantis bought the same for three thousand two hundred and seventy-five dollars; that the master issued a certificate of sale to her, which was by her assigned to C. W. Steward, upon which a master's deed was issued April 1, 1895, conveying to Steward the whole of said premises, including the eighty acres set off to the widow, subject, however, to her life estate in said eighty acres; that the sale was afterward approved by the court, and that Elzina Deadman received, in full of her one-third interest, one thousand and seventy-eight dollars and forty-one cents, and receipted for the same. The answer charges that Elzina Deadman had been duly served with process and had full knowledge of all of said proceedings and that she received and receipted for the proceeds of said sale, and that the purchaser, Steward, went into possession of one hundred and twenty acres of said land, the widow being in possession of the other eighty. It is alleged that by virtue of said partition proceeding and sale said Steward became the owner in fee simple of the whole of said tract, subject to the life estate in eighty acres, and that he went into possession and remained in open and notorious possession from thence until he conveyed ²⁴⁸ the same; that afterward the widow leased the said eighty acres to said Steward, and that under the said lease said Steward was in possession of the eighty acres and of the one hundred and twenty acres as owner. It is averred that said Steward made valuable and lasting improvements upon said premises after he obtained said deed and before the commencement of this suit; that on June 10, 1904, said Steward, in consideration of five thousand dollars, conveyed the whole of said premises to Cordelia Yantis, subject to the rights of the widow therein; that Cordelia Yantis succeeded to the immediate possession of said premises and has been in possession all of the time until the bringing of this suit, and still is in possession of same. It is averred that said Steward and Cordelia Yantis paid all of the taxes assessed upon said premises under claim and color of title made in good faith, and that such payment of taxes was made for more than seven successive years preceding the filing of the bill. The answer claims title by limitation, and sets up the laches of Elzina Deadman in bringing this suit

as a bar to the same. By an amendment to her answer Cordelia Yantis alleges that she made valuable and lasting improvements on the land after she obtained the deed from Steward.

John W. Dixon filed a cross-bill, in which he claimed to be the owner of a one-third undivided interest in the premises, and charged that Mary J. Dixon and Elzina Deadman were the owners of the other undivided two-thirds interest therein. He charges in his cross-bill that his undivided interest is subject to a certain indebtedness due to John W. or Cordelia Yantis, secured by a mortgage upon his interest, brought about as follows: On February 17, 1890, John W. Dixon borrowed from George D. Chafee five hundred dollars and executed to Chafee a mortgage in the form of a deed for said premises to secure a note for said amount; that on October 2, 1891, he became indebted to E. A. Richardson in the sum of one hundred dollars, and executed to him a mortgage in the form of a deed upon said premises to secure said debt; alleges that ²⁴⁹ on February 17, 1892, said Chafee and Richardson were desirous of receiving their money, and that John W. Dixon arranged with John W. Yantis for the money to pay said indebtedness, and that Chafee and Richardson were to transfer said security to Yantis; that in pursuance of this arrangement Chafee and Richardson, at the request of Dixon, and by arrangements with John W. Yantis, conveyed said premises to Cordelia Yantis; avers that said Yantis paid the indebtedness to Chafee and Richardson and advanced to Dixon the further sum of four hundred dollars, making a total of about twelve hundred dollars; that John W. Dixon executed his notes to said Yantis for said amount and received from said Yantis bond for a deed for the reconveyance of said premises upon the payment of said indebtedness; alleges that he has made payments in money and property to a large amount and that there is not to exceed the sum of six hundred dollars now due on said indebtedness; prays for an accounting and offers and tenders to pay whatever may be found to be due upon such accounting, and asks that the conveyance to Cordelia Yantis be held as a mortgage and that he be allowed to redeem therefrom.

Cordelia Yantis and John W. Yantis answered the cross-bill, in which they deny that the transaction by which the title was conveyed to Cordelia Yantis was a loan or that

the deed was a mortgage, and reasserted, as in their previous answer to the original bill, that the transaction was a sale and that the deed was an absolute conveyance made in pursuance thereof. The answer sets up possession, payment of taxes, making of valuable improvements, and insists that John W. Dixon is estopped, by reason of laches, from claiming any rights in the premises.

After replications were filed the cause was referred to a special master to take the proofs and report his conclusions, both of law and fact. The master reported that the original bill and cross-bill were not sustained by the proof and that the equities were with defendants as to both bills, ²⁵⁰ and recommended a decree dismissing them. Elzina Deadman filed sixty-two objections to the findings of the master as respects the original bill and John W. Dixon filed twenty-three objections to the findings on the cross-bill, all of which were overruled by the master and the case was heard in the circuit court on exceptions to the master's ruling. The circuit court overruled all exceptions and entered a decree dismissing both the original and cross-bills.

The evidence in this case is very voluminous and need not be set out in this statement. The testimony bearing upon such questions of fact as are necessary to be determined will be set out and discussed in the opinion.

Under the third clause of the will of William Claridge there can be no doubt that the testator intended that his wife, Elizabeth M. Claridge, should have the two hundred acres of land in controversy during her natural life, and that his daughter, Mary J. Dixon, and her children, John W. and Elzina, and the survivors of them, should have a vested fee simple title in remainder, subject only to the life estate of the widow. The title of the tenants in fee being vested upon the death of the testator, it became subject to the laws of conveyance, partition and sale on execution for the debts of the owners.

That reversioners and remaindermen owning interests in fee in land subject to an unexpired life estate are entitled to partition is well established law in this state: *Scoville v. Hilliard*, 48 Ill. 453; *Hartmann v. Hartmann*, 59 Ill. 103; *Drake v. Merkle*, 153 Ill. 318, 38 N. E. 654; *Ruddell v. Wren*, 208 Ill. 508, 70 N. E. 751; *Miller v. Lanning*, 211 Ill. 620, 71 N. E. 1115; *Dee v. Dee*, 212 Ill. ²⁵¹ 338, 72 N. E. 429. It is equally well established that a vested remainder is sub-

ject to levy and sale on execution against the remainderman: *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504; *Springer v. Savage*, 143 Ill. 301, 32 N. E. 520; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394. In the case last above cited it is held that the remainderman's interest encumbered with a homestead may be levied upon and sold subject to the homestead right of the widow, and that such premises are subject to partition among the heirs, subject to the right of dower and homestead estate of the widow. The rule appears to be otherwise with respect to contingent remainders: *Haward v. Peavey*, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503.

Since it is contended that the titles of Mary J. and John W. Dixon and Elzina Deadman were divested at different times and by different methods, it will be necessary to consider the case as applicable to each of these parties separately.

First, as to the interest of Elzina Deadman: The evidence shows that the partition proceeding set up in the answer of John W. and Cordelia Yantis was regularly conducted and resulted in a decree for the sale of the premises; that there was personal service upon Elzina Deadman, as shown by the return of the sheriff of Moultrie county and by the finding of the court in the decree; that in pursuance of the decree a sale was had and that the premises brought approximately their appraised value; that Cordelia Yantis became the purchaser at the sale and received a certificate of purchase, which she assigned to C. W. Steward, upon which a master's deed was issued to Steward April 1, 1895. The evidence also shows that Steward immediately took possession of one hundred and twenty acres of the land in question and continued to hold the same until June 10, 1904, when he conveyed the premises to Cordelia Yantis. Elzina Deadman made no defense to this bill for partition. Without regard to the validity of the Yantis title to the two-thirds interest which she claimed in that suit as against Mary J. ²⁵² and John W. Dixon, it is clear that, so far as Elzina Deadman is concerned, she is bound by that decree, and will not be heard to say in this or any other suit that Cordelia Yantis had no title. If she desired to question the title of Cordelia Yantis to the interest she claimed, she should have done so in the original partition suit between herself and Cordelia Yantis. Having failed to question her title in that suit she will not be heard now to say that Cordelia Yantis had no interest and that

the shares claimed by her belonged to other persons. She is estopped by the adjudication in that case from asserting the nonexistence of the Yantis title, which was directly involved and passed on in that litigation. She received the proceeds of her one-third interest, which she has held from the time distribution was made and still holds the same, and does not, by her bill, offer to restore the same to the purchaser at the sale. After the receipt of her share of the proceeds of the sale Elzina Deadman remained silent when in conscience she should have spoken; now equity will debar her from speaking when in conscience she ought to remain silent. Relying on his title obtained with a knowledge of this appellant, the purchaser took possession and has expended large sums of money in improvements and taxes, and it would be highly inequitable, if not positively fraudulent, to permit his title to be disturbed by one whose silence justified a belief that her claim had been abandoned.

Conceding the existence of irregularities in the partition proceeding, there is, in our opinion, such a want of diligence in applying for relief that a court of equity cannot grant it without relaxing its respect for some of the elementary maxims that have ever controlled in the administration of equitable remedies. The summons in the partition case was served on Elzina Deadman on the second day of October, 1894, and the master's deed was executed on April 1, 1895. She filed her bill in this case on November 1, 1905. There was therefore a delay of more than ten years from the date ²⁵³ of the master's deed and more than eleven years from the service of the summons, and since she offered no defense her acquiescence may well be said to date from the service of the summons. No circumstances exist to shield her from the rule that "equity aids the diligent—not those who slumber on their rights." The scope and effect of this rule, irrespective of any statutory limitation, was stated by an eminent English chancellor as follows: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands when the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence." This salutary rule has been constantly applied by courts of equity in this state from its earliest history down to the present time, and our reports abound in cases illustrative of

its application. In administering their remedies, courts of equity, while sometimes adopting the statutory period of limitation, by analogy have never regarded themselves bound down by any hard-and-fast rule, but, looking at the parties, their relation to each other and the surrounding circumstances, have determined the question of diligence in each case according to equity, having due regard for these elementary principles upon which their jurisdiction rests.

This much we have said on the assumption that the partition proceeding was so irregular as to give rise to some equities in favor of this appellant had she applied to the court in due season and in a proper manner, but we fail to find any such irregularities. It is probably true that the court erred in circumscribing the life estate of Elizabeth M. Claridge to eighty acres, when, under the will, she was entitled to a life estate in the entire two hundred acres. But even if this should be granted, the life tenant did not complain, but accepted what was awarded her and enjoyed it as long as she lived. Perhaps eighty acres was all she ²⁵⁴ wanted. At all events, this error, if error it was, did the tenants in fee no harm, but was an advantage to them by clearing off the life estate from one hundred and twenty acres, thereby enhancing the value of the fee. If there is any other irregularity in the partition proceeding it has not been pointed out and we have been unable to discover it. We can scarcely conceive of a case in which the complaining party has so little to commend her to the favorable consideration of a court of equity. There was no error in dismissing the original bill so far as Elzina Deadman was concerned.

As to the case of Mary J. Dixon: It will be remembered that Mary J. Dixon is the mother of Elzina Deadman and John W. Dixon. The evidence shows that Mary J. Dixon became surety for her son, John, on certain notes upon which suit was brought, resulting in a judgment for one hundred and seventy-seven dollars against Mary J. Dixon, and by virtue of an execution issued upon said judgment her interest in the two hundred acres of land was sold to Cordelia Yantis, and that Illinois W. Hess, who had a judgment against John W. and Mary J. Dixon for two hundred dollars, after the expiration of twelve months and within fifteen months from the sheriff's sale, redeemed the premises and assigned his judgment and certificate of redemption to

Cordelia Yantis, to whom a sheriff's deed was issued for the undivided interest of Mary J. Dixon in 1894. After the sheriff's deed was issued Mary J. Dixon never took any steps to set aside the sale or redeem therefrom, but appears to have abandoned all claim to any interest in the premises until this suit was brought by her daughter, Elzina Deadman, and she was brought in first as a defendant, and afterward, by amendment, made a complainant in the original bill. The principal objection made to the judgment against Mary J. Dixon upon which her interest in this farm was sold is a claim that the debt had been paid by the sale of lumber and ties off the land before suit was brought, and that the judgment was therefore based ²⁵⁵ upon a groundless claim. There is some testimony tending to show that a sufficient amount of timber was removed from the premises and sold to the Chicago and Eastern Illinois Railroad Company, through Richardson, to have paid the debt in full, but the evidence is not at all clear upon this point. We do not deem this a question of controlling importance, and hence will not set out and discuss the evidence bearing upon that question. If it was established that no debt in fact existed at the time the suit was brought and judgment rendered, the judgment would simply be voidable on the ground of fraud. The purchaser at an execution sale is not required to look beyond what is disclosed upon the face of the record to ascertain if the judgment was founded upon a bona fide debt. The judgment thus fraudulently obtained is not absolutely void, but is only voidable, at the instance of the party aggrieved, when relief is applied for in apt time. Mary J. Dixon has failed to pursue her remedy with that diligence that is required to give her a standing in a court of equity. All that has been said upon this question in disposing of the case of Elzina Deadman applies to the case of Mary J. Dixon, and for the reasons there given, there was no error in dismissing the bill as to her.

The case as to John W. Dixon: By his cross-bill John W. Dixon alleges that his deeds to Chafee and Richardson were intended to secure the grantees for certain indebtedness due from him to them, and that their deeds to Cordelia Yantis were given to secure a loan made for the purpose of obtaining money to liquidate the Chafee and Richardson debts. So far as the deed executed to Chafee is concerned, the evidence satisfactorily shows that it was made as se-

curity for a debt of five hundred dollars, and the same may be said with reference to the conveyance made by Dixon to Richardson; but when these parties conveyed to Yantis, the evidence does not support the contention of John W. Dixon that the conveyance to Yantis was likewise intended as a mere security for a debt. Upon this subject E. A. Richardson testifies ²⁵⁶ that John W. Dixon told him that he wanted to sell his interest and straighten up his debts; that Richardson made an agreement with Yantis by which Yantis was to furnish the money to pay Chafee and Richardson and some other claims against Dixon and give Dixon four hundred dollars in cash and take a deed to his interest in the premises, and that this arrangement was consummated. He testifies that the conveyance to Yantis was an absolute conveyance of all interest that John W. Dixon had, and that there was no agreement that Yantis would reconvey to Dixon upon the payment of the amount of money furnished to him by Yantis. Chafee testifies that he made a deed to Yantis in pursuance of some arrangement made by Dixon and Yantis; that he did not know the details of the understanding between them. Yantis testifies that he bought Dixon's interest outright and paid for it, and that Chafee and Richardson made the deeds to Cordelia Yantis, his wife, by the mutual consent of all the parties. He contradicts the claim of John W. Dixon that he agreed, either in writing or otherwise, to reconvey the premises to Dixon upon the repayment to him of the money that he had advanced. John W. Dixon is the only witness who testifies to the alleged agreement to reconvey. He says that he executed his note to Yantis at the time the deed was made, and that a bond was executed to him by Yantis but was not signed by Mrs. Yantis. He claims that he left the bond with Yantis and that he has never had possession of it since. This is substantially all the evidence bearing upon the question involved. The burden of proof is upon the party alleging that a deed absolute on its face was intended only as a mortgage, to establish such fact by clear and convincing evidence: *Knowles v. Knowles*, 86 Ill. 1; *Bailey v. Bailey*, 115 Ill. 551, 4 N. E. 394; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149; *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206; *Williams v. Williams*, 180 Ill. 361, 54 N. E. 229; *Heaton v. Gaines*, 198 Ill. 479, 64 N. E. 1081.

Appellants insist that having established that the conveyances to Chafee and Richardson were mortgages, and ²³⁷ Yantis having accepted conveyances from them with notice of the character of title in the grantors, the latter will be held to hold the title subject to the same defeasance that existed in the original conveyances, and authorities are cited to sustain the proposition that having established the character of mortgages in these conveyances they will ever be treated as mortgages. Under the established law of this state a deed absolute with a parol or verbal defeasance is valid, and the party entitled to the equity may maintain a bill to redeem if the fact can be established by that quantity of proof that the law demands: Tillson v. Moulton, 23 Ill. 648; Hallesy v. Jackson, 66 Ill. 139; Pearson v. Pearson, 131 Ill. 464, 23 N. E. 418. While a condition of defeasance may rest in a parol or verbal agreement between the parties it may be extinguished in the same way. When the legal title is conveyed to secure a loan no action is necessary to divest the right to redeem. The entire legal title is passed by the deed: Fitch v. Miller, 200 Ill. 170, 65 N. E. 650. The right to redeem may be lost by limitation or laches. Where a deed has been made which was intended as a mortgage, and the party having the right to redeem makes a sale and directs the holder of the legal title to convey the premises to the purchaser, such purchaser will take the title divested of the condition of defeasance: Maxfield v. Patchen, 29 Ill. 39; Carpenter v. Carpenter, 70 Ill. 457; West v. Reed, 55 Ill. 242; Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869. The preponderance of the evidence shows that John W. Dixon made a sale to Yantis, and that the conveyance was made in pursuance of such arrangement and by his direction. There is here also a want of diligence on the part of John W. Dixon to assert his rights. The deeds to Mrs. Yantis were made in 1892, and there is no satisfactory explanation given why twelve years should be allowed to elapse before any attempt was made to set up his right to redeem.

Our conclusion is, upon the whole case, that neither Elzina Deadman, Mary J. Dixon nor John W. Dixon has any ²³⁸ title, rights or interests in the premises involved, and that there was no error in dismissing the original and cross-bills for want of equity.

The decree of the circuit court of Shelby county will be affirmed.

Partition of Estates Held in Reversion or Remainder is the subject of a note to *Fitts v. Craddock*, 113 Am. St. Rep. 55. In some jurisdictions rights in reversion or remainder cannot be affected by partition proceedings: *Lawson v. Bonner*, 88 Miss. 235, 117 Am. St. Rep. 738.

Where a Court Acquires Jurisdiction of the parties and subject matter, then, although errors subsequently intervene, the title of a bona fide purchaser cannot be impeached by parties to the suit: *Teal v. Dunihoo*, 230 Ill. 476, post, p. 319.

STREIT v. FAY.

[230 Ill. 319, 82 N. E. 648.]

LEASES—Provision for Renewal Invalid for Indefiniteness.—

A provision in a lease that the lessee may have the "privilege of five years longer, he paying additional rent on revaluation now fixed at five hundred dollars," no provision being made as to how or when the revaluation should be determined, is too vague and indefinite to constitute a valid covenant for renewal. (p. 306.)

WILLS—Trusts—Repugnant Clauses.—

Where one clause of a will appoints the two sons of the testator trustees of the property devised for their own use and benefit during their natural lives, the effect of the devise, without an intervening trustee, is to vest in the sons a life estate, and a subsequent clause depriving them of the power of alienation is repugnant to the estate devised and therefore void. (p. 307.)

LEASES—Holding Over—Tenancy from Year to Year.—

Where a lessee is suffered to remain in the possession of the premises for more than a year after the expiration of the term, during which period the rent was collected from him, he becomes a tenant from year to year. (p. 309.)

LEASES—Refusal to Pay Rent.—

Where the ownership of leased premises is in doubt, a statement by the lessee, when asked for the rent, that he will pay it when he knows the right party to pay to, is not a refusal of payment nor a denial of the demandant's right as landlord. (p. 310.)

LEASE.—A Tenancy from Year to Year cannot be Terminated

by a demand for immediate possession, but the tenant must be notified to quit in accordance with the statute. (p. 310.)

Adler & Lederer, for the plaintiff in error.

Enoch J. Price, for the defendant in error.

320 FARMER, J. This is an action of forcible detainer brought by defendant in error, Catherine S. Fay, against plaintiff in error, Nicholas Streit, April 23, 1898, before a justice of the peace of Cook county, to recover possession of certain property, consisting of two lots in block 3, Frazier's

addition to Chicago. George E. Cooke, of Louisville, Kentucky, was the owner of the premises, and on the eighteenth day of October, 1890, by ground lease, rented to plaintiff in error one of the lots, to "hold from November 1, 1890, until November 1, 1895, with privilege of five years longer, he paying additional rent on revaluation now fixed at five hundred dollars." The consideration named was thirty dollars a year, payable fifteen dollars semi-annually on the 1st of May and November of each year during the continuance of the lease, at the office of the lessor at Louisville, Kentucky. The lessee also agreed to pay "all water rates, and state and county taxes, that may be laid, charged or assessed on said demised premises pending the existence of this lease." The lease to the second lot, which joined the first one immediately on the south, was for the same consideration and in all its terms and conditions the same as the one above described, with the exception that it was executed February 1, 1892, and was to run to February 1, 1897. Plaintiff in error went into possession of the premises and retained the same to the time of the bringing of this suit. In 1893 George E. Cooke died leaving a will, which was duly probated at Louisville, Kentucky. The only part of said will that pertains to the property in controversy is clause 7 and the ³²¹ codicil hereafter referred to. On April 9, 1898, J. Esten Cooke and wife by quitclaim deed conveyed all interest in said block 3 to defendant in error, the deed being recorded April 14, 1898, and on April 16, 1898, H. Brent Cooke and wife, by similar deed, conveyed all interest in and to the same property to said defendant in error, said deed being recorded April 18, 1898. On April 23, 1898, Thomas Fay, husband of defendant in error, representing her, called on plaintiff in error and asked him for rent. On this subject Fay's testimony, as abstracted, is: "I went to Mr. Streit in the morning and asked him for some rent, and he says, 'I will pay the rent'; he says, 'I will pay the rent when I know the right one to pay it to.' 'Well,' I says, 'Mr. Streit, don't you think from what I have told you we are the right one—Mrs. Fay is the right one?' He says, 'I don't know.' " The plaintiff in error did not pay the rent at this time, and the same day the defendant in error caused a demand for immediate possession of the premises to be served on him and instituted this suit. On May 5, 1898, the justice gave judgment for possession. The case

was appealed to the superior court of Cook county, where a trial was had before the court without a jury and judgment rendered in favor of plaintiff in error, holding that defendant in error was not entitled to the possession of the premises. Defendant in error prosecuted an appeal from that judgment to the appellate court, where the judgment of the superior court was reversed and a judgment rendered in the appellate court finding the plaintiff in error guilty of unlawfully withholding possession of the premises and adjudging that defendant in error have restitution of said premises. No finding of facts is incorporated in the judgment. A certificate of importance was granted by the appellate court, and the case is brought here for review upon a writ of error sued out of this court.

³²³ Three grounds are urged by plaintiff in error as reasons for a reversal of the judgment of the appellate court: (1) He was entitled to retain possession by virtue of covenants of renewals in the leases; (2) that defendant in error had no right to the possession unless she acquired title thereto by the conveyances from the Cookes, and it is insisted that their interest in the premises was not alienable, and therefore defendant in error acquired neither title nor right of possession by virtue of said conveyances; (3) that if said covenants were void as covenants for renewal, permitting him to remain in possession for so long a time after the terms mentioned in the lease had expired made him a tenant from year to year, and as such he was entitled to the notice provided for the termination of such tenancies by section 5 of the landlord and tenant act.

1. It will be observed that the covenants for renewal did not fix the amount of rent to be paid for the extension term, but merely provided that plaintiff in error might have the "privilege of five years longer, he paying additional rent on revaluation now fixed at five hundred dollars." No provision was made as to when or how the revaluation should be determined. The provisions, therefore, for the renewal of the leases were too vague and indefinite to constitute valid covenants for renewal: 1 Taylor on Landlord and Tenant, 8th ed., sec. 333; 18 Am. & Eng. Ency. of Law, 2d ed., 686.

2. Clause 7 of the will is of such extreme length that we shall not set it out in full. The following extract from it sufficiently shows the nature of the estate devised to the sons of the testator, defendant in error's grantors. By said clause

testator devises "in equal parts to my two sons, H. Brent Cooke and J. Esten Cooke, upon the following ³²³ trust and with the following limitations, to wit: The part devised to each of them shall be held by him for his own benefit for the period about to be mentioned, but without any power in him to sell or encumber the same or to anticipate its income or in any way subject same to his debts for and during his natural life, or until a court of competent jurisdiction shall by a judgment hold that his interest in said property, or its use or income, is liable to be subjected to his debts or liable to be sold or encumbered by him or to have its rents and profits anticipated by him, with remainder after such death or judgment to my grandchildren now born or to be hereafter born, per capita and not per stirpes; but in case of the death of any such grandchild, leaving descendants, before the termination of the particular estate, the interest he or she would have taken shall go to his or her descendants. And though such judgment should be appealed from, still it is my will that said beneficial interest of that son against whom such judgment shall be entered shall cease and determine at the date of the judgment appealed from." The codicil provided that if either of the sons should attempt to set aside the will or institute proceedings at law to change it in any way, the interest of such son should cease and go to other persons therein provided.

The clause of the will quoted in part, appointed the two sons trustees of the property devised for their own use and benefit during their natural lives. The language used indicates that the testator intended them to have the possession and occupancy of the lands during their lives, without the right to sell or encumber the same unless a court of competent jurisdiction should hold the property subject to the debts of the life tenant or liable to be sold or encumbered by them, or in case proceedings at law should be instituted by the sons "to change in any way" the will, in either of which events the interest of the sons was to terminate. No trustee having been provided to hold the legal title during the time the testator's sons should have the beneficial interest ³²⁴ in the premises, the effect of the devise was to vest in the sons of the testator a life estate, and the attempt to deprive the life tenants of the power of alienation is repugnant to the estate devised, and therefore void: *Henderson v. Harness*, 176 Ill. 302, 52 N. E. 68. In that case it was said

(p. 310): "By placing this estate devised to Milton Harness in the hands of trustees, as in *Steib v. Whitehead*, 111 Ill. 247, and applying the rents therefrom which should be paid to the appellee, the testator could have accomplished the ends which it is insisted by appellee it was the intention to accomplish. The intervention of trustees was not sought by the testator nor used, and no principle of public policy or of *stare decisis* establishes a rule in this state that the testator may, without the intervention of a trustee, vest an estate in fee or for life in the first taker with a restriction thereon repugnant to an estate, and which would prevent alienation of the same or seizure under process of law."

3. Upon the third proposition above stated we are of opinion the contention of plaintiff in error is correct. Although the covenants for renewal in the leases were not enforceable because of their uncertainty, plaintiff in error was permitted to remain in possession of one of the lots two years and a half, and of the other one year and a half, after the original term in the leases had expired. There is no proof that any rent was due or unpaid at the time the demand for possession was made and the suit instituted. The leases bound plaintiff in error to pay the taxes on the premises, and in event of his failure to do so the same might be paid by the lessor and charged to the lessee and collected in the same manner as rent. In making his defense in the trial court plaintiff in error introduced in evidence a tax deed for said premises issued to a third party, and from this defendant in error argues that the proof shows plaintiff in error had not paid the rent. Such an inference is not warranted. When the agent of defendant in error called upon plaintiff in error he did not claim there was any rent ³²⁵ in arrear, nor is the demand for possession based upon the claim that plaintiff in error had failed to pay rent due or that he had violated any of the terms of the leases under which he was holding over. In the absence of proof to that effect we cannot assume that plaintiff in error had held over without the payment of any rent. The theory of defendant in error in demanding possession and in instituting suit appears to have been, and it is so argued in counsel's brief, that after the expiration of the original term of the leases plaintiff in error was subject to be dispossessed at the will of the landlord. If, as we must presume in the absence of proof to the contrary, plaintiff in error was suffered to remain in

possession of one of the lots more than two years and the other more than one year after the expiration of the term mentioned in the leases, during which period the rent was collected from him therefor, he would become a tenant from year to year. In *Hunt v. Morton*, 18 Ill. 75, the premises were leased to the tenant in the fall of the year under an agreement that he might remain in possession until the following spring. He remained in possession the year following the fall of his entering upon the premises and raised a crop on the land. The following winter he left the premises in possession of his son, who continued in possession and raised a crop thereon the next year. The court treats the possession of the son "the same as if the father had continued and was still in possession," and says, by Caton, J.: "Without any new agreement, and without objection from the landlord or his agent, the tenant continued his possession for two years and over and cultivated the land in crops for both seasons. This certainly created a tenancy from year to year, if it is possible for such a tenancy to be created without an express agreement to that effect, which I presume will not be controverted": See, also, *Eppstein v. Kuhn*, 225 Ill. 115, 80 N. E. 80, 10 L. R. A., N. S., 117; *Abeel v. Radcliff*, 13 Johns. 297, 7 Am. Dec. 377; 1 *Taylor on Landlord and Tenant*, 8th ed., secs. 55, 56, 57; 4 *Kent's Commentaries*, 112, 114.

³²⁶ The authorities cited by defendant in error are not in conflict with this rule. In *Cairo etc. R. R. Co. v. Wiggins Ferry Co.*, 82 Ill. 230, the leasing was for a definite term and after it expired the defendant held over, without, however, the consent of the plaintiff. In *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258, the leasing was for six months. The party holding over disclaimed holding under the lessor as landlord but claimed adversely to and independent of him. Section 22 of 1 *Taylor on Landlord and Tenant* lays down the rule that a tenant "who holds over after the expiration of his term without paying rent or otherwise acknowledging a continuance of the tenancy becomes either a trespasser or a tenant, at the option of the landlord." Here there is no evidence that during the long period of time plaintiff in error held over he ever failed or refused to pay rent or that he ever claimed adversely to the owner. What he said when Fay asked him to pay rent was not that he would not pay, but that he would do so when he knew the right party to

pay it to. Under the state of defendant in error's title this cannot be said to be an unwarranted precaution on his part or a denial of her right as landlord. It does not appear that plaintiff in error ever claimed from any other source than the original leases. A tenancy from year to year cannot be terminated by a demand for immediate possession, but such tenant must be notified to quit in accordance with the requirements of section 5 of chapter 80, Hurd's Statutes of 1905. These requirements not having been complied with by defendant in error she was not entitled to possession, and the judgment of the appellate court to the contrary was erroneous.

The judgment of the appellate court is therefore reversed and the judgment of the superior court affirmed.

From a Tenant Holding Over after the expiration of his term, the law usually implies an agreement to hold for a year upon the terms of the prior lease. The option to so regard it is with the landlord, not with the tenant, and the latter holds over at his peril: Haynes v. Aldrich, 133 N. Y. 287, 28 Am. St. Rep. 636. Compare Andrews v. Marshall etc. Co., 118 Iowa, 595, 96 Am. St. Rep. 412, and see the authorities cited in the cross-reference note thereto.

Notice to Quit is Necessary to Terminate a Tenancy from year to year: See the note to Stedman v. McIntosh, 42 Am. Dec. 126. It has been said, however, that notice to quit is not necessary to terminate a tenancy from year to year arising from the tenant holding over after the expiration of the term: Gladwell v. Holcomb, 60 Ohio, 427, 71 Am. St. Rep. 724.

MANTERNACH v. STUDDT.

[230 Ill. 356, 82 N. E. 829.]

APPEAL.—A Defendant in Partition whose answer merely asserts that she is the owner of the undivided one-fourth of the land sought to be partitioned and denies the allegations of the bill that she is not entitled to any interest therein, has no right of appeal, in the absence of a cross-bill, from a decree dismissing the bill. (p. 313.)

PROCESS—Service on Minors.—Jurisdiction of minor defendants in a proceeding by an administrator to sell land to pay debts of the estate is not acquired by leaving a copy of the summons with their mother and informing her of its contents, when she is a creditor of the estate, and the real party in interest, having resigned her office as administratrix in order to purchase at the sale. (p. 314.)

PROCESS—Presumption in Support of Jurisdiction.—Where a decree in chancery is entered at a term subsequent to the return term and recites due service of process, but the return on the summons is insufficient, the finding in the decree will be supported by the presumption that a second summons was issued and served for the term

at which the decree was entered; but no such presumption can be indulged where the decree was entered at the return term of the summons, in which case the recitals in the decree cannot prevail if the summons and return show the court was without jurisdiction. (p. 315.)

DEEDS.—A Minor is not Bound by the Warranties in a deed executed by his mother, who had purchased the land at an administrator's sale, of her husband's estate, if the minor does not claim as her heir, but as heir of his father. (p. 315.)

ADVERSE POSSESSION.—Payment of Taxes.—To make the period of seven years' payment of taxes under color of title a bar to the recovery of land, they must be paid by the person holding the title, or in some way interested in or connected therewith. It is not enough that a husband pays taxes on land to which his wife holds color of title, without any showing that he does so as her agent or at her request. (p. 317.)

ADVERSE POSSESSION.—Residence on Land.—Adverse possession, under the Illinois statute, must be by actual residence. Mere possession is not enough. (p. 318.)

Mason & Wyman, for the appellants.

Bulkley, Gray & Morse, for the appellees.

³⁵⁷ **FARMER, J.** John Manternach, one of appellants, began this suit by filing a bill in the superior court of Cook county for the partition of a certain lot described in the bill. The bill alleged that the complainant owned the undivided one-fourth of said lot; that he acquired title thereto by inheritance from his father, Peter Manternach, who died January 31, 1886, leaving Emma M. Manternach, his widow, and Lizzie, Annie, Mary and complainant as his children and only heirs at law. The bill averred Peter Manternach died intestate; that his widow was appointed administratrix of his estate February 15, 1886; that in March, 1887, she filed her account in the probate court, showing receipts of \$895.95 and disbursements of \$1,294.65, leaving a balance due her of ³⁵⁸ \$398.70; that January 30, 1889, she resigned her office of administratrix, and caused Alexander S. Maltman to apply for letters and be appointed administrator de bonis non February 6, 1889; that February 7, 1889, said Maltman filed his report and account of the personal estate of the intestate in the probate court, from which it appeared that the indebtedness of the estate, including the widow's award, amounted to \$2,525.50 and the personal property to \$1,770.65, leaving a deficit of \$754.85; that February 8, 1889, said administrator de bonis non filed a petition in the probate court asking for an order and decree to sell the lot described in the bill for the payment of said deficit, and on that day

a summons was issued on said petition, returnable on the third Monday of February, which was the first day of the next term of court succeeding the filing of the petition and the issuing of the writ. The return of the sheriff on the summons is dated the day of its issue, and recites that the writ was served on the complainant and Lizzie Manternach (now Sperk), "by leaving a copy thereof for each of them at the usual place of abode of said defendant with Emma M. Manternach, a member of their family of the age of ten years and upward, and informing said Emma M. Manternach of the contents thereof." No question is involved as to the service of the other defendants.

On the 28th of February, 1889, a decree was entered by the probate court for the sale by the administrator de bonis non of the lot in controversy, and on May 1, 1889, said administrator, in pursuance of the decree, sold said lot to the widow, Emma M. Manternach, for \$1,800, which sale was afterward approved by the probate court. Mrs. Manternach, who had previously been appointed guardian for her children, receipted the administrator for the amount due her and for \$168.80, as guardian for her four minor children, which appears to have been the surplus from the proceeds of this sale after paying the indebtedness, costs and expenses. There is no proof in the record that Mrs. Manternach, ³⁵⁹ as guardian, ever accounted to complainant for his share of the money, or that he received any benefit from it except support and maintenance by his mother. April 22, 1893, Mrs. Manternach sold the lot to August T. Studt, who conveyed it to his wife March 17, 1898, and on March 17, 1906, Mrs. Studt and her husband conveyed the lot to John and Mary Nagl.

The bill avers, on information and belief, that Lizzie Sperk's right to assert title to an interest in said premises is barred by the statute of limitations; that complainant is the owner of the undivided one-fourth of said premises and John and Mary Nagl of the undivided three-fourths thereof, and that complainant is entitled to an account for the rents and profits of the premises accruing after the purchase by Studt from Mrs. Manternach, and prays that an account therefor may be taken and for partition of the premises.

August Studt, Sophia Studt, John Nagl and Mary Nagl filed their joint and several answers. The defense set up by their said answers, as summarized by counsel for appellees

in their brief and argument, are: First, the proceedings for the sale of the real estate were regular on their face and this proceeding is a collateral attack, and the recitals in the decree are binding upon John Manternach; second, he is bound by the warranty in the deed given by Emma Manternach, his mother, to August T. Studd; third, he is barred by section 9 of the statute of limitations; fourth, he is barred by sections 6, 7 and 8 of the statute of limitations; fifth, he is estopped by having received benefits from the sale.

Lizzie Sperk answered, admitting all the allegations of the bill except that she was barred by the statute of limitations from claiming and asserting a right to an interest in the real estate, and averred that she was the owner of the undivided one-fourth of said premises, and asked that the same be ascertained and set off to her, as well as a share of the rents and profits if the account be taken.

300 Upon a hearing in open court a decree was entered dismissing complainant's bill for want of equity, and from that decree John Manternach and Lizzie Sperk have prosecuted this appeal.

In our opinion Lizzie Sperk was not authorized to prosecute an appeal from the decree. The dismissal of the bill was not an adjudication of her rights in the premises. By her answer she merely asserted that she was the owner of the undivided one-fourth of the land sought to be partitioned and denied the allegations of the bill that she was not entitled to any interest therein. In the absence of a cross-bill, finding that the complainant had no interest in the premises and no right to a partition thereof would require that the bill be dismissed, and the decree to that effect was an adjudication, only, that the complainant had no interest in the premises, but was not a determination of the right of Lizzie Sperk, and there was nothing, therefore, for her to appeal from. This appeal therefore brings before us for consideration nothing except the correctness of the decree of the superior court in adjudging that John Manternach (hereafter called appellant) had no interest in the real estate sought to be partitioned and dismissing his bill for want of equity.

The proof tends to show appellant had no knowledge that his father ever owned the lot in controversy until February, 1906, and the suit was instituted by him June 29, 1906. There is some controversy as to the age of appellant, but in

our view of the case his exact age is immaterial. The proof shows him to have been either seven or eight years old at the time of the issuing and service of summons in the ³⁶¹ proceeding by the administrator de bonis non for the sale of real estate to pay debts. Service of summons issued in a chancery proceeding against minor defendants by delivering a copy of the summons for the minor defendants to the complainant in the bill and informing such complainant of its contents does not give the court jurisdiction of the minors so served, and a decree rendered upon such service is void as to them. Cases so holding will be found collected in *Heppe v. Szczepanski*, 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737. The same rule applies to proceedings in the probate court for the sale of real estate to pay debts. It is true, Mrs. Manternach, mother of appellant, with whom a copy of summons was left, was not complainant in the petition to sell the real estate, but the evidence shows she was the creditor for whose benefit it was sold, and that she resigned her office of administratrix and had an administratrix de bonis non appointed so she might become the purchaser at the sale, and while she was not the nominal complainant in the petition she was the real party interested and the one for whose benefit the proceeding was instituted.

The *Heppe* case (209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737), is in its essential features very similar to the case at bar. In that case the widow of Frank Szczepanski was a creditor of his estate, and for the purpose of paying said indebtedness, and upon her request, the executor of her husband's estate procured a decree of the probate court to sell real estate. Rosalia and Marianna Szczepanski, only surviving children of said Frank Szczepanski and his widow, were minors, and the summons as to them was served by leaving a copy with their mother, who at that time was married to a man named Witt Obecny, and informing her of the contents thereof. A guardian ad litem was appointed for and answered the petition for the minors. At the sale, which occurred November 12, 1897, a brother of Mrs. Obecny was the highest bidder for the land, and it was struck off to and reported sold to him by the executor. Upon the approval of the report of sale the executor executed ³⁶² a deed under date of November 18, 1897, to the purchaser, and on the same day the purchaser conveyed the premises to his sister, Mrs. Obecny. In June, 1899, Rosalia Szczepanski and Marianna

Szczepanski filed their bill for partition, and upon the question as to whether service was had upon Rosalia and Marianna the court said (p. 105): "In the case at bar, Katharina Obecný, acting in the name of the executor, Kucharski, was the real complainant in this petition for the sale of this property. . . . There was no service upon her minor children except by leaving a copy of the summons with her, the real, though not nominal, complainant in the petition, and stating the contents of it to her. We do not regard this service, under the decisions referred to, and upon principle, as sufficient. Her interest lay in the direction of keeping a knowledge of the filing of the petition from the very children for whom she accepted service. We are therefore of the opinion that the court acquired no jurisdiction over these appellees to enter the order of sale against their property."

But one summons appears to have been issued in the present case, and it was served in the manner above set out. That summons was made returnable to the February term of court, and at that term the decree for the sale was entered. In *Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652, it was held that where a decree in a chancery proceeding is entered at a term subsequent to the return term and recites due service of process upon the defendants but the return on the summons is insufficient, the finding in the decree will be supported by the presumption that a second summons was issued and served for the term at which the decree is entered. But no such presumption can be indulged where the decree was entered at the return term of the summons, and in such case the recitals in the decree cannot prevail if the summons and return show the court was without jurisdiction. In *Forrest v. Fey*, 218 Ill. 165, 109 Am. St. Rep. 249, 75 N. E. 789, 1 L. R. A., N. S., 740, it was said (p. 170): "Where the record itself shows that notice was not given as required by ³⁶³ law the jurisdiction does not attach, and where it shows that the finding of jurisdiction upon which the court acted was insufficient, the finding of the court as to its jurisdiction is not conclusive, and the recital of proper service on the face of the decree makes no difference." Service of summons upon Mrs. Manternach, as guardian of complainant, did not give the court jurisdiction to enter a decree to sell his land. To have authorized a decree to that effect it was necessary that process be served legally upon complainant: *Greenman v. Harvey*, 53 Ill. 386; *Bonnell v. Holt*, 89 Ill. 71. Neither did

the appointment of a guardian ad litem for the appellant give the court jurisdiction of his person: *Campbell v. Campbell*, 63 Ill. 462; *Chambers v. Jones*, 72 Ill. 275. It is very clear that the court did not have jurisdiction of the person of appellant and had no authority to decree a sale of his interest in the land.

It is contended by appellees that even if the court had no jurisdiction of the person of appellant in the proceeding to sell real estate to pay debts, his mother having made appellee August Studt a warranty deed for the premises, her warranty is binding upon her heirs "and an estoppel to their recovery." This contention is unsound, for the reason that appellant does not claim title as heir of his mother, but his claim is that he derived title by descent from his father. In such case he would be no more bound by the covenants of warranty in a deed made by his mother than he would by the covenants of warranty in a deed made by any other stranger to the title.

Appellees also relied upon the seven years' statute of limitations as one of their defenses, but the proof was insufficient to establish such defense. At the time of the sale of the premises by the administrator they were occupied by a barn, but the barn was burned down some time (just when the evidence does not show) before Mrs. Manternach sold the lot to Studt, in April, 1893. Studt began the erection of a building on the lot in March, 1897, and completed it ³⁶⁴ about the first of July following. He testified he rented the premises, and they had been occupied from the time of the completion of the building until the sale to the Nagls, in March, 1906. This covered a period of more than seven years prior to the filing of the bill, June 29, 1906. But the premises were not owned by Studt during all that time, for he conveyed them to his wife in March, 1898. Studt was absent from Chicago from January 1, 1898, to August 23, 1899. He testified that while he was at home he paid the taxes and while he was absent his wife paid them. All he knew about his wife paying the taxes during his absence, he said, was from what she told him and from the receipts. He testified he had turned over the tax receipts to Nagl, and none were introduced in evidence. Studt's testimony was all the evidence that was introduced on the subject of the payment of taxes. To make the period of seven years' payment of taxes under color of title obtained in good faith a

bar under either section 6 or 7 of the statute of limitations, the taxes must be paid by the person holding the title or in some way interested in or connected therewith: *Hurlbut v. Bradford*, 109 Ill. 397; *Timmons v. Kidwell*, 149 Ill. 507, 36 N. E. 974; *McCauley v. Mahon*, 174 Ill. 384, 51 N. E. 829. The testimony of Studt is vague and uncertain as to how many of the years during which the premises were occupied after he had received the conveyance from Mrs. Manternach he paid the taxes and how many of those years his wife paid them after he made the conveyance to her. If he paid the taxes at any time after making conveyance to his wife, he does not testify that he paid them for her as her agent or at her request. In *Timmons v. Kidwell*, 149 Ill. 507, 36 N. E. 974, it was held that payment of taxes by the husband where color title was in the wife, in the absence of proof that he paid them for his wife, was insufficient. In *Hurlbut v. Bradford*, 109 Ill. 397, and *McCauley v. Mahon*, 174 Ill. 384, 51 N. E. 829, it was held that proof that the taxes were paid for the whole period of seven years by or for the person holding or interested in the color of title must be clear ^{and} ~~and~~ and convincing. There was no proof that the premises were vacant and unoccupied for any period of seven successive years. We hold, therefore, that the evidence was insufficient to sustain the defense under either section 6 or 7 of the statute of limitations.

Section 4 of the statute of limitations (Hurd's Stats. 1905, p. 1331) is also relied upon by appellees. That section reads as follows: "Actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken, as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title." This section was enacted in 1853, and has been the subject of discussion in numerous cases in this court. Sections 6 and 7 of the limitation act were enacted subsequent

to section 4, to meet a class of cases to which that section was not applicable. Section 4 requires that a person claiming under it must have been "possessed by actual residence thereon for seven successive years." Mere possession under section 6 is sufficient, but section 4 requires the possession to be by actual residence, and this has been the construction given this section of the statute in *Stolz v. Doering*, 112 Ill. 234, *Heacock v. Lubuke*, 107 Ill. 396, *Elston v. Kennicott*, 46 Ill. 187, *Woodward v. Blanchard*, 16 Ill. 424, and *Collins v. Smith*, 18 Ill. 160. There is no proof whatever that the premises had been possessed by anyone "by actual residence thereon for seven successive years" or any other period, and we are ³⁰⁰ of opinion, therefore, appellees failed to establish title under section 4 of the statute of limitations.

It is also urged that the appellant received benefits from the proceeds of the sale of the real estate and is therefore estopped from attacking appellees' title and asserting title in himself. The proof shows that his mother, as his guardian, received \$42.50 for him out of the proceeds of the sale. We do not agree to the correctness of this proposition, but as appellant has by an amendment to his bill tendered the money back to whomever the court should decide was entitled to it, we deem it unnecessary to discuss this question.

We are of opinion the court erred in dismissing the appellant's bill, and the decree is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Infant Defendants must be served in substantially the manner prescribed by statute, else the proceedings are defective and subject to direct attack. A defective service, however, may be sufficient to invest the court with jurisdiction, so that its judgment, while erroneous, will not be void and open to collateral attack: *Westmeyer v. Gallenkamp*, 154 Mo. 28, 77 Am. St. Rep. 747; *Kalb v. German Sav. etc. Society*, 25 Wash. 349, 87 Am. St. Rep. 757; note to *Sanford v. Edwards*, 61 Am. St. Rep. 492.

Infants have No Absolute Right to Avoid Judgment recovered against them, and even an irregular judgment cannot be vacated as of course: *Robertson v. Blair*, 56 S. C. 96, 76 Am. St. Rep. 543. As a rule, they are bound by a decree the same as persons of full age: *Harrison v. Wallton*, 95 Va. 721, 64 Am. St. Rep. 830. See the note to *Teel v. Dunnihoo*, 112 Am. St. Rep. 198, on bills by infants to impeach decrees.

TEEL v. DUNNIHOO.

[230 Ill. 476, 82 N. E. 844.]

JUDGMENTS—Res Judicata—Questions not Identical.—A decision that a certain decree and a deed in pursuance thereof did not divest the fee, and that they should be disregarded in determining where the fee rested, is not conclusive of whether the deed can be reformed by striking out the words "bodily heirs." (pp. 323, 324.)

JUDGMENTS—Conclusiveness Against Minors.—Where the court acquired jurisdiction of the parties and the subject matter, then, although errors subsequently intervened, the title of a bona fide purchaser under the decree cannot be impeached by minor parties to the suit. (p. 325.)

JUDGMENTS—Res Judicata.—Where Some Controlling Fact or question material to the determination of both causes of action has been determined in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether or not the cause of action is the same in both suits. (p. 326.)

JUDGMENTS—Enforcement of Inequitable Decree.—Upon an original or cross bill to carry a former decree into execution, the court will look into the original case and see whether the decree is equitable and just. If it is not, its enforcement will be denied. (p. 328.)

DEEDS—Reformation as Against Minors.—Where real estate is bought for its full value, and the grantors understand that they are selling and the grantees understand that they are purchasing a fee title, but by mistake words creep into the deed which defeat such intention, it is not inequitable or unjust to correct the deed by striking out those words. (p. 331.)

JUDGMENTS—Conclusiveness Against Parties.—Where a court having jurisdiction of the parties and subject matter makes findings of fact in its decree upon which innocent parties rely, such facts, when again called in question in a subsequent suit by a party or privy to the first suit, are regarded as established by the findings in the first decree. (p. 331.)

F. W. Raymond and Arthur W. Underwood, for the appellants.

James H. Martin, William W. Clemens and William H. Warder, for the appellees.

⁴⁷⁷ **HAND, C. J.** This was a bill in chancery filed by appellants, Harry C. Teel and Nona Teel (formerly Nona Stocks), and Elmo Stocks, by his guardian, John Stocks, against the appellees, to partition certain farm lands situated in Williamson county between Nona Teel and Elmo Stocks, who were alleged to be the owners in fee simple thereof, and to impeach and set aside as a cloud upon the title of said Nona Teel and Elmo Stocks a certain decree entered by the

circuit court of Williamson county on April 17, 1891, in a suit in chancery then pending in said circuit court, wherein Mary E. A. Stocks and John Stocks, the father and mother of Nona Teel and Elmo Stocks, were complainants, and wherein William L. Henderson and Harriet Henderson (the father and mother of Mary E. A. Stocks) and Nona Stocks were defendants, for fraud and for errors of law appearing upon the face of the record in said chancery suit, and to set aside and cancel as clouds upon the title of Nona Teel and Elmo Stocks a master's deed made to Mary E. A. Stocks in pursuance of the terms of said decree; also to set aside and cancel certain deeds made by Mary E. A. Stocks and her grantees to said lands, through which the parties now in possession of said lands claim title. The court sustained a demurrer to said bill and dismissed the same for want of ⁴⁷⁸ equity, and an appeal was prosecuted to this court, where the decree of the circuit court was reversed and the cause was remanded to the circuit court, with directions to overrule the demurrer: *Teel v. Dunnihoo*, 221 Ill. 371.

It appears from the averments of the bill filed in this case that Mary E. A. Stocks was a daughter of William L. and Harriet Henderson; that on the seventeenth day of August, 1886, William L. and Harriet Henderson conveyed to Mary E. A. Stocks and "her bodily heirs" the land in question for one thousand dollars; that Mary E. A. Stocks and her husband, John Stocks, immediately moved upon the lands and improved the same and made their home thereon for a number of years; that on February 18, 1891, Mary E. A. Stocks and her husband, and after the birth of their child Nona, and when she was of the age of three years, filed a bill in chancery in the circuit court of Williamson county against Nona Stocks, William L. Henderson and Harriet Henderson for the purpose of having corrected said deed by striking out therefrom the words "her bodily heirs"; that upon the hearing upon said bill the court found that William L. and Harriet Henderson by deed conveyed to said Mary E. A. Stocks and "her bodily heirs," on the seventeenth day of August, 1886, the lands described in the bill, and that the words "her bodily heirs" were improperly inserted in said deed, and that Mary E. A. Stocks was entitled to have said deed corrected by eliminating therefrom the words "her bodily heirs," and decreed that William L. Henderson, and Harriet, his wife, execute a good and sufficient warranty deed conveying to

Mary E. A. Stocks said lands in fee simple, without any qualification or restriction whatever, within sixty days, and that in default of the execution and delivery of said deed the master in chancery of said court execute a deed of conveyance conveying to Mary E. A. Stocks in fee simple said lands; that William L. and Harriet Henderson having failed to make a deed as provided by said decree, the master in chancery executed a deed to Mary E. A. Stocks in ⁴⁷⁹ accordance with the terms of said decree; that Mary E. A. Stocks subsequently sold and conveyed said lands by absolute deed, and the lands have been transferred, from time to time, by her grantee and his grantees, and are now owned and in the possession of persons who were not parties to said chancery suit commenced by Mary E. A. Stocks and husband against Nona Stocks and William L. and Harriet Henderson; that Mary E. A. Stocks died on October 21, 1902, leaving her surviving husband, John Stocks, and Nona Teel, born March 21, 1887, and Elmo Stocks, born August 22, 1891, as her children and sole heirs at law, and that said Nona was about eighteen years of age and Elmo about fourteen years of age at the time this bill was filed.

The contentions made on the former appeal were, first, that in the case of Stocks et al. v. Stocks et al., the court did not have jurisdiction of the persons of Nona Teel and William L. Henderson and Harriet Henderson; second, that the guardian ad litem appointed for Nona Teel neglected and failed to properly represent and protect the rights of Nona Teel; third, that the testimony of John Stocks, Mary E. A. Stocks and William L. Henderson, upon which the findings in the decree were based, that the words "bodily heirs," found in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, were improperly inserted in said deed, was false; and fourth, that the deed from William L. and Harriet Henderson to Mary E. A. Stocks conveyed to Mary E. A. Stocks a life estate in said lands only, and that the fee simple estate therein vested in Nona Teel and Elmo Stocks, and that the decree entered by the court in said chancery case, and the deed of the master in chancery based thereon, did not have the effect to divest said Nona and Elmo Stocks, at the time of filing the bill herein, of their title in and to said lands, and that the title to said lands was in Nona Teel and Elmo Stocks at the time of filing the bill

herein in fee simple. And it was held in the opinion then filed that the court in the suit of ⁴⁸⁰ Stocks et al. v. Stocks et al. had jurisdiction of the parties and of the subject matter of that suit, and that the fact that error may have afterward intervened on the hearing or in the entry of the decree would not have the effect to defeat the title of parties who dealt in good faith with the property, relying upon said decree, but as it appeared that the title to said premises passed out of William L. Henderson and Harriet Henderson and vested in said Mary E. A. Stocks for life and in Nona Teel and Elmo Stocks in fee, there was no title remaining in William L. and Harriet Henderson which they could convey, and that by a conveyance voluntarily made, or by one made under the direction of the court, they could not divest Nona Teel and Elmo Stocks of their fee simple title in and to said premises and invest the same in Mary E. A. Stocks, and that the master's deed had no greater effect than a deed from William L. and Harriet Henderson, and that the fee simple title to said premises was in Nona Teel and Elmo Stocks.

Upon the case being reinstated in the circuit court the demurrer was overruled, whereupon the appellees answered said bill and filed cross-bills, in which they prayed, as was prayed in the bill filed by Mary E. A. Stocks and husband, that the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks be reformed and corrected by striking out the words "her bodily heirs." The cross-bills were answered, and, replications having been filed, a trial was had in open court, and a decree was again entered dismissing the original bill for want of equity, and the prayers of the cross-bills of the respective cross-complainants were granted and the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks was corrected by striking out the words "her bodily heirs," and a second appeal has been prosecuted to this court.

⁴⁸¹ It is first contended that the opinion filed by the court on the former appeal is conclusive against the right of the appellees to recover in this case. The question presented to this court when the case was here before was, Did the decree entered in the case of Stocks et al. v. Stocks et al. by the circuit court of Williamson county, and the master's deed made in pursuance of said decree, divest the fee simple title of Nona Teel and Elmo Stocks in the real estate in controversy and invest Mary E. A. Stocks with the fee simple title

to said premises!—and it was held, for the reasons there stated, said decree was inoperative in that regard, and that the decree and master's deed did not divest said Nona Teel and Elmo Stocks of the fee simple title to said premises, and that in determining the question of where the fee simple title to said premises then rested said decree and master's deed should be disregarded, which left the fee simple title in said Nona Teel and Elmo Stocks; while the question presented for determination on this appeal is, Did the circuit court, on the last trial, properly decree, upon the cross-bills filed after the case was reinstated in the circuit court, on the evidence submitted to it, that the deed from William Henderson and Harriet Henderson to Mary E. A. Stocks should be reformed and corrected by striking out from said deed the words "her bodily heirs," and did the court err in reforming and correcting said deed by striking out said words and decreeing that the appellees be invested with the full fee simple title to said premises, as the remote grantees of said Mary E. A. Stocks? It clearly appears, therefore, that the question now presented for decision is a different question from the one determined when the case was here before.

⁴⁸² In *Davis v. Kennedy*, 105 Ill. 300, John R. Kennedy had made a conveyance of an eighty-acre tract of land to his three daughters, but in describing the land there was an error in the deed, the land being described as located in a township other than the one in which it was located. Kennedy thereafter became a bankrupt, and the land was sold by his assignee to Davis. The daughters filed a petition and made a motion in the United States district court, where the bankruptcy proceeding was pending, to set aside the sale, which the court declined to do, whereupon they filed a bill in equity in the state court to correct the mistake in the deed, and it was contended they were foreclosed from such relief by reason of the action of the United States district court in overruling their motion to set aside said sale, but it was held otherwise. This court, on page 307, said: "That proceeding falls far short of an adjudication of the question being litigated in this case. There is, therefore, no just claim that the questions here litigated were there determined. There, the object and direct purpose was to have the sale disapproved and set aside; here, the purpose is to have this deed reformed and the mistake corrected, and the assertion of title under the assignee's deed be enjoined.

So it fails of an estoppel because the questions decided, and necessary to be decided, are not the same. That court, on that petition and motion, could not have declared that defendants in error were not entitled to the relief they seek in this case, because no such question was presented or before that court. We are not warranted in presuming that court did what it was not authorized to do, on the record as it then stood, nor was it asked nor do we suppose it intended so to do. We must therefore hold that this proceeding is not barred by a former adjudication of the same questions now litigated."

We think that case, and many others which might be cited, conclusive of the proposition that the appellees were not barred, by any questions determined when the case was ⁴⁸³ here before, from filing their cross-bills to correct the mistake in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks.

It is next contended the court erred in admitting in evidence against Nona Teel and Elmo Stocks the decree in the case of Stocks et al. v. Stocks et al., as it is said that decree is not binding upon Nona Teel and Elmo Stocks by reason of the fact that the guardian ad litem appointed for Nona Teel neglected and failed to properly protect and guard her interests, and that the testimony of John Stocks, Mary E. A. Stocks and William L. Henderson, upon which the findings in the decree were based, that the words "her bodily heirs," found in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, were improperly inserted in the deed, was false, and that the testimony of John Stocks, Mary E. A. Stocks and William L. Henderson was taken in the form of affidavits—that is, in narrative form—before the master in chancery, and not upon questions propounded to them by the master in chancery. On the former appeal similar contentions were made, and this court, on page 476, said: "The bill filed in that case was sufficient to give the court jurisdiction of the subject matter of the suit, and the court having found it had jurisdiction of the parties, which was a matter upon which it was authorized to adjudicate, the fact that errors may have afterward intervened on the hearing or in the entering of the decree, would not have the effect to defeat the title of the defendants, who dealt in good faith with the property, relying upon such decree, if the effect of the decree was to divest the title of the complain-

ants." The court found, however, the decree did not have the effect to divest the title of Nona Teel and Elmo Stocks, and for that reason the court was of the opinion the fee to said premises still remained in Nona Teel and Elmo Stocks. It was also held in that opinion that while an original bill might be filed on behalf of a minor during his minority, or within the ⁴⁸⁴ period allowed after majority for the prosecution of a writ of error to impeach a decree for fraud or for errors of law appearing upon the face of the record, if it appeared the court entering the decree had jurisdiction of the parties and the subject matter of the suit, and parties who were not parties to the suit and who had dealt with the subject matter of the suit in good faith, relying upon the decree, had acquired interests in the subject matter of the suit, the court would not set aside the decree and thereby divest and destroy their interests in the subject matter of the suit, and the cases of *Hedges v. Mace*, 72 Ill. 472, *Lloyd v. Kirkwood*, 112 Ill. 329, and *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352, were cited as sustaining that position.

In the *Hedges* case (72 Ill. 472), which was a bill to impeach a decree in partition for want of jurisdiction over the persons of the defendants in the partition suit, none of the complainants appear to have been minors, but the court, after disposing of the question of jurisdiction adversely to the contention of the complainants, announced the general doctrine upon the subject now under consideration in the following words (p. 745): "Various other objections are made to the proceedings, but it is not necessary to consider them. If the questions raised are at all tenable they are but errors, and cannot be urged in this collateral manner against the title of the defendants who purchased at the sale under the decree. The law is well settled that where the court has jurisdiction of the subject matter and obtains jurisdiction of the person by service of process, then, although errors may intervene, the title of a purchaser under the decree, who is not a party to the proceeding, will be protected: *Stow v. Kimball*, 28 Ill. 93; *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303; *Wight v. Wallbaum*, 39 Ill. 554; *Mulford v. Stalzenback*, 46 Ill. 303."

In the *Lloyd* case (112 Ill. 329) the question arose upon the cross-bill filed on behalf of a minor to impeach a decree which was relied upon in the original bill as a basis for par-

tition, and the court there said (p. 337): "In many of the states, ⁴⁸⁵ . . . including our own, a decree against an infant, like that against an adult, is absolute in the first instance, subject to the right to attack it by original bill, for either fraud or error, merely; but until so attacked, and set aside or reversed on error or appeal, it is binding to the same extent as any other decree or judgment. This right to attack a decree by original bill may be exercised at any time before the infant attains his majority, or at any time afterward within the period in which he may, under the statute, prosecute a writ of error for the reversal of such decree. . . . The rule thus established is, of course, subject to the qualification that the decree of a court having jurisdiction of the subject matter of the suit and the person of the infant against whom it is rendered, will not be thus set aside as against third parties who have in good faith acquired rights under it; but as against original parties to the suit, and their legal representatives, the rule as above stated will be enforced."

In view of the foregoing authorities, if the mandatory part of the decree sought to be impeached had corrected the Henderson deed by eliminating the words therefrom which vested the fee in Nona Teele and Elmo Stocks, the appellees would have been protected in their title against the claims of Nona Teele and Elmo Stocks. The question then arises, Of what force and effect, as evidence in this case, is that portion of said decree against Nona Teel and Elmo Stocks which finds that the words "her bodily heirs," in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, were improperly incorporated therein, and that Mary E. A. Stocks was entitled to have the deed corrected by eliminating from the deed said words?

It has been frequently held by this court that where some controlling fact or question material to the determination of both causes of action has been determined in a former suit and the same fact or question is again at issue between the same parties, its adjudication in the first will, ⁴⁸⁶ if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not: *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Tilley v. Bridges*, 105 Ill. 336; *Wright v. Griffey*, 147 Ill. 496, 37 Am. St. Rep. 228, 35 N. E. 732; *Reynolds v. Mandel*, 175 Ill. 615, 51 N. E. 649; *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200, 71 N. E. 995. In the *Brack* case,

in a partition suit between the parties, it was held that one Mary J. Singleton was the legally adopted child of Allen L. and Sallie Ralls, and in a subsequent partition suit between the same parties, although in regard to different lands, it was held that the parties defendant in the second suit were bound by the findings of the court in the first suit upon the subject of the adoption of Mary J. Singleton, which finding in the first suit amounted to an estoppel upon them by verdict. In the Hanna case (102 Am. Rep. 608), Ezra B. Reed, owning real estate in Indiana and in this state, made two deeds, one conveying the Indiana land directly to his wife and the other conveying the Illinois land to her through a third party. A bill was filed in the circuit court of Vigo county, Indiana, to set aside the conveyance in that state on the alleged ground that Ezra B. Reed was, at the time of its execution, of unsound mind and incapable of making the deed, and that he was unduly influenced to execute the same. The answer of the defendant denied both allegations, and upon the hearing a decree was entered sustaining the bill and finding that the grantor was of unsound mind and incapable of making said instrument. Afterward, in a suit between the same parties in this state to set aside the conveyance of the Illinois lands, the decree entered in the Indiana court was set up by the complainants as *res judicata*, but the circuit court refused to admit the transcript of the record of the circuit court of Vigo county as evidence to sustain the bill. In reversing that ruling it was said (p. 602): "Where the former adjudication is relied on as an answer and bar to the whole cause of action, or, in other words, where it is claimed to be an answer to all the questions involved in the subsequent ⁴⁹⁷ action, then it must appear . . . that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in cases of this class is technically known as an estoppel by judgment, . . . but where some specific fact or question has been adjudicated and determined in a former suit and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when

the circumstances warrant it, as when offered by a defendant as a matter of defense."

We therefore think it clear that, the circuit court of Williamson county having found in the case of *Stocks et al. v. Stocks et al.* that there was a mistake in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, to which litigation Nona Teel was a party and Elmo Stocks a privy, appellants are bound by such finding and estopped in this proceeding to deny the facts there found as against the appellees, who are subsequent bona fide purchasers of said real estate, even though the guardian ad litem of Nona Teel may not have performed his full duty in said chancery suit, and even though the appellants have introduced into this record some evidence which tends to contradict the evidence of the witnesses who testified in the case of *Stocks et al. v. Stocks et al.*, upon whose testimony said decree was based, which objections and irregularities only amounted to error in the original case, and which did not render the decree in that case void, but which would have been available in this suit against the original parties to that suit (*Lloyd v. Kirkwood*, 112 Ill. 329; *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424), but which are not available against third parties⁴⁸⁸ who have in good faith acquired rights relying upon said decree: *Lloyd v. Kirkwood*, 112 Ill. 329.

It is finally contended that the court erred in entering the decree in this case, as it is said appellees failed to show, by proper proofs, that said former decree was equitable and just, and it is urged on an original bill to carry a former decree into execution the court will look into the original case and see if the former decree is equitable and just, and if it is not, it will refuse its enforcement. The doctrine contended for by the appellants has been recognized by this court in *Wadhams v. Gay*, 73 Ill. 415, and subsequent cases, and it is a well-established equitable doctrine where an original bill has been filed to carry a former decree into execution, and we think applies with equal force where a former decree is sought to be carried into execution by a cross-bill. The prayers of the cross-bills filed in this case, however, are in the alternative, that of *Wilmoth Dunnihoo*, the *Carterville & Herin Coal Company*, *John Waggoner*, *Ellen Augusta Waggoner*, *Finis W. Varnier*, *Henry Keiper*, *Raymond Lisby*, *Clayton Wright*, *John Alexander*, *W. C. Alexander*, *Joseph Moore*, *Wilford Beson*, *Wesley Walker* and *Mary Walker*

being in the following form: "Forasmuch, therefore, as your orators are without remedy except in a court of equity, and to the end that the said Harry C. Teel, Nona Teel, John Stocks, Chicago and Carbondale Railroad Company, Illinois Central Railroad Company and Elmo Stocks, who are made parties defendant to this bill, may be required to make full and direct answer to the same, but not under oath, answer under oath being hereby waived, and that upon a hearing hereon the court may order and decree that the relief granted by the above-recited decree may be made effectual, the said deed from William L. Henderson and wife to Mary E. A. Stocks hereinabove set forth be canceled and set aside, and that the master's deed hereinabove referred to and set forth be declared effectual to convey the ⁴⁸⁹ fee simple title of the lands therein described to said Mary E. A. Stocks at the time of its delivery, or that said deed so made by William L. Henderson and wife to Mary E. A. Stocks be reformed and corrected to accord with the intention of the parties as found and declared by the court in said decree hereinabove set forth, by striking therefrom, and from the record thereof, the words 'her bodily heirs,' and that your orators have such other and further relief as equity may require and as to your honors may seem meet." And we think the decree of the circuit court could properly be sustained on the ground that the findings of fact in the decree in the case of Stocks et al. v. Stocks et al. established the fact that there was a mistake in the deed from the Hendersons to Mary E. A. Stocks and it should be corrected, and such seems to have been the view of the trial court, as its decree was as follows:

"It is therefore ordered, adjudged and decreed that the complainants' original bill herein be dismissed for want of equity, and that complainants in their cross-bills herein be granted the relief prayed for in said cross-bills, and that said deed made by William L. Henderson and wife to Mary E. A. Stocks, dated August 17, 1886, conveying to her the following described real estate: The west half of the southwest quarter of section 22 and the northeast quarter of the northeast quarter of section 28, town 22 south, range 2 east of the third principal meridian, in Williamson county, Illinois, be and the same is hereby reformed and corrected by striking therefrom the words 'her bodily heirs' where the same appear therein after the words 'Mary E. A. Stocks,' and that the record thereof in the recorder's office of Williamson

county, at page 171 of deed records 27, be corrected by the master in chancery of this court by striking out the said words 'her bodily heirs' after the words 'Mary E. A. Stocks,' thus vesting in her the fee simple title as of the date of August 17, 1886."

⁴⁹⁰ If, however, it be conceded that it was necessary that the appellees show that the decree entered in that case was equitable and just, we think the evidence found in this entire record, when taken in connection with the decree in *Stocks et al. v. Stocks et al.*, clearly shows that equity and good conscience required the correction of said deed as between Mary E. A. Stocks and Nona Teel and Elmo Stocks, who were "her bodily heirs." From the recitals in said decree it appears that the land in question belonged to William L. Henderson; that on August 17, 1886, he sold the same to Mary E. Stocks for the sum of one thousand dollars and executed to said Mary E. A. Stocks a deed of conveyance of said lands, intending to convey thereby said lands to said Mary E. A. Stocks in fee simple, and that in consideration of said deed of conveyance said Mary E. A. Stocks paid to said William L. Henderson the sum of one thousand dollars; that by some mistake or error of the scrivener who wrote said deed, or from some other error or mistake at the time unknown to both the grantors and the grantee in said deed, the deed was so written as to convey said lands to said Mary E. A. Stocks and to "her bodily heirs," thereby vesting in said Mary E. A. Stocks a life estate, only, in said lands, which was not the intention of the grantors or the grantee, each of whom intended and agreed that said deed of conveyance should pass to said Mary E. A. Stocks the said lands in fee simple absolute. It further appears that Mary E. A. Stocks sold and conveyed said premises to her grantee, and he to his grantees, for a full and valuable consideration, and that her remote grantees are now in possession of said lands. In *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892, and *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925, this court held that it was not inequitable and unjust to correct a deed, under similar circumstances to those disclosed in this record, by striking out from a deed words of similar import to the words found in the deed from the Hendersons to Mrs. Stocks. This case, and the cases above ⁴⁹¹ referred to, differ materially from the case of *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591, the distinction between the cases being pointed

out in the Atherton case, on page 261. Mistakes of law cannot be corrected by a court of equity. Where, however, real estate is bought for its full value, and the grantors understand they are selling and the grantees understand they are purchasing a fee title, and by mistake some words creep into the deed which defeat such intention, it clearly is not inequitable or unjust that the error should be corrected.

The appellants have sought in this case to impeach the findings of the decree entered in the case of Stocks et al. v. Stocks et al. by parol evidence and by showing irregularities took place upon the trial. Many years have elapsed since the testimony in that case was taken and the decree entered. Mary E. A. Stocks and William L. Henderson are both dead, and the interest of John Stocks, through his children, is adverse to the decree. This case demonstrates the wisdom of the rule that where a court has jurisdiction of the parties and subject matter of a suit and makes certain findings of fact in its decree, upon which innocent parties rely, the facts thus found, when again called in question by a party or privy to said suit in a subsequent suit, are held to be established by the findings of fact in the first decree. Were not this the rule, no title in which a minor is a party to a suit would ever be secure until after the time for the suing out of a writ of error or for filing a bill to impeach the decree had elapsed.

Finding no reversible error in this record the decree of the circuit court will be affirmed.

Mr. Justice Vickers took no part in the decision of this case.

Res Judicata.—When Some Controlling Fact or question material to the determination of the case has been adjudicated in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first suit will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether or not the cause of action is the same in both suits: Brack v. Boyd, 211 Ill. 290, 103 Am. St. Rep. 200; Chicago etc. R. R. Co. v. Cass County, 72 Neb. 489, 117 Am. St. Rep. 806; Rew v. Independent School Dist., 125 Iowa, 28, 106 Am. St. Rep. 282.

On the Reformation of Written Instruments and the correction of mistakes therein by courts of equity, see the notes to Steinmeyer v. Schroepel, 117 Am. St. Rep. 227; Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 512; Williams v. Hamilton, 65 Am. St. Rep. 481.

BRUNER v. HICKS.

[230 ILL. 536, 82 N. E. 888.]

HOMESTEADS—Lease.—The Value of a Homestead, so far as concerns an alleged release thereof by leasing the premises for the purpose of prospecting for oil and gas, is determinable as of the date of the lease, and not as of the time when gas or oil is discovered by the lessees. (p. 336.)

HOMESTEAD.—A Lease of a Homestead, valued at less than one thousand dollars, for the purpose of prospecting the premises for oil and gas, for an indefinite term in case these substances are discovered, is void and will sustain no rights in favor of the lessee, if the lessors have not released their homestead right in the manner provided by statute, or voluntarily abandoned possession and accepted rent with knowledge of the facts. (p. 337.)

C. S. Conger, McCarty & Arnold, J. C. Maxwell and Brownlee & Browne, for the appellants.

Parker & Newlin and J. A. Hindman, for the appellees.

537 HAND, C. J. This was a bill in chancery filed by Andrew Bruner, John Righter and W. G. Skelly, in the circuit court of Crawford county, against Frank Hicks, John Kerr, John W. Smith, Lem Neely, David C. Brubaker and Mary E. Brubaker, to enjoin the said Hicks, Kerr, Smith and Neely from sinking or drilling any well or wells for oil or gas upon a certain thirty-six acre tract of land located in Crawford county, by virtue of a certain lease bearing date April 5, 1905, made by said David C. Brubaker and Mary E. Brubaker, the owners in fee of said premises, to said Frank Hicks, and which lease had in part been assigned by Hicks to Kerr, Smith and Neely, upon the ground that said David C. and Mary E. Brubaker, on the eighth day of December, 1905, had executed a lease of said premises for the purpose of mining and operating for oil and gas, and laying pipe lines and building tanks, stations and structures thereon to take care of said products, to one George D. McCarty for the period of ten years or so long as oil and gas might be found on said premises, which lease had been assigned to Bruner, Righter and Skelly, and which lease, it was alleged, contained a release and waiver of the homestead rights of 538 David C. and Mary E. Brubaker in said premises, and was entered into by said McCarty with said David C. and Mary E. Brubaker and assigned to the said Bruner, Righter and Skelly, and recorded in the office of the recorder of deeds

of said county, without notice to them, or either of them, of the fact that said lease of April 5, 1905, had been made by said David C. and Mary E. Brubaker to Frank Hicks, and which lease to Hicks, it was averred, was void by reason of the fact that said premises were of less than one thousand dollars in value and were occupied by said David C. and Mary E. Brubaker as a homestead, and the homestead rights of David C. and Mary E. Brubaker therein were not waived or released in said lease, and that the premises described in said lease were so imperfectly described therein that they could not be located or identified as the property owned by David C. and Mary E. Brubaker.

A demurrer was sustained to the bill, whereupon a supplemental and amended bill was filed by said Bruner, Righter and Skelly, in which they omitted to name David C. and Mary E. Brubaker as defendants, and from which they also omitted all averments in regard to the homestead rights of David C. and Mary E. Brubaker in the premises, and averred that the complainants had been let into the possession of said premises by David C. and Mary E. Brubaker under the lease of December 8, 1905, and that they had made valuable improvements on said premises. The misdescription of the premises in the lease of April 5, 1905, and the want of notice to McCarty and his assigns of the lease of April 5, 1905, at the time of the execution of the lease of December 8, 1905, were also averred, which averments were relied upon to establish complainants' rights under the lease of December 8, 1905, and to avoid the rights of Hicks, Kerr, Smith and Neely under the lease of April 5, 1905.

On their petition David C. and Mary E. Brubaker were allowed to intervene as defendants to said supplemental and amended bill, and they thereupon filed an answer thereto. ⁵³⁹ They also filed a cross-bill, in which they averred that at the time the lease of December 8, 1905, was made, and at the time of the filing of their answer and cross-bill, said premises were owned in fee by them; that they occupied the same as a homestead; that said premises, at the time said lease was executed, were in value not to exceed one thousand dollars, and that they had not waived or released their homestead in said premises or abandoned the possession of said premises or surrendered the possession of said premises voluntarily to the complainants, and asked that the lease of December 8, 1905, be canceled and set aside as a cloud upon their title, and

that the complainants be enjoined from interfering with their possession of said premises. The other defendants to the supplemental and amended bill also filed an answer and cross-bill. By their cross-bill they asked that the description of said premises in the lease of April 5, 1905, which was admitted to be incorrect, be corrected, and for other relief.

The cross-bills were answered and replications were filed and a trial was had in open court, and the chancellor entered a decree setting aside and canceling as a cloud upon the title of David C. and Mary E. Brubaker the lease of December 8, 1905, and the assignment thereof to the complainants, and perpetually enjoined the complainants from going upon said premises to prospect for oil or gas, or otherwise, and from removing therefrom any property placed thereon and in the wells drilled by them, and from removing any oil therefrom, directly or indirectly, by themselves, agents, etc., and corrected the description of the premises contained in the lease of April 5, 1905, as against David C. and Mary E. Brubaker, and the complainants have prosecuted an appeal to this court to reverse said decree.

540 The lease in question was executed with the view to transfer a freehold interest in said premises, as it provided the term created thereby might last for an indefinite and undetermined period of time in case oil or gas was discovered upon said premises, and in that regard this lease is not like a lease for a term of years. It was therefore necessary that the lease, to be valid, should contain a release or waiver of the homestead rights of David C. and Mary E. Brubaker, and if the premises, at the time the lease was executed, were of less value than one thousand dollars the lease was void.

The first question presented upon this record for determination is the value of the premises in question on the eighth day of December, 1905, at the time the lease was made to McCarty by David C. and Mary E. Brubaker. If said premises at that time were of less value than one thousand dollars, then the lease from David C. and Mary E. Brubaker to McCarty is absolutely void and the appellants can predicate no rights thereon, unless it appears that the homestead rights of David C. and Mary E. Brubaker in the premises were waived and released or the possession of the premises was abandoned by them or they have estopped themselves from setting up their homestead rights as against the appellants.

The evidence as to the value of the premises on December 8, 1905, was conflicting. The witnesses who testified upon that point—and they were numerous—fixed the value thereof at that time from seventeen dollars and fifty cents per acre to fifty dollars per acre, and the appellants in their original bill, which was sworn to, admitted they were worth less than one thousand dollars. The trial court held they were worth less than one thousand dollars. The chancellor who tried the case saw and heard the witnesses, and in view of the conflict in the evidence, his judgment upon the question of the value of said premises on December 8, 1905, we think should be held to control. It must therefore be held, for the purposes of this case, that said premises, at the time ⁵⁴¹ the lease to McCarty was executed, were worth less than one thousand dollars. As it is admitted that the homestead rights of David C. and Mary E. Brubaker in said premises were not waived or released and that they have not abandoned the possession of said premises, the question remains, Did they voluntarily permit the appellants to enter upon said premises to explore and prospect for oil and gas, and did they receive rent from the appellants under the lease of December 8, 1905, subsequent to its date, and thereby estop themselves from asserting the invalidity of said lease by reason of their failure to release or waive their homestead rights therein?

Up to the time of the filing of this bill the complainants had not done any prospecting for oil or gas upon said premises. After the bill was filed, however, and against the wish and protest of David C. and Mary E. Brubaker, they went upon said premises and sunk five wells, from which they obtained large quantities of oil and gas, and the rent provided for in the lease, which they claim to have paid to David C. and Mary E. Brubaker, amounted to but two dollars and twenty-five cents, which the trial court found was received by David C. and Mary E. Brubaker by reason of the fraudulent representations made to them by the complainants and their attorneys that the controversy over the McCarty and Hicks leases had been settled between those parties, and which amount they offered to return to the complainants and deposited for their benefit in court. We think it clear, therefore, that it cannot be successfully contended that the complainants were voluntarily let into the possession of said premises by David C. and Mary E. Brubaker,

or that David C. and Mary E. Brubaker, or either of them, ever received, with a full knowledge of all the facts which affected their interest, any rent provided to be paid to them by the terms of the lease of December 8, 1905. We are therefore of the opinion they are not estopped to challenge the validity of said lease by reason of a failure on their part to release their homestead rights in the premises covered by the lease.

⁵⁴² It is contended, however, that although the court properly held that the premises on December 8, 1905, were of less value than one thousand dollars, that fact should not control, as it is said the court, in determining the homestead rights of David C. and Mary E. Brubaker in said premises, should have been governed by the value of said premises on the day on which oil and gas were discovered upon said premises, and not their value on the day on which the lease was executed. We cannot agree with this contention. If the premises, at the time the lease of December 8, 1905, was executed, were less in value than one thousand dollars, then the lease which attempted to give to McCarty and his assigns the right to use, possess and enjoy a portion of said premises for the purpose of mining and operating for oil and gas, and laying pipe-lines and building tanks, stations and structures thereon to take care of said products, deprived David C. and Mary E. Brubaker of a portion of their homestead, and said homestead not having been waived or released in accordance with the terms of the statute, said lease was void. It may be conceded that the title to the oil and gas in said lands did not vest in the appellants, as assignees of said lease, until the oil and gas were discovered and appropriated by them; still the right to occupy the premises for the purposes aforesaid conferred upon McCarty and his assignees a present vested right in said premises, which might last ten years and might last for an indefinite period if oil and gas were discovered in said premises, and to the extent of that use David C. Brubaker and Mary E. Brubaker were deprived of their homestead rights, which rights they could release to McCarty and his assigns only by an instrument in writing duly signed and acknowledged in accordance with the provisions of the statute governing the release and waiver of homesteads: *Franklin Land Co. v. Wea Gas, Coal and Oil Co.*, 43 Kan. 518, 23 Pac. 630.

It is also contended that the court erred in correcting the description in the lease of April 5, 1905, by making the description ⁵⁴³ therein contained correspond with the description of the premises which the parties intended to cover by said lease. The correction was limited by the decree to David C. and Mary E. Brubaker alone, and in no way affected the appellants. We think, therefore, they have no reason to complain as against that part of the decree.

It is also contended the decree is erroneous in enjoining the appellants from removing the property which they had attached to the land of David C. and Mary E. Brubaker. From a careful reading of this record we are impressed with the view that the lease of December 8, 1905, was obtained from David C. and Mary E. Brubaker purely as a matter of speculation and not with a view to prospect their lands, as the Brubakers were led to believe the object of the lease was at the time it was executed, and that nothing was done under the lease by the appellants until other parties, acting under the Hicks lease, commenced prospecting for oil and gas upon the lands of David C. and Mary E. Brubaker, when the appellants, by a temporary injunction, tied the hands of these parties and then went onto the lands and commenced prospecting for oil and gas against the wishes and protests of the owners of the land, claiming under a lease which was absolutely void, and that while they may have expended a considerable amount of money upon said lands, we think they did so with a knowledge of all the facts and that they acted at their peril, and that the circuit court did not err in enjoining them from removing the property which they had placed upon the land.

Finding no reversible error in this record the decree of the circuit court of Crawford county will be affirmed.

A Homestead Right is inalienable otherwise than in the manner prescribed by statute: *Ogden Bldg. etc. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, and cases cited in the cross-reference note thereto; *McDonald v. Sanford*, 88 Miss. 633, 117 Am. St. Rep. 758; *Murphy v. Renner*, 99 Minn. 348, 116 Am. St. Rep. 418. As to the application of this rule in the case of leasing a homestead, see *Milliken v. Carmichael*, 139 Ala. 226, 101 Am. St. Rep. 29; note to *Jerde v. Furbush*, 95 Am. St. Rep. 926.

Abandonment of Homesteads is the subject of a note to *Burkhardt v. Walker*, 102 Am. St. Rep. 388.

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McKINNIE v. LANE.

[230 Ill. 544, 82 N. E. 878.]

ASSUMPSIT—Payment in Articles of Personality.—Where there is an agreement to pay a certain sum in specified articles of personal property, at agreed prices, on a particular day, a failure to deliver the articles on the day fixed converts the transaction into a money obligation, and a recovery on the common counts may be had. (p. 340.)

SALE—Time for Delivery.—If There is No Agreement fixing the time for the delivery of goods, the law will presume delivery to be made on demand, or at least within a reasonable time. (p. 340.)

BILL OF PARTICULARS.—The Object of a Bill of particulars is to inform the defendant of the claim he is called upon to defend against. (p. 341.)

BILL OF PARTICULARS.—The Effect of a Bill of particulars is to limit and restrain the plaintiff, on the trial, to the proof of the particular cause or causes of action therein mentioned. (p. 341.)

BILL OF PARTICULARS.—The Amendment of a Bill of Particulars in assumpsit should be permitted where the bill states that the balance of the amount was to be given in goods at agreed prices, while the evidence shows that payment was to be in goods or in cash. (p. 341.)

APPEAL.—A Party cannot Complain of an Error which he induced the court to make, or to which he consented, in refusing to allow the amendment of a bill of particulars. (p. 341.)

INSTRUCTIONS.—A Party cannot Complain of an instruction given on behalf of his adversary like one given at his own request. (p. 342.)

EVIDENCE—Explanation of Receipt in Full.—A person suing for an alleged balance owing for the purchase of goods may explain why he gave the defendant a receipt in full. (p. 342.)

Currey & Allen, for the appellants.

Wheeler, Silber & Isaacs, for the appellee.

545 **VICKERS, J.** This suit was brought in the circuit court of Cook county by Maurice T. Lane against P. L. McKinnie to recover the sum of \$1,700, which the former claimed to be due him as a balance on the purchase price of certain paintings sold to McKinnie.

The declaration included only the common counts and was accompanied by a bill of particulars as follows:

"To two pictures by Dupres and Mueller.....	\$3500
Credit	\$1700
Two pictures by Hammerstadt.....	100
	<hr/> 1800
Balance due	<hr/> \$1700

"The balance of this amount was to be given in pictures at agreed prices. These pictures were demanded and refused and are now suing for the cash.

"MAURICE T. LANE,

"By WHEELER, SILBER & ISAACS,

"Attorneys."

On June 11, 1900, appellee sold to P. L. McKinnie two paintings for which he claims he was to receive the sum of \$3,500, \$1,700 of which he admits was paid in money and \$1,800 he claims was to be paid in other pictures or in cash. Two pictures were received by appellee, as he claims, on the balance due, for which he gave McKinnie credit for \$100. A demand for the other \$1,700 worth of pictures was, according to appellee's contention, met with a refusal, whereupon suit was instituted September 11, 1903, by appellee to recover the remaining \$1,700 in money. The cause was tried by jury in the circuit court and a judgment rendered in favor of appellee for \$1,700. Appeal was prosecuted to the appellate court for the first district, where the judgment was affirmed, and by further appeal the record is brought to this court for review.

⁵⁴⁶ After the trial in the court below, and before the case was passed upon by the appellate court, McKinnie died, and his executors were substituted in the case and appear as appellants herein.

McKinnie testified that the purchase price of the paintings was \$1,700, which he paid. He submitted a receipted bill showing the purchase price of \$3,500, but he explains that by saying: "Mr. Lane called and got his checks for the total amount and brought me a bill made out at \$3,500, which bill at \$3,500 was an absolute and perfect fiction. I told Mr. Lane I did not care to have a bill made out in that manner, but he said to me: 'Doctor, these pictures are worth more than this money; that is to say, you may be able to sell them sometime for a larger sum than \$1,700, and I will take from you a few paintings to sell on commission, and you can let some of them go on this, but this \$1,800 on here is simply a booster.' I didn't fancy it, but he persuaded me it was all right. I never agreed to give Mr. Lane any other paintings than the two which he received for these paintings. He wanted me to forward them to him at Pittsburg, which I did, and they are the only paintings which I ever offered to Mr. Lane in the world. It was wholly, purely,

absolutely, a fictitious and boosted price." He also submitted in his own behalf a check containing the words, "In full to date." This check was dated June 11, 1900, and was cashed by Lane.

Lane testified that the purchase price of the two oil paintings was \$3,500, to be paid \$1,700 in money and \$1,800 in specific pictures at agreed prices, or in cash; that he received \$1,700 in money on delivery of the two paintings, also two pictures at \$100; that when he called for the remaining pictures, representing the other \$1,700, McKinnie refused to deliver them to him; that he called repeatedly to get them, "three, four or five times at McKinnie's house" and "at least a dozen times at his office," but was never able to get the remaining pictures. Referring to the check which ⁵⁴⁷ contained the words "in full to date," he denied that these words were on the check when he received it. He explained the receipted bill by saying: "It was done as I do in thousands of cases dealing with rich people; I merely receipted the bill and called afterward to get my pictures and could not get them."

The affirmance of the judgment by the appellate court settles all controverted questions of fact adversely to the contention of appellants.

It is contended by appellants that under the bill of particulars filed in this case recovery could not be had under the common counts. It is well-settled law that where there is an agreement to pay a certain sum in specified articles of personal property, at agreed prices, on a particular day, a failure to deliver the articles on the day fixed in the agreement converts the transaction into a money obligation: *Borah v. Curry*, 12 Ill. 66; *Smith v. Dunlap*, 12 Ill. 184; *Bilderback v. Burlingame*, 27 Ill. 338; *Sleuter v. Wallbaum*, 45 Ill. 43. In the case at bar there was no agreement fixing the date for the delivery of the pictures. In such case the law will presume delivery to be made on demand or at least within a reasonable time. The record shows that after delivering the paintings to McKinnie and receiving the \$1,700 in money and \$100 in pictures appellee waited two years before bringing suit, making during that time repeated demands for the pictures. Appellee did all the law required of him, and when McKinnie refused to deliver the pictures as agreed, he became liable to pay in money to appellee the sum which they had agreed the pictures would have represented had they

been delivered. The common counts were ⁵⁴⁸ sufficient to support that cause of action. The law is well settled that where a contract has been fully performed and nothing remains to be done but to pay the money, a recovery may be had under the common counts.

Appellants insist that there is a variance between the bill of particulars and the evidence, in that the bill of particulars states that the balance of the amount was to be given in pictures at agreed prices, while the evidence shows that McKinnie was to pay the balance in pictures or in cash. The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrain the plaintiff, on the trial, to the proof of the particular cause or causes of action therein mentioned: *Morton v. McClure*, 22 Ill. 257; *McDonald v. People*, 126 Ill. 150, 9 Am. St. Rep. 547; *Waidner v. Pauly*, 141 Ill. 442, 30 N. E. 1025. At the conclusion of his evidence appellee asked leave to amend his bill of particulars by inserting the words "or cash," in order that the supposed variance might be obviated. Upon objection by appellants he was not permitted to make the amendment. A bill of particulars may be amended, and it was proper for appellee to ask leave to amend and leave so to do should have been granted: *Morton v. McClure*, 22 Ill. 257; *Waidner v. Pauly*, 141 Ill. 442, 30 N. E. 1025. If the bill of particulars had been amended as requested there would have been no ground to claim that a variance existed. The refusal of the court to permit the amendment occurred through the objection of appellants, and they are not now in position to urge the variance, even if the point was raised below. A party cannot complain of an error which he induced the court to make or to which he consented: *Smith v. Kimball*, 128 Ill. 583, 21 N. E. 503; *Oliver v. Oliver*, 179 Ill. 9, 53 N. E. 304; *Conness v. Indiana etc. R. R. Co.*, 193 Ill. 464, 62 N. E. 221; *Glos v. Murphy*, 225 Ill. 58, 80 N. E. 59.

Appellants complain that it was error to instruct the jury that if they "find, from the evidence, that the defendant was to pay for said pictures \$1,700 in cash and \$1,800 either in ⁵⁴⁹ cash or other pictures," then the issues should be found for the plaintiff. It is contended that the expression "either in cash or other pictures," contained in the instruction, is error, because the bill of particulars mentions pictures only. This instruction was proper under the evidence.

Instruction No. 2 given on behalf of appellee was as follows: "The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury, and the law is, that where a number of witnesses testify directly opposite to each other the jury are not bound to find the weight of the evidence as evenly balanced, and the jury have a right to determine, from the appearances of the witnesses on the stand, their manner of testifying, their apparent candor and frankness, their apparent intelligence, and from all other surrounding circumstances attending the trial, which witnesses are the more worthy of credit, and to give credit accordingly."

In this instruction appellants object to the use of the words, "from all other surrounding circumstances attending the trial." Without the use of these words the instruction states the law. Appellants' instruction No. 6 contains these words: "The jury have a right to take into consideration all the facts and circumstances connected with the case." Appellants' instruction contained words of the same import and meaning as the instruction objected to. A party cannot complain of an instruction given on behalf of his adversary like one given at his own request: *Springer v. City of Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166.

Appellants assign error on alleged improper remarks by appellee's counsel in his address to the jury. We have read the remarks insisted on by appellants as error and see nothing in them to condemn. Appellee had testified that it was his custom in dealing with wealthy patrons, when taking pictures in part payment for sales, to give a receipt in full ⁵⁵⁰ and later to call for the pictures. It was certainly proper for him to explain to the jury the reasons why he gave a receipt in full to Dr. McKinnie, and comments made by counsel in his argument were in line with the evidence and tended in no way to prejudice appellants' interests.

There is no error in the record, and the judgment of the appellate court for the first district is affirmed.

The Nature of Assumpsit as a Remedy is discussed in *McDonald v. Metropolitan Ins. Co.*, 68 N. H. 4, 73 Am. St. Rep. 548; *Merchants' etc. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586; *Downs v. Finnegan*, 58 Minn. 113, 49 Am. St. Rep. 488. An agreement to pay

in kind, if not discharged at the maturity of the obligation by a delivery of the goods, may be treated by the obligee as an agreement to pay in cash, and he may maintain a general action of assumpsit thereon: *Wainwright v. Straw*, 15 Vt. 215, 40 Am. Dec. 675.

A Bill of Particulars is Amendable, like a declaration: *Babcock v. Thompson*, 3 Pick. 446, 15 Am. Dec. 235; *Spawn v. Veder*, 4 Cow. 401, 15 Am. Dec. 401.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

FOWLER UTILITIES COMPANY v. GRAY.

[168 Ind. 1, 79 N. E. 897.]

INJUNCTION—Breach of Contract.—Generally, an injunction will not be granted to restrain a breach of contract when the complainant's promises are of such a nature that they could not be specifically enforced, unless they have already been performed. (p. 346.)

CONTRACTS—Meaning of—What Enforceable.—The term "contract" implies mutual obligations, and, in general, contracts, other than options or unilateral obligations, are not enforceable unless both parties are bound, so that an action could be maintained by each against the other for a breach. (p. 346.)

INJUNCTION—Breach of Contract—Specific Performance.—General rules of law governing suits for specific performance of contracts govern suits for injunction to prevent the breach of a contract. (p. 346.)

SALES—Future Delivery—Consideration—Option.—A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties. (p. 347.)

INJUNCTION—Breach of Contract.—An injunction will not lie to restrain an apprehended injury resulting from a breach of contract, unless the petitioner is without adequate remedy at law, and the contract itself is free from doubt and not uncertain or vague in its terms or provisions. (p. 348.)

SPECIFIC PERFORMANCE—Revocable Contracts.—A court of equity will not interfere to decree the specific performance of a contract where the power of revocation exists. (p. 348.)

CONTRACTS—Determinable at Will—Specific Performance—Injunction.—A contract which can be terminated at the will of one of the parties without liability for damages, so far as it remains executory, is not binding for want of mutuality and its performance cannot be enforced in equity, either by way of specific performance or injunction. (p. 349.)

C. M. Snyder, for the appellant.

Fraser & Isham, B. B. Berry and D. Smith, for the appellee.

* MONTGOMERY, C. J. This is a suit for an injunction to prevent the violation of an oral agreement made about September 1, 1902, wherein appellant promised to install in appellee's building a heating plant with sufficient capacity to heat said building to seventy-eight degrees Fahrenheit, and to connect the same with a central hot water heating plant, in consideration of the sum of two hundred dollars payable upon the installation of such plant, and fifty dollars per year payable as long as appellee desired heat to be so supplied and appellant was operating its central plant under a franchise granted by the board of trustees of the town of Fowler. The annual payments were to be made in two installments—twenty-five dollars on January 1st, and twenty-five dollars on October 1st, of each year—and no greater charge for heating the building was to be made so long as appellee desired the same to be so heated. The complaint further alleged that the plant had been completed and heat supplied as agreed, and that appellee had paid said sum of two hundred dollars, and all other payments as they accrued under said agreement, but that appellant is now demanding an increased price for heating ³ said building, and threatening to cut off the hot water supply from the same unless said increased demand is paid. A demurrer to the complaint was overruled, and appellant answered (1) by denial, and (2) by affirmatively setting up the statute of frauds. To the latter answer appellee replied in denial. A trial resulted in a finding and decree in favor of appellee, enjoining appellant from doing any act tending to violate or terminate the agreement to furnish heat for appellee's building at the rate of fifty dollars per year so long as he may desire such heat, and pay therefor, within the term of appellant's franchise.

The assignment of errors properly challenges the sufficiency of the complaint. The right to a future supply of hot water heat at a special price, which appellee claims and is seeking to enforce by this suit, rests wholly upon contract. The theory of the suit, as clearly manifest from the record, is that appellant is bound to supply such heat for an indefinite time, to be determined solely by the arbitrary discretion and will of appellee. It is admitted that appellee is not bound to accept such heat for any particular period, and his only obligation is an implied promise to pay at the

stipulated rate for such time as he may suffer the heat to be supplied.

"The general rule is that an injunction will not be granted to restrain a breach of contract by a defendant when the complainant's promises are of such a nature that they could not be specifically enforced, unless they have already been performed": 22 Cyc. L. & Pr. 850. This rule is founded upon a want of mutuality. The term "contract" implies mutual obligations, and, in general, contracts, other than options, are not enforceable unless both parties thereto are bound, so that an action could be maintained by each against the other, for a breach: Bishop on Contracts, 2d ed., sec. 78; Lawson on Contracts, sec. 97; *Henry School Tp. v. Meredith* ⁴ (1904), 32 Ind. App. 607, 70 N. E. 393. There are many unilateral contracts which constitute an exception to this rule, including the right to exercise options, but the contract in suit has been executed in part and does not belong to that class.

The principle applicable to the contract under consideration is stated in the following paragraph, quoted from the case of *Rutland Marble Co. v. Ripley* (1870), 10 Wall. 339, 19 L. ed. 955: "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

This is not an action for specific performance, but the contract is to be enforced negatively by an injunction prohibiting its breach, and the general rules governing such actions apply. In the case of *Iron Age Pub. Co. v. Western Union Tel. Co.* (1887), 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449, involving a contract determinable at will, the court said: "We can tie the hands of the Associated Press and the other defendants by injunction, forbidding the delivery of the press dispatches to anyone else than the complainant, as prayed for, and leave the complainant free to terminate the con-

tract at its will without limitation of time or circumstances, or to perform its duties as correspondent as negligently or diligently as discretion may dictate. . . . The first decree^s suggested would be entirely opposed to all equity precedents and practice, the settled rule being, that the courts will not interfere by injunction in cases of this kind, if, indeed, in any case where defendant cannot be made secure in his rights and remedies for violation of the duties imposed on the complainant by the contract sought to be enforced: *Bromley v. Jeffries* (1700), 2 Vern. 415; *Richmond v. Dubuque etc. R. Co.* (1871), 33 Iowa, 422, and cases cited on page 486."

The application of the rule to cases of this class is concisely stated by Judge Sanborn in *Cold Blast Trans. Co. v. Kansas City etc. Co.* (1902), 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, as follows: "A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties": See, also, *Lancaster v. Roberts* (1893), 144 Ill. 213, 33 N. E. 27; *Welty v. Jacobs* (1898), 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Rust v. Conrad* (1882), 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; *American etc. Co. v. Harper* (1902), 54 Cent. L. J. 449; *Hoffman v. Maffioli* (1899), 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; *Campbell v. Lambert* (1884), 36 La. Ann. 35, 51 Am. Rep. 1; *Houston etc. R. Co. v. Mitchell* (1873), 38 Tex. 85; *Philadelphia Ball Club v. Hallman* (1890), 8 Pa. Co. Ct. 57; *Davie v. Lumberman's Min. Co.* (1892), 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357. In the case last cited the supreme court of Michigan said: "When a party agrees to sell articles of merchandise, or deliver the productions of his labor, to another at a certain price as long as he can make it pay, every one must clearly understand that the term is dependent on conditions over which the promisee has no control, and, in so far as anyone has the power to make the term effective, it is lodged solely in the promisor, who by judicious purchases or skillful manipulations of^e labor may be able to make a transaction pay when a more careless, negligent, or improvident person would be unable to do so. This serious element of uncertainty destroys all mutuality in the contract, and gives the promisor full power to say when a further execution of the contract will not be advantageous, because he cannot make it pay. Contracts cannot arise where there is no mutuality, nor can

they arise from the action of one party alone where the other has no power to prevent his action."

It was held in the case of *Philadelphia Ball Club v. Hallman* (1890), 8 Pa. Co. Ct. 57, that an agreement, whereby one engaged to play baseball for a period of time which at the option of the club might equal the term of the player's life, and which reserved to the club the right to discharge the player on ten days' notice without cause, was not enforceable by an injunction against its violation by the player, for the reason that the agreement was too unfair, and wanting in mutuality.

When a party comes into equity it should be very plain that his claim is an equitable one. The application is in a measure addressed to the judicial discretion of the court. The court will not exercise its extraordinary power to restrain an apprehended injury resulting from a breach of contract, unless the petitioner is without adequate remedy at law, and the contract itself be free from doubt and not uncertain or vague in its terms or provisions: *Loy v. Madison etc. Gas Co.* (1901), 156 Ind. 332, 58 N. E. 844.

In the case of *Rust v. Conrad* (1882), 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265, a bill in equity founded upon a contract determinable at the will of one of the parties was dismissed as not of equitable cognizance, the principal ground, as stated by Judge Cooley, being as follows: "But the court will also refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality, or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense, of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. . . . All contracts where the party has reserved to himself, or where the law gives him authority to render nugatory any decree that ought to be rendered in their enforcement, rest upon the same principle. This was recognized in *Rutland Marble Co. v. Ripley* (1870), 10 Wall. 339, 19 L. ed. 955, and more distinctly asserted and decided in *Southern Express Co. v. Western N. C. R. Co.* (1878), 99 U. S. 191, 25 L. ed. 319. In this last case the very strong

assertion is made that 'a court of equity never interferes where the power of revocation exists.' "

It is admitted that the supply of hot water heat bargained for in the contract under consideration could be terminated at the will of appellee, without liability for damages, and it must follow that its continuance was dependent upon the pleasure of both parties. The decree entered by the trial court may, for aught we know, have been virtually annulled before this time at the instance of appellee in the exercise of his discretion. The agreement relied upon, so far as it remains executory, is not binding for want of mutuality, and its performance cannot be enforced in equity at the suit of either party. Other objections to the complaint have been urged, but the conclusion reached renders their consideration unnecessary.

The judgment is reversed, with directions to sustain appellant's demurrer to the complaint.

Gillett, J., absent.

Injunction to Prevent Breach of Contract is the subject of a note to Philadelphia Ball Club v. Lajoie, 90 Am. St. Rep. 634.

GREEN v. ESTABROOK.

[168 Ind. 123, 79 N. E. 373.]

MORTGAGES—Effect of Joinder of Wife in.—If a wife joins her husband in a mortgage of his real estate, she is thereby barred of her inchoate interest therein as against the mortgagee and his privies. (p. 352.)

MORTGAGES—Joinder of Wife in—Rights of Wife.—If a wife joins her husband in the execution of a mortgage on his hands, she is entitled to a decree on foreclosure that her husband's interest shall first be exposed for sale. (p. 352.)

MORTGAGES—Joinder of Wife in—Rights as Against Creditors.—If a wife joins her husband in the execution of a mortgage on his lands, she is entitled to her marital interest, as against creditors in the surplus arising from the sale of the land on mortgage foreclosure. (p. 352.)

MORTGAGES—Joinder of Wife in—Rights upon Redemption. A wife upon redeeming from a mortgage in which she has joined with her husband may enforce the whole claim against his two-thirds interest in the land. (p. 352.)

MORTGAGES—Joinder of Wife in—Foreclosure—Rights of Wife.—If a wife joins her husband in the execution of a mortgage

on his land, and upon foreclosure the court orders that his two-thirds interest shall first be exposed for sale, and it sells for a sum sufficient to satisfy the mortgage debt, the unsold interest of the wife vests in her when the year for redemption expires. (p. 353.)

STATUTES—Construction—Husband and Wife—Inchoate Interest of Wife.—A statute providing that a wife's inchoate interest in her husband's land shall become vested where his land is sold at judicial sale must be liberally construed in her favor. (p. 353.)

HUSBAND AND WIFE.—Wife's Inchoate Right under statute to a one-third interest in her husband's lands is a substitute for dower. (p. 354.)

MARRIED WOMEN are Regarded as Purchasers for a valuable consideration of all property which accrues to them by virtue of the marriage. (p. 354.)

HUSBAND AND WIFE.—Wife's vested interest which she takes in her husband's land sold at judicial sale is not cut down by reason of the fact that the demands of creditors have been satisfied. (pp. 354, 355.)

HUSBAND AND WIFE—Mortgages—Redemption.—If a husband redeems his land sold at judicial sale, the inchoate interest of his wife therein does not become choate. (p. 355.)

CONSTITUTIONAL LAW—Husband and Wife—Wife's Inchoate Rights.—A statute providing that a wife's inchoate interest in her husband's lands shall become vested when such land is sold at judicial sale does not deprive him of his property without due process of law. (p. 355.)

L. Mock, J. Mock and G. Mock, for the appellant.

W. H. Eichhorn and G. A. Matlack, for the appellee.

¹²⁵ GILLET, J. Appellant commenced partition proceedings against appellee, Leah Estabrook, alleging that he was the owner of a one-third interest of the land described, and that she was the owner of the remaining two-thirds interest. On her own application, appellee Emma Green was admitted as a party defendant, and filed a general denial to the complaint, and a cross-complaint against appellant, to quiet title to one-third of said real estate. Appellant answered the cross-complaint by a general denial. The remaining issues need not be stated.

At the request of appellant, the court made special findings and stated its conclusions of law thereon. The following facts are found: Appellant and appellee, Green, were married in 1889, and the marriage relation thus formed still continues, although for some years they have been living apart. At the time of their marriage, appellant was the owner of the tract of land sought to be partitioned. January 26, 1901, appellant borrowed three hundred and seventy-five dollars from appellee, Leah Estabrook, to pay for im-

provements on said land. The debt was evidenced by his note, and at the same time he and his wife joined in the execution of a mortgage on said real estate to secure said note. Suit was afterward brought to recover on said note and to foreclose said mortgage, appellant and his wife being made defendants ¹²⁶ thereto. Such proceedings were afterward had in said suit that judgment was rendered on said note and a decree of foreclosure entered, ordering the undivided two-thirds of said real estate to be sold. Upon the sale appellee Leah Estabrook, bid the full amount of her judgment for said two-thirds interest, and, as there was no redemption, she obtained a sheriff's deed therefor. The remaining one-third has never been sold by virtue of any legal process. The court stated, as one of its conclusions of law, that the defendant, Emma Green, was the owner of an undivided one-third of said real estate, and that the defendant, Leah Estabrook, was the owner of two-thirds of said land.

The question in the case is whether appellant or appellee Green is the owner of one-third of the land, the title of appellee, Estabrook, to the other two-thirds being undisputed. No question is made by counsel for appellant concerning the regularity or form of that part of the decree of foreclosure which related to the sale of a two-thirds interest, nor is it questioned that it was in fact made for the protection of the wife. On the contrary, the brief of appellant's counsel implicitly assumes the validity of such order, and the principal question is whether, under the act of August 24, 1875 (Acts 1875, p. 178; Burn's Rev. Stats. 1901, sec. 2669 et seq.), the one-third interest of the wife became choate and vested in her as against her husband, since the rights of creditors, other than the mortgagee, did not intervene.

Section 1 of the statute referred to is as follows: "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue ¹²⁷ of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise. When

such inchoate right shall become vested under the provisions of this act, such wife shall have the right to the immediate possession thereof, and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her."

When the wife joined in the mortgage, it was for the sole purpose of barring her inchoate interest as against the mortgagee and the privies of the latter: *Perry v. Borton* (1865), 25 Ind. 274; *Purviance v. Emley* (1891), 126 Ind. 419, 26 N. E. 167; *Mandel v. McClave* (1889), 46 Ohio St. 407, 15 Am. St. Rep. 627, 22 N. E. 290, 5 L. R. A. 519. It is settled that as respects a mortgage so executed the wife occupies a position analogous to that of a surety, and that as such she is entitled to an order that her husband's interest shall first be exposed for sale: *Leary v. Shaffer* (1881), 79 Ind. 567; *Crawford v. Hazelrigg* (1889), 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139; *Purviance v. Emley* (1891), 126 Ind. 419, 26 N. E. 167; *Kelley v. Canary* (1891), 129 Ind. 460, 29 N. E. 11; *Smith v. Sparks* (1904), 162 Ind. 270, 70 N. E. 253. It has also been decided that she is entitled to her marital interest, as against creditors, in the surplus arising from the sale on mortgage foreclosure, although she joined with her husband in the mortgage: *Purviance v. Emley* (1891), 126 Ind. 419, 26 N. E. 167; *Clements v. Davis* (1900), 155 Ind. 624, 57 N. E. 905. And see *Staser v. Gaar, Scott & Co.* (1907), 168 Ind. 131, 79 N. E. 404. It has been held by the appellate court that upon redeeming from a mortgage in which she has so joined, she may enforce it as against the holder of the other two-thirds interest: *Union Nat. Bank v. McConaha* (1895), 14 Ind. App. 82, 42 N. E. 495.

It does not seem to admit of question that, where an order is made, for the protection of the wife, that the ¹²⁸ husband's two-thirds interest shall first be exposed for sale, and if it sells for a sum sufficient to satisfy the decree, the statute vests the unsold interest of the wife when the year for redemption expires.

Even apart from the statute, it appears that the wife has a sufficient equity to protect her inchoate interest, by the procuring of an order that the interest of the husband shall first be offered: *Leary v. Shaffer* (1881), 79 Ind. 567. But the statute of 1875 provides that upon a judicial sale of the husband's interest, where the wife's interest is not directed to be barred or sold, her inchoate interest shall become abso-

lute when the legal title of the husband shall become absolute and vested in the purchaser. The decisions of this state which recognize the wife's right as against general creditors to one-third of the real estate even where her interest is directed to be sold, rest upon the idea that the mortgage has barred her interest only as against the mortgagee and his privies, and that as to general creditors her interest in the proceeds has become choate by the sale. The cases on which has been based the practice of procuring an order in a foreclosure suit that the two-thirds interest of the husband shall first be offered for sale amount to an adaptation of the general principle, that a wife may procure an order for the protection of her inchoate interest, to the provisions of the act of 1875, *supra*, thus anticipating the fact that her interest will become choate at the end of the year, if the husband's two-thirds interest is sold and there is no redemption. To meet possible contingencies that may arise prior to the acquiring of title at the end of the year of redemption, it may be that the decree ought to provide for first offering the whole interest of the husband, subject, however, to the right of the wife to one-third in case her interest becomes choate either under the statute of 1875 or the general statute of descents. If, however, the customary practice of offering the husband's two-thirds interest is observed, and it sells for enough to satisfy the decree, there can be no ¹²⁰ doubt that when the year for redemption has expired, and the wife is in esse, the sale of the husband's two-thirds interest, after the ordinary manner, divests him of all his title, and therefore the case would be squarely within the statute. It is not required by said enactment, in order to create an interest in the wife, that the decree should direct, as against the husband, that the whole estate should be sold, leaving her inchoate interest to become choate when the purchaser makes title, but it is within the contemplation of the enactment, as judicially construed, that when the title has passed to the latter to all that can pass as against a choate marital right, her title shall thereby be created, although that portion of the estate to which she becomes entitled by statute has never been sold as against the husband.

The real contention of appellant's counsel, however, seems to be based upon the theory that the statute does not give the wife one-third as against the husband, but only as against creditors. It is settled that the statute in question is to be

liberally construed in favor of the wife: *Lawson v. DeBolt* (1881), 78 Ind. 563; *Straughan v. White* (1882), 88 Ind. 242; *Mansur v. Hinkson* (1884), 94 Ind. 395. In the interpretation of the statute the nature of the claim which the enactment was designed to amplify must not be overlooked. Her inchoate right under the laws of this state is a substitute for dower, and this court has declared that dower is "a legal, an equitable, and a moral right": *Noel v. Ewing* (1857), 9 Ind. 37; *McCord v. Wright* (1884), 97 Ind. 34; *Crawford v. Hazelrigg* (1889), 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139; *Staser v. Gaar, Scott & Co.* (1907), 168 Ind. 136, 79 N. E. 404.

In the determination of the question in hand, the fact is to be remembered, that "marriage is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of the marriage": ¹³⁰ *Derry v. Derry* (1881), 74 Ind. 560. See, also, *Richardson v. Schulz* (1884), 98 Ind. 429; *Staser v. Gaar, Scott & Co.* (1907), 168 Ind. 131, 79 N. E. 404.

We may also suggest that it was the wife's equity which was alone sufficient to procure an order that the husband's interest in the land be first offered for sale, so that, as against the husband, it would seem that she had a reasonably strong equity to that part of the estate which her right has saved from the wreckage. The case of *Kelley v. Canary* (1891), 129 Ind. 460, 29 N. E. 11, is one which is strongly against the construction contended for by appellant. It was there held that where the wife had procured an order upon the foreclosure of a mortgage in which she had joined, that the two-thirds interest of the husband should first be offered, and it sold for enough to satisfy the decree, the purchaser obtaining title, she was entitled to the remaining one-third as against one who deraigned title through a deed made by the husband subsequently to the execution of the mortgage, in which deed she did not join. In disposing of the case this court said, that if the husband had not conveyed she would take one-third as against him, and that his conveyance did not place the purchaser in any better condition. It was also observed—and we are of the opinion that this is the keynote of the statute—that its purpose was "to secure the wife not only against the misfortunes of the husband but his improvidence as well."

There is no merit in the contention that construing the act of 1875 with section 2640 of Burn's Revised Statutes of 1901, section 2483 of the Revised Statutes of 1881, the wife takes her share as against creditors only. The later statute contains a substantive provision in favor of the wife, and the interest she takes in the real estate is not cut down by reason of the fact that the demands of creditors have been satisfied: *Mansur v. Hinkson* (1884), 94 Ind. 395.

We are not impressed with the claim that the act of 1875, construed as we have indicated, is invalid as depriving appellant ¹³¹ of his property. He had a right to redeem his two-thirds interest, and the effect of such redemption would have been to prevent his wife's interest from becoming choate: *Huffmaster v. Ogden* (1893), 135 Ind. 661, 35 N. E. 512. He was not put under any greater burden in effecting a redemption than he would have been under had the statute not existed. It was not until all interest over which he had any control, so far as the foreclosure was concerned, was irretrievably lost to him that the statute attached: See *Ervin v. State* (1898), 150 Ind. 332, 48 N. E. 249. But even should we give him the benefit of assuming every possibility in his favor, and indulging the supposition that a sale of the whole estate would have produced an overplus, of which he might, but for the statute, have availed himself, yet we are not prepared to say, in view of the fact that the wife is a purchaser as respects her marital right, that a statute is invalid which, as against such a possibility, humanely gives her a remnant of the estate as a provision for her support. The authority of the law-making power over the marriage relation and its incidents is clearly sufficient to uphold the statute.

Judgment affirmed.

If a Married Woman Executes Jointly with Her Husband a mortgage on land, owned in part by him and in part by her, to secure his debt, his land should first be made liable and sold in exoneration of hers: Shew v. Call, 119 N. C. 450, 56 Am. St. Rep. 678.

A Married Woman Who Mortgages her separate property to secure a loan to her husband is a surety, not the principal debtor, notwithstanding her general interest in his transactions: Bull v. Coe, 77 Cal. 54, 11 Am. St. Rep. 235; Osborne v. Cooper, 113 Ala. 405, 59 Am. St. Rep. 117.

BROADSTREET v. HALL.

[168 Ind. 192, 80 N. E. 145.]

NEGLIGENCE—Parent and Child—Reckless Riding of Child.—If a father sends his young son, known to be a reckless rider, upon the highway to deliver a message upon a horse known to be unruly, and which the son is unable to control, such father is guilty of negligence. (p. 359.)

NEGLIGENCE—Proximate Cause—Parent and Child—Reckless Riding of Child.—If a father sends his young son, known to be a reckless rider, upon the highway to deliver a message upon a horse known to be unruly, and which the son is unable to control, and which, in consequence, he runs into a carriage causing a personal injury, the father is guilty of negligence, and such negligence is the proximate cause of the injury. (pp. 359, 360.)

NEGLIGENCE—Anticipation of Injury.—To constitute actionable negligence it is not essential that the complaining party should make it appear that the precise injury or accident which did occur could have been anticipated or foreseen by him. (p. 360.)

MASTER AND SERVANT—Parent and Child—Negligence of Child.—If a father sends his young son, known to be a reckless rider, upon the highway, to deliver a message, upon a horse known to be unruly, he thereby creates the relation of master and servant between himself and his son, and is liable on account of the son's negligence in riding the horse along the highway while engaged in the performance of the business of his father. (p. 360.)

NEGLIGENCE—Use of Highways.—Whoever travels over and along a public highway must do so in such a manner and with such care as is consistent with the rights and safety of others traveling thereon. A violation of this duty is negligence. (p. 361.)

PARENT AND CHILD—Master and Servant—Principal and Agent—Torts of Child.—A parent, merely as such, is not liable for the torts of his child; but he may be liable upon the relation of principal and agent, or master and servant. (p. 361.)

APPEAL—Order-book Entry of Verdict—Bill of Exceptions.—A copy of an order-book entry of a verdict under the certificate of the clerk of the lower court imports absolute verity and cannot be contradicted by the bill of exceptions or a motion and affidavit therein contained. (p. 364.)

TRIAL—Instructions.—If the jury has been fully instructed, it is not error to refuse to give further and additional instructions. (p. 364.)

TRIAL—Instructions.—An instruction stating to the jury that in determining the disputed question, it should consider all the evidence upon that question in the case, together with all the facts and circumstances shown to exist in the case which have any bearing thereon, is not open to the criticism that it permits the jury to consider evidence which is not pertinent or relevant to the issue. (pp. 364, 365.)

EVIDENCE—Negligence—Master and Servant.—In an action against a father to recover for a personal injury inflicted by the reckless riding of his son on an unruly horse while upon an errand for his father, evidence of prior specific acts of careless and reckless riding by such son and of his reputation in that regard is admissible to charge his father with notice or knowledge thereof, and of his incompetency, for that reason, to be intrusted with the control and management of the horse at the time he was sent on the errand in question. (p. 366.)

Moore Brothers, C. C. Matson and Crane & McCabe, for the appellant.

S. A. Hays, C. E. Akers and N. A. Whitaker, for the appellee.

¹⁹³ JORDAN, J. Action by appellee to recover damages for personal injuries sustained. The cause was originally instituted and tried in the Putnam circuit court, wherein appellee recovered a judgment, which, on appeal to the appellate court, was reversed by reason of certain erroneous rulings of the trial court: *Broadstreet v. Hall* (1904), 32 Ind. App. 122, 69 N. E. 415. The venue of the action was subsequently changed to the Montgomery circuit court. The complaint upon which the cause was tried in the latter court consists of two paragraphs, the first and third. The ¹⁹⁴ former, having been amended, is denominated the amended first paragraph of the complaint. The answer was the general denial. There was a trial by a jury. No evidence, however, was introduced by appellant. A verdict was returned in favor of appellee, assessing her damage at fifteen hundred dollars, and over appellant's motions for a venire de novo and a new trial judgment was rendered on the verdict. The denial of these motions and the overruling of the demurrer to the third paragraph of the complaint are the errors assigned and relied upon for reversal.

The amended first paragraph of the complaint abounds in repetitions and unnecessary averments. The following, however, may be said to be an epitome of the facts therein alleged. On April 15, 1899, Clyde Broadstreet, a minor of tender years, son of defendant, was living with his said father as a member of his family at the town of Cloverdale, Putnam county, Indiana. On that day the defendant employed his said son to convey a certain message from said town to Harrison Broadstreet, who resided two miles distant therefrom. For the purpose of carrying this message the defendant furnished and supplied his son with a horse, owned by him (the defendant), and this horse was ridden by the boy on that occasion. The horse in question was difficult to control, and, it is alleged, defendant's son was careless and negligent in managing and controlling the horse which defendant furnished him upon the occasion of carrying said message—all of which the defendant then and there well knew. Defendant's son, at the instance and command of his father, rode

the horse in question for the purpose of carrying the message as commanded by his father to the person to whom it was directed. While in the performance of this service, and within the scope of his employment and agency, he rode the horse along a public highway upon which the plaintiff was lawfully traveling in a buggy. The paragraph further alleges that on said occasion the son, in the performance of the ¹⁹⁵ aforesaid service for his father, negligently, carelessly and recklessly rode and ran said horse along said highway over and against the buggy in which plaintiff was traveling, and thereby struck her and threw her out of the buggy upon the ground, by reason of which she was bruised, wounded and permanently injured and damaged.

The facts alleged in the third paragraph may be summarized as follows: On April 15, 1899, defendant negligently ordered, commanded and permitted his son, Clyde Broadstreet, of the age of nine years, who was residing with his father as a member of the family, to ride a horse owned by the defendant to carry a message for the defendant from the town of Cloverdale, Putnam county, Indiana, to Harrison Broadstreet, who resided about two miles distant from said town. Said Clyde Broadstreet was inexperienced in the management and control of horses, did not have the strength and skill to manage and control horses, and was reckless and careless in the management and control of horses—all of which was at the time known to the defendant. In pursuance of the order and command of the defendant, he started upon his said mission of conveying the message in question, and, while riding said horse furnished by his father along the public highway in a careless and reckless manner, he met the plaintiff, who was lawfully traveling in a buggy upon said highway. It is alleged that, by reason of said Clyde's inability, and want of strength and skill, to manage and control said horse on which he was riding, he ran the horse into and against the buggy in which plaintiff was then and there traveling on said highway, and thereby threw her out of said vehicle to the ground, by reason of which she was bruised and wounded to such an extent as to be permanently injured and damaged.

The evident theory of the first paragraph, as outlined by the facts, is that the relation of master and servant existed between appellant and his minor son at the time ¹⁹⁶ of the accident in question, and that therefore, under a well-settled

rule, appellant is responsible for the negligence of his said servant, to which the injury of appellee is imputed. This negligence, as shown, was committed by appellant's son and servant within the scope of the employment or service which he was performing at the time for his father.

The third paragraph proceeds upon the theory that the injuries received by appellee are due to the negligence of appellant, under the circumstances, in placing his minor son in the control and management of his horse upon the occasion and for the purpose in question, and allowing him to ride the horse along the public highway in the performance of the business or mission upon which he sent him. That, by reason of the boy's carelessness, youth, inexperience in the management of horses, and his want of strength and ability to govern the horse at the time in question, he ran into appellee's buggy and threw her to the ground, thereby injuring her, as alleged in the pleading.

The objection urged by appellant's counsel in respect to the insufficiency of the third paragraph of the complaint is that it was the willful act of the horse which is averred to have injured appellee, and that, inasmuch as the act is such as horses do not usually commit, the paragraph is bad, for the reason that there are no facts to show that the horse which appellee's son was riding at the time had any disposition or propensity to commit such act, and that the defendant had notice of such disposition. Counsel, however, certainly misapprehended the facts as they are averred in the third paragraph, for the injuries alleged to have been sustained by appellee are not attributed to the willful act of the horse, but it is alleged that appellant, by reason of the youth of his son, his careless and reckless habits, and his want of strength and skill to manage and ¹⁹⁷ control the horse in question, which horse, as averred, was difficult to manage and control—all of which facts were well known to appellant at the time—was, under the circumstances, guilty of negligence in placing his son in charge of the horse, and sending him out upon the public highway to convey the message to Harrison Broadstreet, as he was directed and commanded to do.

It appears that by reason of his inability to manage and control the horse, and by reason of the careless and reckless manner in which he rode the horse along the public highway upon which appellee was traveling, he collided with the buggy

and thereby caused the injury of which appellee complains. That appellant must be regarded as guilty of negligence in placing his son in control of the horse and sending him out upon the public highway is manifest. In *Dunlap v. Wagner* (1882), 85 Ind. 529, 44 Am. Rep. 42, this court said: "We assume that horses require the management of an intelligent person, in reasonable control of his mental and physical powers, and this we do for the reason that all persons are presumed to know the natural and ordinary propensities and dispositions of such animals." It is apparent that the injury which appellee received was the natural and approximate result of appellant's negligence. It is a maxim of the law that a person must be held to contemplate the probable consequences of his own act. It is true, however, that in cases of this kind the injury received by the complaining party must be such as the wrongdoer might reasonably have anticipated or foreseen, but it is not essential that it should be made to appear that the precise injury or accident which did occur could have been anticipated or foreseen. It will be sufficient if the injury resulting from the wrongful act is such as was usual, and therefore might have been expected: *Dunlap v. Wagner* (1882), 85 Ind. 529, 44 Am. Rep. 42, and authorities cited.

¹⁹⁸ Appellant, by engaging his son to carry the message for him on the occasion in question, under the facts and the law applicable thereto, must be held, to that extent at least, to have created the relation of master and servant between him and his son, and is, under the third paragraph of the complaint, responsible in damages for injuries resulting from the inability of the son properly to control or manage the horse, or, under the first paragraph of the complaint, on account of the son's negligence in riding the horse along the public highway while engaged in the performance of the business of his father. In support of these propositions, see the following: *Teagarden v. McLaughlin* (1882), 86 Ind. 476, 44 Am. Rep. 332; *Dunlap v. Wagner* (1882), 85 Ind. 529, 44 Am. Rep. 42; 1 *Cooley on Torts*, 3d ed., *122; *Tiffany on Personal and Domestic Relations*, sec. 120; *Schouler on Domestic Relations*, 5th ed., sec. 263; *Lashbrook v. Patten* (1864), 62 Ky. 316; *Wood on Master and Servant*, 2d ed., secs. 277, 282; 1 *Thompson on Negligence*, 2d ed., sec. 529.

In *Lashbrook v. Patten*, 62 Ky. 316, the minor son of the defendant, while driving a carriage conveying his two sisters

to a picnic, negligently ran into and against the vehicle of the plaintiff, in which the latter was traveling, causing his horse to become frightened, to "run over" and break the carriage, and throw out plaintiff's daughter. The carriage driven by the son on that occasion belonged to the father, as did the horse by which it was drawn, and the son and his sisters, who were in the carriage with him, were all members of his father's family, and the son was driving with the approbation of the father. The court, in that case, held that the son must be regarded as in the employ of his father, and, therefore, at the time of the accident was the servant of the father, and the latter was liable in damages for the son's negligence upon the occasion in question.

Generally speaking, the law regards public highways as open alike to travel thereon by all persons who may desire¹⁰⁰ to exercise that right, subject, however, to all reasonable conditions and restrictions that may be interposed: *City of Terre Haute v. Kersey* (1902), 159 Ind. 300, 95 Am. St. Rep. 298, 64 N. E. 469. But whoever travels over and along a public highway must do so in such a manner and with such care as is consistent with the rights and safety of others traveling thereon, and a violation of this duty is regarded by the law as negligence. Appellant's counsel earnestly argue that in this case he is not liable because the father is not responsible for the torts of his minor child. But this is not the question with which we have to deal. It is true that a father is not responsible for the torts of his child, due to the negligence or willful act of the latter, merely because of the relation existing between parent and child. The liability of the father does not depend upon this relation, but upon the relation of principal and agent, or master and servant, and is governed by the rules applicable to such relation. Or, in other words, the law holds the father liable only on the same grounds that he would be responsible for the wrong of any other person; that is, he directed or ratified the wrongful act of his child or accepted the benefit thereof, or that the child at the time the tort was committed was engaged in performing work or service for the father: *Teagarden v. McLaughlin*, 86 Ind. 476, 44 Am. Rep. 332; 1 *Cooley on Torts*, 3d ed., *122; *Tiffany on Personal and Domestic Relations*, sec. 120; *Schouler on Domestic Relations*, 5th ed., sec. 263.

In view of these well-settled principles it has been held that where a father permitted his infant son, eleven years

old, to ride the father's horse, the father was not liable for an injury resulting from the negligence of the child, while using the horse, in running over a person, for the reason that the wrongful act was not committed with the father's consent or at his direction and the son at the time was not performing any act for the father: *Smith v. Davenport* ²⁰⁰ (1891), 45 Kan. 423, 23 Am. St. Rep. 737, 25 Pac. 851, 11 L. R. A. 429. We conclude that the third paragraph of the complaint is sufficient on demurrer.

The evidence in the case establishes the following facts: On April 15, 1899, appellant resided in the town of Cloverdale, Putnam county, Indiana, and was engaged in selling implements and buggies. Clyde Broadstreet, his son, a boy between eight and nine years old, resided with his father as a member of his family. Clyde was small, weighing from fifty-five to seventy pounds, and was physically weak. He appears to have had a disposition for fast riding. At and prior to the time of the accident in question he had a reputation in the community in which he lived for riding horses in a reckless, careless and dangerous manner. He frequently rode his father's horse up and down Main street of said town in front of his father's store and house, in a reckless manner and at a dangerous rate of speed. Appellant was aware of the reckless and careless manner in which his son was accustomed to manage and ride a horse. He also knew his son's inability, by reason of his physical weakness and age, properly to manage and control a horse. On the morning of the day aforesaid appellant sent his said son with a message to Harrison Broadstreet, who lived some two or three miles distant from the town of Cloverdale, to inform him that a buggy which he had ordered through appellant had been received by the latter and was ready for delivery. Upon the occasion in question, appellant directed his hired man to catch and saddle the horse for Clyde to ride. Clyde, it appears, was so small that he was unable to saddle and mount the horse, and this service was generally performed by the hired man. Upon this occasion, after the horse was saddled, appellant placed his said son on the horse, put him in charge of it, and sent him out upon the highway to carry said message to Harrison Broadstreet. ²⁰¹ Clyde, as it appears, rode the horse to the place where Harrison Broadstreet resided, delivered the message appellant had sent, and started on his return, riding along and over the public highway, which was the proper road for

him to use in going and returning. On his return trip he rode the horse at a "lope" or gallop, whipping the horse all the way along the highway. At one point it appears that he came very near colliding with a buggy in which an old man, named Hood, was riding. After passing Mr. Hood he continued riding at the same rapid gait, galloping and whipping his horse, and urging it on "faster and faster," as a witness testified.

Appellee, at the time of the accident, was returning to her home from Cloverdale, traveling over the public highway in "an open-top buggy" which was driven by a Miss Foster, who had invited appellee to ride with her. Appellee and her companion had traveled along the highway in the buggy about one-half a mile when they met Clyde Broadstreet. When they first saw him he was about sixty yards beyond them, and was riding his horse at full speed. Miss Foster turned the horse she was driving to the right, as far as she could, but Clyde did not slacken his speed, nor did he do anything to check the horse which he was riding, but bore down at full speed upon the buggy in which appellee was traveling and ran into the buggy. The horse upon which he was riding struck the front wheel of the buggy, breaking it, and also breaking the shaft, and appellee was thereby "knocked or thrown out" of the vehicle backward, and seriously bruised and wounded. The injuries which she received at the time are shown to be serious and permanent, and greatly impaired her ability to perform labor or domestic duties. She has been rendered nervous and restless, and suffers much pain. There is no evidence to show that she was at the time of the accident guilty of contributory negligence. Under the authorities hereinbefore cited, we are satisfied that the evidence sustains the ²⁰² verdict, and the motion of appellant requesting the court to direct a verdict in his favor was properly denied.

A transcript of an entry from the trial court's order-book, showing the return of the verdict, is as follows:

"Come again said jury in charge of the sworn bailiff aforesaid and by their foreman present to the court the following verdict: 'We, the jury, find for the plaintiff, and assess her damages in the sum of fifteen hundred dollars.

" 'B. B. RUSK,
" 'Foreman.' "

As previously shown, appellant unsuccessfully moved for a venire de novo, on the grounds: (1) That the verdict was so ambiguous that no judgment could be rendered thereon; (2) that no damages were assessed by the jury. We are referred by appellant's counsel to a motion and an affidavit in support thereof, each of which is embraced in the bill of exceptions and shows that the verdict, as returned into court, reads as follows: "We, the jury, find for the plaintiff and assess her damages at 1,500," there being an entire absence of any dollar mark. But this fact is not verified by the order-book entry which, under the certificate of the clerk of the lower court, imports absolute verity and cannot be controlled by the bill of exceptions in question, or the motion and affidavit therein contained. The entry of the verdict which the clerk has transcribed from the order-book, and certified as a true and correct entry, has attached immediately to the left of the fifteen hundred a dollar mark. If this was not the condition of the verdict when it was returned into court, appellant should not have permitted the clerk to transcribe the entry of the verdict into the order-book with the dollar mark immediately preceding the figures 1,500, as disclosed by the order-book entry hereinbefore set out. It follows that there is no defect in the verdict as it appears in the record herein, and the motion for a venire de novo was properly denied.

²⁰³ The court gave to the jury on its own motion seven instructions, by which it correctly and fully advised the jury in regard to the law applicable to the case. Appellant presented a request for twelve additional instructions. Eight of these were given by the court, but Nos. 2, 8, 10, and 11 were refused. When the instructions given by the court on its own motion, and those which it gave at the request of appellant, are considered, we perceive no room for further instructions in behalf of appellant. In fact, it may be said that the instructions refused by the court, so far as they are correct, were embraced in those given by the court.

Appellant assails instruction No. 5 of the series given by the court on its own motion. By this charge the jury was informed that the question as to whether appellant's son, at the time of the accident complained of, was engaged in the service of defendant and acting within the scope of his said service was one of fact to be determined from all of the evidence in the case. But in determining this question the court informed the jury that it was its duty to consider all of the

evidence of the witnesses upon the subject, together with all of the facts and circumstances shown to exist in the case which had any bearing upon the question. The court further said in the charge in question that it "was not necessary that agency be established by direct or positive proof, but it may be established by circumstantial evidence." Appellant criticises that part of the charge which stated to the jury that the question was to be determined from all of the evidence in the case. Possibly this statement, standing alone, might be open to appellant's criticism that the jury was thereby given to understand that it, in the determination of the question as to whether the defendant's son at the time of the accident was engaged in the employment or service of the defendant, might consider all the evidence in the case, regardless of its pertinence ²⁰⁴ or bearing on that question, but the court, in that part of the charge immediately following, expressly stated to the jury that in determining the question it was its duty to consider all of the evidence upon that subject, together with all of the facts and circumstances shown to exist in the case which had any bearing thereon. Certainly the jury must have understood from this latter statement that in determining the question involved it must consider only such evidence as was pertinent to or had a bearing upon the question.

Complaint is made of the admission of certain evidence to show that appellant's son, in the neighborhood in which he resided, was, at and prior to the time in controversy, generally reputed to be careless and reckless in managing and riding horses. Complaint is also made because the court permitted witnesses to testify that prior to the time of such accident they frequently had seen appellant's son riding in a reckless and careless manner along Main street in the town of Cloverdale, in front of appellant's house and place of business. His riding on these occasions was so reckless and careless as to attract attention of persons on the street. The evidence in question as to the son's reputation was admissible to charge appellant with knowledge or notice of his son's careless and reckless manner of riding and controlling horses, and of his incompetency, for that reason, to be intrusted with the control and management of the horse at the time appellant sent him upon the errand in question: 1 Wigmore on Evidence, sec. 249, and authorities cited; *Western Stone Co. v. Whalen* (1894), 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E.

241; 6 Thompson on Negligence, 2d ed., sec. 7781; Wood on Master and Servant, 2d ed., sec. 421; 1 Shearman and Redfield on Negligence, 5th ed., sec. 191.

The specific acts of reckless and careless riding at the time and place testified to by the witnesses were also admissible for the same purpose of charging appellant ²⁰⁵ with knowledge or notice of his son's incompetency to control or manage the horse at the time he employed him to carry the message: Pittsburgh etc. R. Co. v. Ruby' (1871), 38 Ind. 294, 10 Am. Rep. 111; City of Delphi v. Lowery (1881), 74 Ind. 520, 39 Am. Rep. 98.

The trial court, at the time the evidence in question was received, by an instruction to the jury limited the consideration thereof by that body to the legitimate purpose for which it was introduced. There was no error in admitting the evidence in question. Other minor points are discussed by appellant's counsel relative to the introduction of evidence. These rulings of the court we have considered, but discover no error therein. There being no available error presented by the record, the judgment is affirmed.

A Parent is not Answerable for the Negligence of his minor child in riding a horse, unless done with the parent's consent or in connection with his business: Smith v. Davenport, 45 Kan. 423, 23 Am. St. Rep. 737; note to Johnson v. Glidden, 74 Am. St. Rep. 801. As to the liability of a master for the negligence of his servant in managing a team intrusted to him by the master, see Socker v. Waddell, 98 Md. 43, 103 Am. St. Rep. 314; Pierce v. Conners, 20 Colo. 178, 46 Am. St. Rep. 279; Ritchie v. Waller, 63 Conn. 155, 38 Am. St. Rep. 361; McCarthy v. Timmins, 178 Mass. 378, 86 Am. St. Rep. 490.

MILLER v. TOWN OF SYRACUSE.

[168 Ind. 230, 80 N. E. 411.]

NUISANCES—Power of Municipal Corporation to Declare.—Under a general grant of power to a municipal corporation to declare what shall constitute a nuisance, it cannot declare that to be a nuisance which from its evident nature, situation and surroundings is not, and cannot in fact become, a nuisance. (p. 368.)

NUISANCES at Common Law.—Anything offensive to the sight, smell, or hearing, erected or carried on in or near a public place where the people dwell or pass, or have the right to pass, to their annoyance, is a nuisance at common law. (p. 368.)

NUISANCES—Power of Municipal Corporations to Declare.—Under a general grant of power to a municipal corporation to declare

what shall constitute a nuisance, it may include nuisances per se, and those things which in their nature may become nuisances, and as to which there may be honest differences of opinion in impartial minds. (p. 368.)

MUNICIPAL CORPORATIONS — Ordinances — Nuisance.—A municipal ordinance which treats a thing as a nuisance is sufficient, without a formal declaration that it is such. (p. 368.)

MUNICIPAL CORPORATIONS—Exercise of Police Power—Nuisances.—The legislature may properly delegate to incorporated towns the exercise of police power within fixed constitutional limits, to declare, prevent and abate nuisances and preserve the public health. (p. 369.)

MUNICIPAL CORPORATIONS—Ordinances—Police Power—Keeping Hogs.—An ordinance prohibiting the keeping of hogs in a pen within certain prescribed limits of a city is clearly within the scope of the exercise of the police power which may be delegated to the city. (p. 369.)

MUNICIPAL CORPORATIONS — Ordinances — Reasonableness.—If the adoption of a municipal ordinance is expressly authorized by the legislature and the power so granted is not in conflict with constitutional prohibitions, or fundamental principles, it cannot be successfully assailed as unreasonable in a judicial tribunal. (p. 369.)

MUNICIPAL CORPORATIONS—Ordinances—Exercise of Police Power.—Under a general grant to a city of authority to exercise the police power, ordinances exercising such power should not be declared invalid as unreasonable unless plainly in violation of constitutional guaranties. (p. 370.)

MUNICIPAL CORPORATIONS — Ordinances — Keeping of Hogs.—An ordinance prohibiting the keeping of hogs in a pen within certain prescribed limits in a city is valid as a legitimate exercise of the police power for the promotion of the public health and comfort. (pp. 371, 372.)

A. L. Cornelius, for the appellant.

J. A. Sloane, for the appellee.

232 MONTGOMERY, C. J. Appellant was convicted of violating an ordinance of the town of Syracuse, which prohibited the keeping of hogs in a pen within the corporate limits when within two hundred feet of a street or alley of the town.

The only error assigned is the overruling of appellant's demurrer to the amended complaint.

The sufficiency of the complaint is attacked upon the ground that the provisions of the ordinance upon which it is based are too broad and sweeping to be valid exercise of the police power.

Section 4357 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, sec. 3333) confers upon the board of trustees of an incorporated town the power "to declare what shall constitute a nuisance, and to prevent, abate and remove the same,

and take such other measures for the preservation of the public health as they shall deem necessary." It was in pursuance of this authority, we assume, that the ordinance in question was enacted. It is well settled that a municipality cannot, under this general warrant, declare that to be a nuisance which, from its evident nature, situation and surroundings, is not, and cannot in fact become, a nuisance: *City of Evansville v. Miller* (1897), 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161, and cases cited.

Many things, however, from their nature, the condition in which they may be maintained, and their proximity to public places, may become nuisances, and in dealing with such things the municipality is clothed with a large discretion. Anything offensive to the sight, smell, or hearing, erected or carried on in or near a public place where the people dwell or pass, or have the right to pass, to their annoyance, is a nuisance at common law: *Hackney v. State* (1856), 8 Ind. 494; *Haggart v. Stehlin* (1894), 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577.

²³³ The supreme court of Illinois has held that, under a power in terms quite similar to the provision just quoted, the governing body of a municipal corporation in that state is authorized to denounce conclusively as a nuisance those things which are nuisances per se, and also those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds: *Laugel v. Bushnell* (1902), 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266. See, also, *Baumgartner v. Hasty* (1885), 100 Ind. 575, 50 Am. Rep. 830.

The ordinance under consideration does not recite or declare what object or reasons there are for its passage, or in terms denounce as a nuisance the keeping of hogs in a pen within the prohibited limits, but its silence and omission in these respects in nowise affect the validity of the ordinance. The objects of any particular enactment are generally obvious, and the reasons for its passage are usually found in existing conditions, and the adaptability of the act to secure the manifest purpose of the legislation. It is accordingly sufficient that the statute or ordinance treats a thing as a nuisance, without a formal declaration that it is such: *Harrington v. Board etc.* (1887), 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305; *City of Crowley v. Ellsworth* (1905), 114 La. 308, 108 Am. St. Rep. 353, 38 South. 199, 69 L. R. A. 276.

The police power is incident to the sovereignty of the state, and may be exercised by the legislature to protect or promote the public health, morals or safety, subject only to such limitations as are imposed by the fundamental law. The legislature has properly delegated to incorporated towns the exercise of such power, within fixed limits, to declare, prevent and abate nuisances and preserve public health. When the exercise of the police power by the state is challenged as unreasonable, it is a judicial function to determine whether the particular regulation comes within the scope of such power, and, finding ²³⁴ that fact in the affirmative, courts "cannot run a race of opinions upon points of right, reason and expediency with the law-making power." It is not essential that a police regulation be wholly wise and just to sustain its validity, but if such regulation appears to have been designed for, and to be reasonably calculated to subserve, a proper public purpose, it will be upheld unless it clearly invades some right secured by the state or federal constitution.

The objects of this ordinance were clearly within the scope of the police power, and it was enacted, as already shown, in pursuance of express authority conferred by the legislature: *Walker v. Towle* (1901), 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; *Beiling v. City of Evansville* (1896), 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; *Rund v. Town of Fowler* (1895), 142 Ind. 214, 41 N. E. 465.

It is well settled that when the adoption of a municipal ordinance or by-law is expressly authorized by the legislature, and when the power so granted is not in conflict with a constitutional prohibition or fundamental principles, it cannot be successfully assailed as unreasonable in a judicial tribunal: *Beiling v. City of Evansville* (1896), 144 Ind. 644, 42 N. E. 621; *Rund v. Town of Fowler* (1895), 142 Ind. 214, 41 N. E. 465; *Skaggs v. City of Martinsville* (1895), 140 Ind. 476, 49 Am. St. Rep. 209, 39 N. E. 241, 33 L. R. A. 781; *Steffy v. Town of Monroe City* (1893), 135 Ind. 466, 41 Am. St. Rep. 436, 35 N. E. 121; *Coal Float v. City of Jeffersonville*, (1887), 112 Ind. 15, 13 N. E. 115.

The legislature did not define with precision the details of the regulations which a town may adopt for the prevention or abatement of nuisances, or prescribe the precise penalties which it may impose for a violation of such provisions, but it did delegate and confer upon town boards full authority within their jurisdictions to declare and define what shall

constitute a nuisance, and power to prevent and abate the same, and power to take such other measures as may be deemed necessary for the preservation of the public health. It would ²³⁵ be manifestly difficult, if not impossible, to frame general laws dealing in detail with nuisances, and the legislature has wisely committed to the local governments authority to enact, and the responsibility of enforcing, proper sanitary and health regulations. If there be any fear of oppression, that fear must be that the people invested with the right of self-government will oppress themselves, as the power is wholly in their hands. Courts should be reluctant to disturb a municipal regulation, enacted in pursuance of such a comprehensive grant of power, and designed to promote the public health and comfort, on the ground of unreasonableness, but such regulation should be upheld as valid unless it is plain that it has no real relation to its professed object, or is a palpable invasion of private rights protected by constitutional guaranties. In discussing this question Judge Dillon says: "Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them": 1 Dillon on Municipal Corporations, 4th ed., sec. 379.

In the case of *Town of Darlington v. Ward* (1896), 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326, it was held that an ordinance making it unlawful to keep any hog within the corporate limits of the town could not be held void for unreasonableness, under statutes giving power to define nuisances and regulating and controlling the keeping of animals in the town.

The court of criminal appeals of Texas upheld an ordinance which prohibited the keeping of hogs within one mile of the courthouse, the corporate limits of the town extending one and one-half miles in each direction from the courthouse: *Ex parte Glass* (1905) (Tex. Cr.), 90 S. W. 1108.

In the case of *Smith v. Collier* (1903), 118 Ga. 306, 45 S. E. 417, the supreme court of Georgia held that an ordinance ²³⁶ which declares that "no hogs shall be permitted to remain within the corporate limits . . . between the first day of April and the first day of October," is not, upon its face, so unreasonable that it would be the duty of the courts to declare it void.

The supreme court of North Carolina held an ordinance to be valid which prohibited the keeping of hog-pens within one hundred yards of another's residence: *State v. Hord* (1898), 122 N. C. 1092, 65 Am. St. Rep. 743, 29 S. E. 952.

The supreme court of Massachusetts sustained an ordinance prohibiting the keeping of swine within particular districts of the city, and declared that, in the absence of evidence to the contrary, the court will presume that such ordinance is reasonable: *Commonwealth v. Patch* (1867), 97 Mass. 221.

The supreme court of Iowa confirmed a conviction under an ordinance of the city of Cedar Rapids for maintaining a pen in which one hog was kept, in violation of a regulation of the board of health. It was admitted in the case that the pen was kept clean, and was not a nuisance by reason of filth, but was a nuisance, if at all, because of the regulation of the board of health. The court said in concluding the opinion: "Before an ordinance or regulation of a board of health can be said to be unreasonable, it should clearly so appear. The question should not remain doubtful, and the exercise of the discretion necessarily reposed in the officers and boards of cities making regulations for the preservation of the health of the inhabitants cannot be declared invalid unless it clearly so appears. A legal restraint may be imposed on the few for the benefit of the many. We conclude that the regulation and ordinance cannot, as a matter of law, be said to be unreasonable": *State v. Holcomb* (1885), 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33. As illustrative cases, see, also, *Hoops v. Ipava* (1893), 55 Ill. App. 94; *Ex parte* ²³⁷ *Foote* (1901), 70 Ark. 12, 91 Am. St. Rep. 63, 65 S. W. 706; *City of St. Louis v. Stern* (1876), 3 Mo. App. 48; *Commonwealth v. Van Sickle* (1845), *Brightly* (Pa.), 69.

The strongest cases cited by appellant in support of his contention are *Ex parte O'Leary* (1887), 65 Miss. 80, 7 Am. St. Rep. 640, 3 South. 144, *State v. Speyer* (1895), 67 Vt. 502, 48 Am. St. Rep. 832, 32 Atl. 476, 29 L. R. A. 573, and *McKnight v. City of Toronto* (1883), 3 Ont. 284. We need not attempt to distinguish these cases, or to reconcile the apparent conflicts, as we are satisfied that our conclusion is in accord with the authorities, sound legal principles, and a wholesome administration of the law.

The ordinance in question is the product of the legitimate exercise of a legislative power and administrative discretion lodged in the municipality for the promotion of the public

health and comfort, and we are not warranted in saying, as a matter of law, that its provisions are unreasonable or improperly invade private rights. The court did not err in overruling appellant's demurrer to the amended complaint. The judgment is affirmed.

POWER OF MUNICIPALITY TO DECLARE WHAT IS A NUISANCE.

I. Power to Declare a Nuisance, 372.

II. What may be Declared a Nuisance, 375.

III. What may not be Declared a Nuisance, 376.

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I. Power to Declare a Nuisance.

As announced in the principal case, the rule is everywhere conceded that a municipal corporation has no authority to declare that to be a nuisance which in fact is not such, although it is by law empowered to declare what shall be a nuisance. The authorities on this subject are numerous and uniform, and among them are the following: *Ward v. City of Little Rock*, 41 Ark. 526, 48 Am. Rep. 46; *Town of Arkadelphia v. Clark*, 52 Ark. 23, 20 Am. St. Rep. 154, 11 S. W. 957; *Ex parte Foote*, 70 Ark. 12, 91 Am. St. Rep. 63, 65 S. W. 706; *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *City of Orlando v. Pragg*, 31 Fla. 111, 34 Am. St. Rep. 17, 12 South. 368, 19 L. R. A. 196; *Harmon v. City of Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *Village of Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677; *Laugel v. City of Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266; *City of Indianapolis v. Miller*, 168 Ind. 285, 80 N. E. 626, 8 L. R. A., N. S., 822; *Everett v. City of Council Bluffs*, 46 Iowa, 66; *Tissot v. Great Southern Tel. etc. Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 South. 261; *City of St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49; *Wreford v. People*, 14 Mich. 41; *Green v. Lake*, 60 Miss. 451; *Ex parte O'Leary*, 65 Miss. 80, 7 Am. St. Rep. 640, 3 South. 144; *St. Louis v. Heitzeberg Packing etc. Co.*, 141 Mo. 375, 64 Am. St. Rep. 516, 42 S. W. 954, 39 L. R. A. 551; *City of St. Louis v. Schunckelberg*, 7 Mo. App. 536; *City of Kansas v. McAleer*, 31 Mo. App. 433; *State v. Jersey City*, 29 N. J. L. 170; *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *In re Sam Kee*, 12 Saw. 379, 31 Fed. 680; *Hennessy v. City of St. Paul*, 37 Fed. 565. If a city by its charter is given the extraordinary power to define and declare what is a nuisance, such power will not justify a wanton declaration that an act or avocation is a nuisance which unquestionably is not: *City of Kansas v. McAleer*, 31 Mo. App. 433. Power conferred in general terms on a municipal corporation to declare what are and to abate nuisances cannot be taken to authorize the condemnation of that as a nuisance, which in its nature, situation, or use is not such in fact: *City of Orlando v. Pragg*, 31 Fla. 111, 34 Am. St. Rep.

17, 12 South. 368, 19 L. R. A. 196. A clause in a charter giving a city power to declare what shall be a nuisance, and to prevent and remove it, does not mean that a city council may by ordinance declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination: *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693. And a city council has no power to declare a thing a nuisance which is not such at common law, nor in fact has not been declared to be such by statute: *Everett v. City of Council Bluffs*, 46 Iowa, 66. Under a general grant of power, a city is not authorized to declare that to be a nuisance, which in fact is not one, and thus destroy property or interfere with individual rights under the pretense of preventing or removing nuisances, but the city has the power to prevent and remove that which comes within the legal notice of a nuisance.

In *Re Sam Kee*, 12 Saw. 379, 31 Fed. 680, it was decided that a city ordinance which declares it a nuisance to keep a laundry within the larger part of the limits of a city, without regard to the character of the structure, or the appliances used, or the manner in which the occupation is carried on, is unconstitutional and void. In this case, it was said that "there is nothing tending, in the slightest degree, to show that this laundry is, in fact, a nuisance, and the uncontradicted allegations of the petition are that it is not. So far as appears, it is only made a nuisance by the arbitrary declaration of the ordinance, and it is beyond the power of the common council, by its simple fiat to make that a nuisance which is not so in fact: *Yates v. Milwaukee*, 10 Wall. 505, 19 L. ed. 987. To make an occupation indispensable to the health and comfort of civilized man, and the use of the property necessary to carry it on, a nuisance, by a mere arbitrary declaration in a city ordinance, and suppress it as such, is simply to confiscate the property and deprive its owner of it without due process of law. It also abridges the liberty of the owner to select his own occupation and his own method in the pursuit of happiness, and thereby prevents him from enjoying his rights, privileges, and immunities, and deprives him of the equal protection of the laws secured to every person by the constitution of the United States": In *re Sam Kee*, 12 Saw. 379, 31 Fed. 680. Again, in *Hennessy v. City of St. Paul*, 37 Fed. 565, it was said: "It was urged on the trial, and it is pressed with some degree of earnestness, that under the charter and ordinance as above recited, the exclusive jurisdiction was conferred upon the common council to determine what constitutes a nuisance. I do not think so. The common council undoubtedly has the power to abate nuisances, and a dilapidated and vacant building, by reason of fire, and its temporary occupation by disorderly persons and trespassers, and its use as a receptacle of filth, may become a common nuisance as recognized by law. But unless a nuisance, as defined by common law or by statute, exists, the act of the common council cannot make it one by a mere resolution. Such a doctrine might place the property of the people, no matter what in fact might be its real condition and character, at the disposal of the

common council, without compensation. A nuisance cannot be created by mere declaration of the common council, unless it is in some manner injurious to the public."

In *Grossman v. Oakland*, 30 Or. 478, 60 Am. St. Rep. 832, 41 Pac. 5, 36 L. R. A. 593, the general rule was laid down that a municipal corporation has no power to declare a particular use of property a nuisance, unless such use comes within the common law or the statutory idea of a nuisance, though its charter purports to confer upon it power to prevent and restrain nuisances, and to declare what shall constitute a nuisance. In this case it was said that under such a charter "the city is clothed with authority to declare by general ordinance under what circumstances and conditions certain specified acts or things injurious to the health, or dangerous to the public are to constitute and be deemed nuisances, leaving the question of fact open for judicial determination as to whether the particular act or thing complained of comes within the prohibited class, but it cannot, by ordinance, arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law or judicially determined to be such: *Denver v. Mullen*, 7 Colo. 345, 30 Pac. 693. An ordinance of the city cannot transform into a nuisance an act not treated as such by statutory or common law, nor can it prohibit the free use of property by the owner, so long as such use does not interfere with the rights of others": *Grossman v. Oakland*, 30 Or. 478, 60 Am. St. Rep. 832, 41 Pac. 5, 36 L. R. A. 593. The power to declare what are nuisances, and provide for their removal does not include an act, the doing of which may be a nuisance, but is confined to stationary nuisances, such as can be removed: *State v. Jersey City*, 29 N. J. L. 170. Trades, occupations, or businesses which, in their nature, are not nuisances, but which may become such by reason of their locality, surroundings or the manner in which they are conducted, cannot be arbitrarily declared to be nuisances, but they can be so declared only when, under the circumstances, they have become so in fact: *Langel v. City of Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266. The mere fact that a city ordinance declares a particular use of property to be a nuisance does not make it such unless it be a nuisance in fact: *Tissot v. Great Southern Tel. etc. Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 South. 261. And a common council of a city has no power to declare anything a nuisance which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience, and even not then, where the thing complained of is expressly authorized by the supreme legislative power of the state: *State v. Jersey City*, 29 N. J. L. 170. In *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, it was said that limekilns "not being nuisances in their nature, irrespective of their local surroundings, it is very clear that there has been no authority conferred upon the mayor and city council to make them nuisances, either to health, comfort, or property, by simply declaring them so. In the absence of express authority, the principle is too well settled to require the citation of authorities for its support, that a

particular use of property declared a nuisance by an ordinance of a municipal corporation does not make such use a nuisance, unless it be so in fact, according to the common law or statutory definition of nuisance. The ordinance in question, however, does not in terms declare limekilns to be, within the limits of the city, nuisances. It simply prohibits their operation altogether, but upon what ground does not distinctly appear. But the provision in the charter only confers authority to prevent and remove nuisances, and the mere possibility that all the limekilns within the limits of the city may, in the future, become nuisances, does not justify the city in prohibiting the business entirely in anticipation. Upon any such principle of action by the city, many of the most valuable and indispensable trades might be stopped."

Considerable discretion is generally vested in cities to declare what constitutes a nuisance, and such discretion when exercised by them will not be judicially interfered with, unless the corporation has been manifestly unreasonable and oppressive, or has invaded private rights illegally and transcended the power granted: *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 South. 621.

II. What may be Declared a Nuisance.

When cities are authorized by general statute to declare what constitutes a nuisance and to abate it, they may declare anything a nuisance which is in fact in its nature such, either under common-law principles or which is legally made a nuisance by statute. Thus an old, dilapidated building, situated upon the principal street of a city, unfit for human habitation, or other lawful use, devoted to no use or purpose, a resort for tramps and disorderly persons, a source of serious discomfort and annoyance to the public and of actual danger to useful and valuable property of the community within the range of its influence, may be declared by ordinance a public nuisance and abated as such: *Nazworthy v. City of Sullivan*, 55 Ill. App. 48. If a city under its charter has the extraordinary power to define and declare what is a nuisance, it may declare that the running of a rock-crushing machine in any block or square wherein there are three or more residences or dwellings occupied is a nuisance, and may prohibit it: *Kansas City v. McAleer*, 31 Mo. App. 433. By virtue of such power the following ordinance is valid: "All steam gristmills, sawmills, or machinery run by steam, contained and operated in buildings or structures wholly or in part of wood, which establishment, by reason of the defect or dilapidation of the buildings, the defective construction of the machinery, the worn-out condition of the boiler, or other cause, are or shall hereafter become dangerous to the persons or property in the vicinity, are hereby declared to be public nuisances, and liable to be proceeded against as such": *Green v. Lake*, 60 Miss. 451. Under such a charter a city has authority to declare the sale of intoxicating drinks within its limits a nuisance: *Block v. Town of Jacksonville*, 36 Ill. 301. An exhibition of a stallion on the public streets of a

city or village may be declared a nuisance by the municipal authorities: *State v. Iams* (Neb.), 111 N. W. 604; or the keeping of a jackass within the limits of a municipal corporation: *Ex parte Foote*, 70 Ark. 12, 91 Am. St. Rep. 63, 65 S. W. 706. A merry-go-round run by a steam engine, the whistle of which blew every few minutes, accompanied by a band, and attended by a large, noisy, and boisterous crowd until late at night, disturbing some of the people living nearby, is such a nuisance as a town council has power to declare to be such, and to abate it: *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

Under a city charter authorizing the common council to enact ordinances declaring what is a nuisance and to abate it, a city was held to have power to pass an ordinance prohibiting the erection of billboards exceeding seven feet in height, within the city, without the council's permission, and authorizing the abatement of any board erected in violation of the ordinance as a nuisance: *Whitmier-Filbrick Co. v. City of Buffalo*, 118 Fed. 773.

A city, in the exercise of its granted legislative discretion, may determine what is a nuisance, and enact necessary ordinances to suppress it, and it may thus declare and abate as a nuisance the act of smoking by passengers while in street-cars, as a part of the police power vested in it: *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 South. 621. A city charter giving the power to declare, prevent, and abate nuisances on private property gives power to pass an ordinance forbidding the owner of premises from permitting a growth of weeds thereon: *City of St. Louis v. Galt*, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778.

As a city has power to declare anything a nuisance which is clearly per se such, it has authority, of course, under a general grant of power over nuisances, to adopt an ordinance declaring a slaughterhouse within the town limits to be a nuisance and to have it abated: *Harrison v. City of Lewistown*, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628.

III. What may not be Declared a Nuisance.

Under the rule that a city can have no power to declare a certain thing or a particular use of property a nuisance, regardless of the fact of whether it is such or not, it may be well to call attention to some of the things, and uses of property, which cannot be declared nuisances. Thus, neither the keeping nor the raising nor owning of bees within the limits of a city is, in itself, a nuisance, and an ordinance which declares it to be so without regard to the fact of whether it is so or not is void: *Town of Arkadelphia v. Clark*, 52 Ark. 23, 20 Am. St. Rep. 154, 11 S. W. 957; and public picnics and dances are not in their nature nuisances, and an ordinance declaring them to be such is void: *Village of Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677.

Trees growing in a street or highway do not constitute a nuisance unless they obstruct travel, and in the absence of such obstruction an ordinance declaring them to be a nuisance is void: *Everett v. City of*

Council Bluffs, 46 Iowa, 66. It has also been held, though we doubt the soundness of such holding, that as a municipal corporation cannot make that a nuisance which is not such in fact, an ordinance declaring that "all hog-pens or lots now used as such are hereby declared a nuisance and shall be abated" is too broad and sweeping in its provisions, and is void: *Ex parte O'Leary*, 65 Miss. 80, 7 Am. St. Rep. 640, 3 South. 144. And that it is only when the keeping of hogs in a city is really a nuisance that the city may prevent their being kept therein, so that an ordinance providing generally that hogs may not be kept in the city, without reference to whether they are or are not a nuisance, is void: *Comfort v. City of Kosciusko*, 88 Miss. 611, 41 South. 268. Dense smoke alone is not a nuisance under the common law, and when not declared to be such by statute, it cannot be so declared by ordinance until shown to be such by clear and convincing proof: *St. Louis v. Heitzberg Packing etc. Co.*, 141 Mo. 375, 64 Am. St. Rep. 516, 42 S. W. 954, 39 L. R. A. 557. An ordinance declaring the running of any locomotive or train of cars upon any track in the city at a greater rate than one mile in six minutes, or declaring the stopping of a train of cars upon the track of a railroad authorized by law, where the track does not cross a street or public square, a removable nuisance, is not a fair or legal exercise of the power to declare nuisances and provide for their removal: *State v. Jersey City*, 29 N. J. L. 170. Statutory authority to declare what are and to obviate nuisances does not empower a municipal corporation to declare it a nuisance to open theater entrances and exits on alleys: *City of Indianapolis v. Miller*, 168 Ind. 285, 80 N. E. 626, 8 L. R. A., N. S., 822. Under general power to declare, prevent and abate nuisances, and regulate the places where offensive trades are carried on, a city is not authorized to prohibit the operation of limekilns within its limits, irrespective of their location: *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105.

A municipal corporation cannot, by its mere declaration that a certain structure is a nuisance, subject it to removal by any person supposed to be aggrieved, or even by the city itself: *Yates v. City of Milwaukee*, 10 Wall. 497, 19 L. ed. 984. Under a charter conferring upon the common council of a city the power to abate and remove nuisances and to define and declare what shall be deemed to be such, such council cannot, in the absence of any general law of the city or state, by a mere declaration by ordinance that a structure is a nuisance, make it such: *Chicago etc. R. R. Co. v. City of Joliet*, 79 Ill. 25; *Lake v. City of Aberdeen*, 57 Miss. 260. Under power to declare what shall constitute a nuisance, a city council has no authority to declare a partially burned building a nuisance, irrespective of its actual condition as affecting public or private safety, and health: *City of Evansville v. Miller*, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161. A public laundry is not a nuisance per se, and cannot be made so by the mere legislative declaration of a city council. Such declaration is not a proper exercise of the police power, but is unconstitutional and void:

In *re Sam Kee*, 12 Saw. 379, 31 Fed. 680; In *re Hong Wah*, 82 Fed. 623. The common council of a city cannot, by ordinance, declare a church which is being erected by a negro congregation a nuisance, on the ground that worship therein will be noisy and disagreeable to neighboring residents. Such an ordinance is arbitrary and unconstitutional: *Boyd v. Board of Council of Frankfort*, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669. If a cemetery has never been, and will not become, a nuisance, and is not dangerous to life or detrimental to the public health, it is not within the constitutional powers of a municipality to declare it a nuisance for the purpose of suppressing it, and prohibiting its use: *County of Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Town of Lake View v. Letz*, 44 Ill. 81; *Hume v. Laurel Hill Cemetery*, 142 Fed. 522. A city ordinance declaring a certain newspaper to be a public nuisance, and prohibiting its circulation within the city limits is unconstitutional and void: *Ex parte Neill*, 32 Tex. Cr. Rep. 275, 40 Am. St. Rep. 776, 22 S. W. 923. Where the charter of a town confers power on it to prevent and remove nuisances, without any provision authorizing it to define and declare what is a nuisance, the town has only power to remove summarily conditions which were nuisances at common law, and as wooden awnings over a city sidewalk do not constitute a public nuisance, *per se*, the city has no power to declare them a nuisance, and require the summary abatement thereof: *Brown v. Town of Carrollton*, 122 Mo. App. 276, 99 S. W. 87.

IV. Conclusiveness of Declaration.

In Illinois the rule is firmly established that city and village authorities under a general grant of power to declare what shall constitute a nuisance, have no power to adopt an ordinance declaring a thing a nuisance which is in fact not clearly so, but, in doubtful cases, where a thing may not be a nuisance, depending on a variety of circumstances requiring the judgment and discretion of such authorities in the exercise of their legislative functions, their action is conclusive of question, and binding on the courts: *North Chicago etc. Ry. Co. v. Town of Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Harmison v. Town of Lewistown*, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628; *Langel v. City of Bushnell*, 96 Ill. App. 618; affirmed on appeal in *Langel v. City of Bushnell*, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266. And the same rule prevails in Indiana: *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, 38 N. E. 402, 39 N. E. 869, 28 L. R. A. 679. As a general rule, however, the power or authority of a municipality to declare a certain thing a nuisance arbitrarily cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not: *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6. Whether an act or thing not clearly a nuisance constitutes one or not must be judicially determined in each particular case: *Town of Arkadelphia v. Clark*, 52 Ark. 23, 20 Am. Rep. 154, 11 S. W. 597; *Phillips v. City of Denver*, 19 Colo. 179, 41 Am. St.

Rep. 230, 34 Pac. 902; *St. Louis v. Heitzeberg Packing etc. Co.*, 141 Mo. 375, 64 Am. St. Rep. 516, 42 S. W. 954, 39 L. R. A. 551; *Hutton v. City of Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *Griffin v. City of Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684. If an alleged nuisance is not so at common law, or made so by statute, but has been declared a nuisance by ordinance and ordered to be abated, under power to declare and abate nuisances granted to a city, the person violating the ordinance may show that the thing declared to be a nuisance is not so in fact, and the action of the city in such case is not conclusive: *City of St. Louis v. Schuuckelberg*, 7 Mo. App. 536.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY v. RAMSEY.

[168 Ind. 390, 81 N. E. 79.]

ACTIONS—Separate Causes—Jurisdiction.—If two steers are killed, one instantly and the other mortally wounded, by being struck by a locomotive, running twenty-five or thirty miles per hour, at points about two hundred feet apart, there is but one cause of action, and the circuit court is not deprived of jurisdiction on the question of the value of the property involved. (p. 380.)

RAILROADS—Liability for Killing Stock—Farm Crossings.—A railroad company is not liable, unless negligent, for injury to or the killing of animals that enter upon its tracks by a gate of a private farm crossing. (pp. 381, 382.)

RAILROADS—Liability for Killing Stock—Entries upon Right of Way.—A railroad company is not liable, unless negligent, for killing stock which first entered upon its unfenced right of way, but afterward crossed the land of others and again entered upon such right of way through a gate at a private farm crossing. (p. 382.)

NEGLIGENCE—How Determined.—If a statute fails to define what shall constitute negligence, it must be determined by the rules of the common law. (p. 384.)

TRIAL—Findings—Presumption.—If a finding is silent upon a material fact, it will be presumed not to exist, as against the party having the burden of proof. (p. 384.)

RAILROADS—Duty as to Stock Wrongfully on Track.—A railroad company owes no duty to be on the lookout for cattle, wrongfully and unexpectedly, on its right of way. (p. 384.)

RAILROADS—Liability for Killing Stock—Negligence When Question of Fact.—If an engineer in charge of a locomotive actually saw cattle on the track, and could have stopped the train with reasonable effort and safety and thus have avoided killing them, the question whether his failure to do so, under the circumstances, constituted negligence, is a question of fact. (p. 385.)

J. R. East and R. H. East, for the appellee.

E. C. Field, H. R. Kunie and J. E. Henley, for the appellant.

391 HADLEY, J. Action by appellee for the killing of two steers. The complaint is in two paragraphs, the first stating the cause of action under the statute, alleging that the steers went upon the railroad track at a point where the same might have been, but was not, securely fenced. The second is predicated upon the alleged negligence of appellant's servants in the management and operation of its train. A demurrer to each paragraph of the complaint was overruled, the case was put at issue by general denial, there was a special finding of facts, conclusions of law stated, and judgment rendered thereon in favor of appellee for ninety dollars.

392 Appellant's first proposition is that the trial court did not have jurisdiction over the subject matter of the action; that as each animal was of the value of forty-five dollars, and as they were killed at different times, there were two separate causes of action, each of which was within the exclusive jurisdiction of a justice of the peace; citing Burns' Rev. Stats. 1901, sec. 5513; Rev. Stats. 1881, sec. 4026; Louisville etc. R. Co. v. Quade (1885), 101 Ind. 364; and other cases. The proposition would be sound if its premise were sound. But the finding is that the steers were killed, one instantly, the other mortally wounded, by being struck by a locomotive, running twenty-five or thirty miles an hour, at points about two hundred feet apart. These findings show that while both animals were not struck at precisely the same moment, the time intervening could not have amounted to more than a few seconds, and, for the purpose of this action, will be regarded as the same time.

The facts specially found, applicable to the first paragraph of the complaint, may be summarized as follows: Appellant was the owner of thirteen steers, kept in an inclosed pasture, surrounded by a fence, in good repair and sufficient to turn stock. On May 1, 1904, they escaped from said pasture without plaintiff's fault or knowledge, and he did not know that they had escaped, until he was informed on the morning of May 2d that two of them had been killed by defendant company. After the steers left defendant's pasture they entered upon defendant's right of way at a point near said pasture where the defendant had failed to construct and maintain a fence, and where it could and should have been fenced. From the place of entry the cattle passed along the line of the railroad to Clear creek, where they passed under a bridge constructed by defendant over said creek, from the east to the

west side of the railroad, and continued their course west over the lands of others, until they arrived at and entered upon the lands of one Ketcham, whose land lay on both sides of the railroad. ³⁹³ Gates in the right of way fence had been therefore erected and a private farm crossing constructed across the right of way and track of the railroad for the use and convenience of Ketcham, and upon his request. When the cattle went upon the land of Ketcham the west gate of said farm crossing was open, and they passed through said open gate onto the defendant's railroad, and then and there the two animals were killed, by being struck while on the track, at places about two hundred feet apart, by a locomotive drawing a train and running upgrade at the rate of twenty-five or thirty miles an hour. The animals killed were worth ninety dollars.

In 1863 (Burns' Rev. Stats. 1901, sec. 5312 et seq., Rev. Stats., 1881, sec. 4025 et seq.) the legislature passed an act imposing upon railroad companies liability for stock killed at all places where their roads were not securely fenced, making no exceptions or provisions for private farm crossings. A line of decisions followed the passage of this act, construing its provisions to the effect that if a railroad company constructed, or permitted the land owner to construct, a private crossing for his accommodation, such land owner thereby waived the benefit of the statute as to all animals of his own that passed to the railroad through such private gate, but as to all other persons the obligation of the company securely to fence its right of way existed at private crossings the same as elsewhere, and the company was liable for injury to animals of others entering upon the railroad at such crossings: *Wabash R. Co. v. Williamson* (1885), 104 Ind. 154, 3 N. E. 814, and cases cited. This remained the law until 1885, when an act was passed providing that persons owning land on both sides of the railroad should have the right to construct and maintain private wagon ways across the railroad. And when such railroad is fenced such land owner shall erect and maintain substantial gates in the lines of such fence, and keep the same securely locked. It is further provided: "If animals are killed or ³⁹⁴ injured on the track of such railroad by the cars or locomotives thereof, the company owning or operating such railroad shall not be liable to pay damages therefor if such animal entered upon the track of such railroad through such gates, unless it shall be

proved that such killing or injury was caused by the negligence of the servants of the company owning or operating such railroad": Burns' Rev. Stats. 1901, secs. 5321, 5322; Acts 1885, p. 148, secs. 2, 3.

The act of 1885, and all previous legislation, and the decisions of the court construing the same, were reviewed in the case of *Hunt v. Lake Shore etc. R. Co.* (1887), 112 Ind. 69, 13 N. E. 263, and the conclusion there reached that, by the latter act, the manifest intention was to give the farmer, who prior thereto had no such power, the right to force a wagon way across a railroad that traversed his land, and to relieve railroad companies from all liability for injuring or killing animals that got upon the track by passing through one of such gates. In other words, under the act of 1885 a railroad company is not liable, in the absence of negligence, for the injury or killing of animals that enter upon its tracks by a gate of a private farm crossing. We are still satisfied with the ruling, and this decision must dispose of the present case if it is found that the cattle in question went upon the railroad track through such gate.

It will be recalled that the cattle broke out of their pasture, and reached the railroad at a place where it might have been, but was not, fenced. The plaintiff himself testified that the unfenced road the cattle entered upon was a stone-quarry switch and not a part of the main road. The special finding further states that the cattle went along the road till they came to Clear creek, then down into the creek, passing under the bridge from the east to the west side of the right of way of the main track, and thence, continuing west some distance, over the lands of others, reached and entered upon the lands of Ketcham, and thence passed to the railroad track ³⁹⁵ through an open gate to a private crossing constructed for the convenience and accommodation of Ketcham and upon his request.

Relying on a long line of cases which hold that the test of liability for animals killed is the point of entry upon the railroad, and not the place where killed, appellee earnestly contends that the special findings show that the animals sued for entered upon the railroad at a place where the company was bound to fence, and not through the gate of a private crossing. We cannot accept this view as a correct rendering of the facts. The first entry upon the railway ended when the cattle passed under the bridge and off the railroad

right of way to the west. They traveled over the lands of others, and reached and entered upon the farm of Ketcham, and while on the latter's farm went through an open gate of his private farm crossing onto the railroad, and were then and there killed. How long they wandered, or how far from the bridge was the point of second entry, is not stated. It is, however, very clear that they were uninjured when they left the railroad of their own accord at the bridge, and that they would not have been injured at all by defendant's cars if they had not re-entered upon the railroad. Having abandoned the railroad at the bridge, we are unable to see any causal or proper connection between the first and second entry. For aught that appears, the second entry might have been miles distant from the first, and might have occurred hours after the first, and we feel compelled to regard them as separate and distinct entries. The cases of *Jeffersonville etc. R. Co. v. Lyon* (1880), 72 Ind. 107, and *Louisville etc. R. Co. v. Etzler* (1892), 3 Ind. App. 562, 30 N. E. 32, relied upon by appellee as supporting his claim that the two constitute but a single entry, cannot be accepted as authorities on that point. In each of these cases the animals injured passed onto the railroad at a place where the company was bound to fence, and while there were frightened and driven by a train along the track to a part of the railroad that was properly inclosed, and there killed. It seems clear that the entry that resulted in the killing of the animals was through the gate of a private farm crossing, and that the case must be governed by the rule declared in *Hunt v. Lake Shore etc. R. Co.*, 112 Ind. 69, 13 N. E. 263, and *Pennsylvania Co. v. Spaulding* (1887), 112 Ind. 47, 13 N. E. 268.

With respect to the second paragraph of complaint that counts on negligence of appellant's servants in managing the train, the facts disclosed by the special findings are, in substance, as follows: The defendant's track is practically straight for a distance of eight hundred feet south of the point where the first steer was struck, from which point the engineer in charge of the train might have seen the cattle on the right of way if he had looked. Said engineer did see the cattle when four hundred feet south of where the first one was struck, and blew the engine whistle, and gave the usual signal for animals on the track, but failed to stop or check the train, until both animals were struck. The steers escaped

from their pasture and were killed as aforesaid without any fault on the part of the plaintiff.

In section 5322, supra, exempting railroad companies from liability, where stock enters at a private cross^{ing}, there is this exception, "unless it shall be proven that death or injury was caused by the negligence of the company." There being no definition of what shall constitute the negligence referred to by the statute, it is determined by the rules of the common law.

The charge in the complaint is that the employees knew that the cattle were on the track, and would be injured by the onward movement of the train, and, with this knowledge, they went ahead, instead of bringing the train to a stop, as they might have done. The finding is that the engineer might have seen the cattle on the right of way for a distance of eight hundred feet if he had looked,³⁹⁷ and did see them for a distance of four hundred feet, and blew the whistle, but failed to stop his train until after the animals were killed.

It is not shown that the cattle were on the track when the engineer could have seen them. For aught that is found they might have been at the bottom of a high embankment, and might not reasonably have been expected to run upon the track in front of the train. Besides, there is no finding that the engineer did not try to stop the train, or that he could have stopped it if he had tried.

It rested upon the plaintiff to prove the negligence. It is a familiar rule of practice that, if a finding is silent upon a material fact, as to that fact it will be presumed against the party having the burden of proof: *Dennis v. Louisville etc. R. Co.* (1888), 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448.

The railroad company owed the plaintiff no duty to be on the lookout for his cattle. They were wrongfully and unexpectedly on the right of way, while the company was running its train at a speed and place where it had a right to run it unobstructed by the presence of the cattle. If the employé in charge of the locomotive actually saw the steers on the track, and could have stopped the train with reasonable effort and safety, and avoided the injury, whether his failure to do so, under the circumstances, constituted negligence was a question of fact. But it is plain that we cannot say, as a matter of law, that his failure to see, or heed if he did see, the cattle on the right of way, eight hundred feet distant, was negligence. Neither can we say, as a mat-

ter of law, that he could have stopped the train, moving, as it was, twenty-five or thirty miles an hour, within a space of four hundred feet, and avoided the injury: *Dennis v. Louisville, etc. R. Co.* (1881), 116 Ind. 42, 18 N. E. 179, 1 L. R. A.

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The facts found it does not appear that there was any duty resting upon the engineer to bring his train to a stop, or conceding to him the presumption of due care, be held that the second paragraph of the complaint was not made out.

For errors of the court in stating its conclusions of law on the special findings in favor of the plaintiff, the judgment is reversed, with instructions to the Monroe circuit court to state the conclusions of law in favor of the defendant, and render judgment accordingly.

Judgment reversed.

Employees in Charge of a Railroad Train are not bound to be on a constant lookout for animals trespassing on the track; but when they actually see an animal on the track, or likely to at once go thereon, it is their duty to use every precaution to avoid injury to him: *Memphis etc. R. R. Co. v. Kerr*, 52 Ark. 162, 20 Am. St. Rep. 159, and note; *Rogers v. Georgia R. R. Co.*, 100 Ga. 699, 62 Am. St. Rep. 351; *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323, 19 Am. St. Rep. 174; *Case v. Central R. R. Co.*, 59 N. J. L. 471, 59 Am. St. Rep. 617.

SCHMIDT v. CITY OF INDIANAPOLIS.

[168 Ind. 631, 80 N. E. 632.]

MUNICIPAL CORPORATIONS—Ordinances—Motives in Enacting.—If a city is empowered to enact an ordinance "to tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries," the motives and purposes inducing the passage of a penal ordinance licensing and regulating such breweries, distilleries and depots are irrelevant, and courts will not inquire into them. (p. 389.)

MUNICIPAL CORPORATIONS—Penal Ordinances—Unfair Enforcement—Pleading.—Unless facts are pleaded showing a fixed and continuous policy of unjust discrimination on the part of a municipality in the enforcement of a penal ordinance, its validity cannot be inquired into. (p. 389.)

MUNICIPAL CORPORATIONS—Ordinances—License Tax or Tax for Revenue.—An ordinance relating to health, welfare, morality and security, and imposing the payment of a fee for the purpose of carrying out such regulation, imposes a license proper by virtue of the police power, but when the fee is imposed solely for revenue purposes, it is a tax. (p. 390.)

MUNICIPAL CORPORATIONS—Ordinance's Validity—Presumption.—If a municipal ordinance is adopted which would be lawful

if intended for one purpose, and unlawful if for another, the presumption is that the purpose was lawful. (p. 390.)

MUNICIPAL CORPORATIONS—Ordinances—License on Liquor Traffic.—Generally, license fees imposed upon useful occupations are in fact taxes exacted under the revenue power, while licenses imposed upon the liquor traffic and such other occupations as call for regulation by the state are none the less licenses proper because they yield a revenue in excess of that required for the purpose of regulation. (p. 390.)

INTOXICATING LIQUORS—Power of Municipalities to Control Traffic in.—The business of handling and selling intoxicating liquor may be licensed, regulated, restrained, or prohibited by the legislature, without limit, in the exercise of the police power, and this power may be expressly delegated to municipalities. (p. 391.)

INTOXICATING LIQUORS—Interstate Commerce.—Intoxicating liquors when transported as articles of interstate commerce and delivered to the consignee are subject to the police regulations of the several states, and of the cities therein under power delegated by the state. (p. 392.)

INTOXICATING LIQUOR—Power to License Traffic.—The police power may be rightfully exercised in the levy of such a license tax as will limit and discourage the business of handling and selling intoxicating liquors, and this power necessarily implies the right to fix the amount of the license fee. (pp. 392, 393.)

INTOXICATING LIQUORS—Amount of License Fee.—The power to license and to fix the fee to be charged for carrying on the business of dealing in intoxicating liquors being lodged in a municipality, the amount to be exacted will be disturbed only in case of a manifest abuse of power. (p. 393.)

INTOXICATING LIQUORS—Ordinances—Discrimination.—A municipal ordinance imposing a license fee upon all breweries, distilleries, and depots thereof, established within the city, is not unjustly discriminating, though it defines the places which shall be considered as depots, so as to include a brewery outside the city shipping beer to a resident agent to be sold in such city. (p. 394.)

CONSTITUTIONAL LAW.—Municipal Legislation is to be construed and interpreted by the same rules as statutes, and its constitutionality and validity upheld whenever possible. (p. 394.)

F. E. Matson and J. F. Cowern, for the appellee.

Harvey, Pickens, Cox & Kahn, for the appellant.

⁶³² **MONTGOMERY, C. J.** In the police court of the city of Indianapolis appellant was convicted of violating an ordinance which prohibits the conduct or maintenance within the city of a brewery, or a depot or agency of a brewery, without a license. He appealed from this judgment to the superior court of Marion county, wherein he refiled his ⁶³³ answer in two paragraphs. The first paragraph was a general denial, and the second pleaded certain facts affirmatively. The court sustained appellee's demurrer, for want of facts, to the second paragraph of answer, to which decision appellant duly excepted, and thereupon withdrew the general de-

nial, and announced an election to stand upon the sufficiency of the second paragraph, declined to amend or to plead further, and the court adjudged appellant guilty as charged, and assessed a fine of five dollars and costs.

The only error assigned is the sustaining of appellee's demurrer to the second paragraph of answer.

The ordinance in question provides (1) that it shall be unlawful for any person, firm, association, company or corporation to establish, conduct or maintain in the city of Indianapolis any brewery, distillery or depot or agency of any brewery or distillery, without complying with the provisions of the ordinance; (2) that an annual license fee of one thousand dollars shall be charged and paid for each brewery, distillery, depot or agency so established, conducted or maintained, and on the payment of such a fee a license shall be issued for one year, designating the place where such brewery, distillery, depot or agency is to be established, conducted or maintained; (3) that "any structure or inclosure within said city used by any person, firm or corporation for the receipt and storage of liquors brewed by any brewery without said city and shipped to said city for sale or distribution to wholesale or retail dealers in such liquors shall be considered a depot of a brewery under the provisions of this ordinance, whether such deposit or storage be made by the owner of said brewery, or the agent of such owner, or by a purchaser from said brewery handling said liquors on his own account"; (4) that a register of the name of the receiver, date of issuance and expiration of such licenses, and location of such distillery, brewery, depot or agency shall be kept; (5) that during business hours all such places shall be open to inspection by the police officials, ⁶³⁴ board of health, and chief of the fire force of the city; (6) that no liquors shall be distilled, brewed or kept containing poisonous or injurious drugs, or other deleterious substances, and all liquors kept at such places shall be subject to examination and tests as to their purity by inspectors of the board of health; (7) that all such places and premises shall be kept clean and free from any unwholesome material or by-product giving off noxious or offensive odors, and requiring immediate removal of any accumulation of such material on notice from the health officers; (8) that such liquors shall be guarded from contact with fire, and making it the duty of the fire chief to see that the storage of such liquors is not subject to danger

from fire; (9) that it shall be unlawful to allow minors to congregate on the premises of any such brewery, distillery, depot or agency; (10) that it shall be unlawful to sell in less quantity than a quart, or to give away any liquors to be drank upon any such premises; (11) that a penalty not exceeding one hundred dollars per day for a violation of any provision of the ordinance may be assessed; (12) that all conflicting ordinances be repealed; (13) that the ordinance take effect from and after its passage and publication.

The second paragraph of answer set out verbatim the ordinance upon which the prosecution was founded, exhibited the manner in which it was amended at the time of its adoption, alleged that the Pabst Brewing Company is a corporation organized under the laws of Wisconsin and engaged in the manufacture of beer at Milwaukee, and for more than ten years has been engaged in selling the same in Indiana and other states, described the manner in which it is inclosed in casks, barrels and bottles, transported and stored; that it is pure, prepared for shipment under the supervision of competent scientists, sold at wholesale only in original packages to dealers and consumers, and that none is sold on Sunday or sold or given away to minors or to persons in the habit of becoming intoxicated or to be ^{or} drank upon the premises where sold; that the premises are kept clean and free from unwholesome substances and noxious odors, and minors are not allowed to congregate in the vicinity thereof; that there is no more danger of fire or explosion from the storage of such beer than from the storage of other merchandise; that appellant is the special agent of the Pabst Brewing Company and charged with the duty of receiving, storing and caring for shipments of beer at Indianapolis, and selling the same in said city and surrounding territory; that the ordinance discriminates in favor of persons who may handle and deal in beer brewed in the city of Indianapolis, and also in favor of distilleries and against breweries; that it grants to citizens of Indianapolis privileges and immunities which, upon the same terms, are withheld from citizens outside of said city, in violation of section 23, article 1 of the constitution of Indiana; that it denies to citizens of other states privileges and immunities granted to citizens of Indiana; that it levies a tax upon commerce between the states in violation of section 8, article 1, of the constitution of the United States; that the license fee charged is excessive; that three other brew-

ing companies are located within the city of Indianapolis, and engaged in the manufacture and sale of beer in competition with the Pabst Brewing Company; that other persons within the city are engaged in buying beer from breweries and selling the same in like manner as appellant, from whom no license is required; that the object of the ordinance is not police regulation, but to oppress and discriminate against the business of breweries located outside of the city, and the same is so enforced as to favor the business of breweries located within the city of Indianapolis.

The charter of the city of Indianapolis empowers its common council to enact an ordinance "to tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries": Burns' Rev. Stats. 1901, sec. 3794; Acts 1891, ⁸³⁶ p. 137, sec. 23. The ordinance was enacted in pursuance of this statute, and its subject matter was plainly within the authority expressly granted. Under such circumstances the motives and purposes inducing the passage of the ordinance are irrelevant, and courts will not inquire into or consider a charge of an improper or sinister purpose on the part of members of the common council in the adoption of such ordinance. The allegations of the answer concerning the purpose of the council in the passage of the ordinance must be disregarded: Downey v. State (1903), 160 Ind. 578, 67 N. E. 450; Cloverdale v. Edwards (1900), 155 Ind. 374, 58 N. E. 495; Lilly v. City of Indianapolis (1898), 149 Ind. 648, 49 N. E. 887; Buell v. Ball (1866), 20 Iowa, 282; Freeport v. Marks (1868), 59 Pa. 253; 26 Am. & Eng. Ency. of Law, 2d ed., 569.

The charge that the ordinance at a given time was unfairly enforced is too general to present any question. No facts were alleged upon which to rest the conclusion of the pleader that the ordinance is so enforced as to favor the business of breweries located within the city. Without intimating that the validity of a penal ordinance may be assailed on the ground of partiality in its enforcement, we hold that in the absence of facts pleaded showing a fixed and continuous policy of unjust discrimination on the part of the municipality we will not enter upon a consideration of the question suggested. The general purpose of the ordinance is manifest from its terms and from the charter provisions quoted, and the question for determination is whether this enactment for the achievement of that purpose violates the fundamental law.

Appellant's counsel contend that this is a taxing ordinance, and that the police regulations were embodied as a mere cloak to conceal its true character and object.

We are required at the threshold to decide whether the sum exacted by this ordinance is a license fee imposed ⁶³⁷ under the police power, or a tax for revenue. Ordinances enacted in relation to the comfort, health, convenience, good order, morality, security and general welfare of the inhabitants are comprehensively known as police regulations. Where a fee is imposed for the purpose of such regulation and the ordinance requires compliance with prescribed conditions in addition to the payment of the fee, such sum is a license proper, imposed by virtue of the police power; but where the fee is imposed solely for revenue purposes, and payment thereof gives the right to carry on the business without the performance of any further conditions, it is a tax: 21 Am. & Eng. Ency. of Law, 2d ed., 774, and cases cited. Where a municipal regulation is adopted, which would be lawful if intended for one purpose, and unlawful if for another, the presumption is that the purpose was lawful, unless the contrary clearly appears: *Johnson v. Philadelphia* (1869), 60 Pa. 445; *Lansdowne Borough v. Springfield Water Co.* (1901), 16 Pa. Super. Ct. 490; *Robson v. Doyle* (1901), 191 Ill. 566, 61 N. E. 435; *Harmon v. City of Chicago* (1892), 140 Ill. 398, 29 N. E. 732; *Ivey v. State* (1900), 112 Ga. 175, 37 S. E. 398; *State v. Capdevielle* (1901), 104 La. 561, 29 South. 215.

In general it may be said that license fees imposed upon useful occupations, not hurtful or pernicious to society, and not calling for regulation by the sovereign power, are in fact taxes, exacted under the revenue power; while licenses imposed on the liquor traffic and such other occupations as call for regulation by the state are none the less licenses proper because they yield a revenue in excess of that required for the purpose of regulation. This distinction makes much of the argument of appellant's counsel inapplicable, and the propositions upon which they insist untenable. Presuming, as we must, that the common council in the enactment of this ordinance acted within its authority and in good faith, we are unable to say, ⁶³⁸ upon the facts well pleaded in the answer and admitted to be true by the demurrer, that the ordinance is a revenue measure in the guise of a police regulation.

It is argued that the regulating provisions of the ordinance are all covered by statutes and are accordingly void; but with this contention we cannot agree. The maintenance of offensive things in or near a public place, to the annoyance of the inhabitants, constituted a nuisance at common law, and the substance of the common-law definition of a nuisance has been embodied in the statute law of this state; and yet the common council of appellee has power to declare what shall constitute a nuisance, and to prevent, abate and remove the same. The specific duties imposed by this ordinance upon the police, health officers and fire chief, and the prohibition against allowing minors to congregate upon or about the premises, are not found in the statutes. The evils which attend and inhere in the business of handling and selling intoxicating liquors are universally recognized, and the danger therefrom to the peace and good order of the community everywhere necessitates the exercise of the police power. The theory of the legislation upon this subject is, that the business is one which requires restraint because it is harmful to society, and the license fee is exacted for the purpose of restraining the business. This necessity for regulation and restriction in the interests of peace and good order and for the promotion of public morals, as already said, distinguishes the liquor business from useful and harmless occupations. It is well settled that the legislative power to deal with this subject, whether it be to license, regulate, restrain or prohibit the sale of such liquors is unlimited. All such restrictive measures, taken either by the state or by virtue of authority delegated to municipalities, are upheld as a proper exercise of the police power: 17 Am. & Eng. Ency. of Law, 2d ed., 223, and cases cited, note 2.

⁶³⁹ In the case of *City of Indianapolis v. Bieler* (1894), 138 Ind. 30, 36 N. E. 857, this court held a license ordinance very similar to the one in suit, but without any of the regulating provisions of the present act, not to be an attempted exercise of the taxing power, but a valid exercise of the police power expressly granted to the city by the legislature: See, also, *Jordan v. City of Evansville* (1904), 163 Ind. 512, 72 N. E. 544, 67 L. R. A. 613; *Boomershine v. Uline* (1902), 159 Ind. 500, 65 N. E. 513; *State v. Gerhardt* (1896), 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; *Emerich v. City of Indianapolis* (1889), 118 Ind. 279, 20 N. E. 795; *Gambill v. Endrich Bros.* (1904), 143 Ala. 506, 39 South. 297.

In the case of *Pabst Brewing Co. v. City of Terre Haute* (1899), 98 Fed. 330, the United States circuit court for the district of Indiana held an ordinance similar to the one involved in the case of *City of Indianapolis v. Bieler* (1894), 138 Ind. 30, 36 N. E. 857, to have been enacted under the taxing power, and not under the police power of the state. The provisions in the present ordinance for the control, regulation, and supervision of such breweries, distilleries, depots, and agencies are sufficient to distinguish this from the case of *Pabst Brewing Co. v. City of Terre Haute* (1899), 89 Fed. 330, and to make that case an authority for our conclusion, that the ordinance under consideration was passed in the proper exercise of the police power of the city.

The conclusion already announced—that this is to be classed as a police regulation and not a revenue measure—disposes of the contention that it is an unlawful interference with interstate commerce, in violation of the constitution of the United States. By an act, approved August 8, 1890, Congress expressly subjected intoxicating liquors, when transported as articles of interstate commerce and delivered to the consignee, to the police regulations of the several states and territories: 26 U. S. Stats., p. 313, c. 728; *City of Indianapolis v. Bieler* (1894), 138 Ind. 30, 36 N. E. 857; *Pabst Brewing Co. v. City of Terre Haute* (1899), 89 Fed. 330; ⁶⁴⁰ *Pabst Brewing Co. v. Crenshaw* (1905), 193 U. S. 17, 25 Sup. Ct. Rep. 552, 49 L. ed. 925; *Foppiano v. Speed* (1905), 199 U. S. 501, 26 Sup. Ct. Rep. 138, 50 L. ed. 288; *In re Rahrer* (1891), 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572.

It is insisted that as a license fee the charge of one thousand dollars is excessive. It is true that as a general principle the amount which may be exacted for a license proper under the police power must be limited and reasonably measured by the cost of the issuance of the license and of the regulation and inspection for which provision is made, while a wider latitude is allowed in imposing a special tax upon a particular occupation or business as a source of revenue. The general doctrine properly applies only to useful occupations which, being not detrimental to the public, cannot be unduly restricted or substantially prohibited under the guise of a police regulation. The courts now quite generally recognize that as to those lines of business which are hurtful to public morals, productive of disorder, or injurious to the public, but nevertheless tolerated, the police power may be rightfully exercised

in the levy of such a license tax as will limit and discourage the business: Gray on Limitations of Taxing Power, sec. 1452; Tiedeman on Limitations of Police Power, pp. 273, 277, 278; 2 Cooley on Taxation, 3d ed., pp. 1142, 1143; Meyer, Jossen & Co. v. City of Mobile (1906), 147 Fed. 843; Duluth Brewing etc. Co. v. City of Superior (1903), 123 Fed. 353, 59 C. C. A. 481; Bartemeyer v. Iowa (1873), 18 Wall. 129, 21 L. ed. 929; Boston Beer Co. v. Massachusetts (1877), 97 U. S. 25, 24 L. ed. 989; State v. Hudson (1883), 78 Mo. 302.

The power and authority to license necessarily implies the right to fix the amount of the license fee: City of Portland v. Schmidt (1885), 13 Or. 17, 6 Pac. 221. The power to license and to fix the fee to be charged being lodged in the municipality, the amount to be ⁶⁴¹ exacted is not strictly a judicial question, and the action of the municipal body in fixing the license fee will be disturbed only in case of a manifest abuse of its power: Matter of Guerrero (1886), 69 Cal. 88, 10 Pac. 261; Dennehy v. City of Chicago (1887), 120 Ill. 627, 12 N. E. 227; Spiegler v. City of Chicago (1905), 216 Ill. 114, 74 N. E. 718.

The allegations of the answer showing the cleanliness of the premises, purity of the goods, and freedom from danger of fire, are of no weight in determining the question before us. In the light of these controlling principles we cannot judicially know or say that the amount of the license exacted of appellant in this case was unreasonable or excessive. The contrary is presumptively true: City of Indianapolis v. Bieler (1894), 138 Ind. 30, 36 N. E. 857; Jordan v. City of Evansville (1904), 163 Ind. 512, 72 N. E. 544, 67 L. R. A. 613; 2 Cooley on Taxation, 3d ed., p. 1143; Meyer, Jossen & Co. v. City of Mobile, 147 Fed. 843; Van Hook v. City of Selma (1881), 70 Ala. 361, 45 Am. Rep. 85; Kittanning Borough v. Kittanning etc. Gas Co. (1904), 26 Pa. Super. Ct. 355, 362; Brown v. City of Galveston (1903), 97 Tex. 1, 75 S. W. 488.

It is further claimed that section 3 of the ordinance is void, for the reason that it discriminates in favor of persons who may handle and deal in beer brewed in the city of Indianapolis, and in favor of distilleries as against breweries, and grants to citizens of Indianapolis privileges and immunities which upon the same terms are withheld to citizens residing outside of said city, and denies to citizens of other states privileges and immunities granted to citizens of Indiana. Appellant is not in a position to raise and present the last

objection, since he is not shown by the record to be a citizen of another state, and the constitutional provision invoked does not apply to the Pabst Brewing Company, a corporation: *Pembina Min. Co. v. Pennsylvania* (1888), 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650.

642 The provisions of the city charter and of the first and second sections of the ordinance are general in character, and subject alike to license and regulation every brewery, distillery, depot and agency of any brewery or distillery within the city, and are wholly free from any charge of discrimination. The objections under immediate consideration are directed solely to section 3 of the ordinance. In our opinion this section is merely in aid, and in a measure explanatory, of the preceding sections, and is not to be construed as exclusive in character and as containing an exhaustive definition of the subjects to be licensed. We may assume that at the time of the passage of the ordinance certain places were maintained within the city, for the storage and distribution of beer brewed without the city, some of which were conducted by the owners of such liquors, and others by agents, and that to facilitate the interpretation and enforcement of the ordinance this section was drafted, providing that all such places, without regard to proprietorship, should be included within the purview of the ordinance and regarded as depots of a brewery. This construction seems to us reasonable, gives the ordinance a general and uniform application to all places within the contemplation of the statute, and upholds its validity. Municipal legislation is to be construed and interpreted by the same rules as statutes are construed. It is the duty and the uniform rule of this court, when the constitutionality of a statute is under consideration, so to construe and interpret its provisions, if possible, as to sustain and not defeat the act in question: *Hovey v. State* (1889), 119 Ind. 395, 21 N. E. 21; *McComas v. Krug* (1882), 81 Ind. 327, 42 Am. Rep. 135, and cases cited; 8 Cyc. Law & Pr. 801.

It is our conclusion, therefore, that the ordinance as a whole makes no discriminations, is not subject to the constitutional objections urged against it, and is valid. Appellant was not charged with a violation of any of the regulative 643 sections of the ordinance, other than the one requiring a license, and the conclusion reached renders it unnecessary to determine whether any of such regulative sections may be void for the reason that the same subject matter is covered

by a penal statute. It follows that the second paragraph of answer was insufficient, and the demurrer thereto was rightly sustained.

The judgment is affirmed.

The Regulation of the Sale of Intoxicating Liquors by municipal corporations is the subject of a note to *State v. Calloway*, 114 Am. St. Rep. 298. The legislative branch of the state government, in the exercise of the police power, has practically unlimited power, in regulating and absolutely forbidding the sale of intoxicants: *New Orleans v. Smythe*, 116 La. 685, 114 Am. St. Rep. 566; *State v. Frederickson*, 101 Me. 37, 115 Am. St. Rep. 295; *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437; *Equitable Loan etc. Co. v. Edwardsville*, 143 Ala. 182, 111 Am. St. Rep. 34. As to whether such regulations are unconstitutional when affecting interstate commerce, see *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814; *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283; *Tredway v. Riley*, 32 Neb. 495, 29 Am. St. Rep. 447.

PROVIDENCE WASHINGTON INSURANCE COMPANY v. WOLF.

[168 Ind. 690, 80 N. E. 26.]

INSURANCE, FIRE.—Waiver of Proof of Loss by the insurer within a specified time may be inferred from such acts and conduct as are inconsistent with an intention to insist upon a strict performance. (p. 400.)

INSURANCE, FIRE.—Waiver of Proof of Loss.—A distinct recognition of liability by the insurer, as by an offer to pay all or a part of the loss, amounts to a waiver of formal notice and proof of loss or of defects therein. (p. 401.)

INSURANCE, FIRE.—Waiver of Conditions.—An insurance company may waive conditions inserted in the policy for its benefit, and such waiver may be inferred from the conduct of its agents and representatives. (p. 401.)

INSURANCE, FIRE.—Waiver of Arbitration.—The insured is released from complying with a contract to submit the loss under a fire policy to arbitration, as a condition precedent to bringing suit, by any conduct on the part of the insurer's representatives which has the effect of unreasonably delaying or preventing an appraisal from being had or an award being made. (p. 402.)

INSURANCE, FIRE.—Waiver of Arbitration.—Question for Jury.—Whether arbitration of a fire insurance loss failed on account of the fraud of either party, and whether delay and failure to demand an appraisal or to proceed therewith in a reasonable time, if agreed upon, constitute a waiver, are questions for the jury to determine. (p. 404.)

INSURANCE, FIRE.—Arbitration.—Appraisement.—A pro-vision in a fire insurance policy that the loss is to be paid sixty days after due notice and satisfactory proof of loss has been received does not give the insurer, after he has agreed to an appraisal and named an appraiser, an absolute right to sixty days within which to commence the appraisal. (pp. 404, 405.)

INSURANCE, FIRE—Appraisal—Time for.—The right of the insured to have an appraisal of his loss under an agreement therefor is not indefinite as to time, but such appraisal must be completed by the insurer within a reasonable time, and what is such reasonable time upon the facts of the case is a question for the jury to determine. (pp. 404, 405.)

APPEAL—Pointing Out Errors.—The appellate court will not search the record for alleged errors, and unless the page and line where such rulings may be found are cited in the brief, they will not be considered. (p. 406.)

INSURANCE, FIRE—Appraisal—Waiver.—In an action on a fire insurance policy where the defense is set up that a required appraisal has not been made, an instruction that such requirement might be waived and that the insurer's conduct should be considered on the question of waiver by unreasonable delay is proper, and not open to the objection that it permits the jury to put a too liberal construction upon the contract of insurance. (p. 407.)

PLEADING—Plea in Abatement—Plea in Bar—Estoppel.—An insurer, by pleading a provision of his policy for the arbitration of the amount of the loss, and that he has not waived such provision, in abatement of the action, and procuring an unsuccessful trial on such plea, cannot thereafter change his position and claim that the matter so pleaded in abatement is a matter in bar of the action to recover on the policy. (p. 408.)

TRIAL—Oral Exceptions to Instructions to be effective must be entered upon the record. (p. 408.)

NEW TRIAL—Instructions—Exceptions.—Assigning the giving of an instruction to the jury, or other ruling of the trial court, as a cause for a new trial, presents no question to such court as to the correctness of such ruling, unless an exception has been properly taken thereto. (p. 408.)

TRIAL—Instructions.—Remarks of the court to the jury during the progress of the trial calling attention to the purpose for which certain evidence is admitted are not instructions. (p. 409.)

S. N. Chambers, S. O. Pickens, C. W. Moores, R. F. Davidson, O. Pickens and Duncan & Batman, for the appellant.

A. Dowling, East & East and J. E. Henley, for the appellee.

⁶⁹² **MONKS, J.** This action was brought by appellee against appellant on a fire insurance policy issued by appellant to appellee, insuring him against loss or damage by fire, upon a certain stock of goods, wares, merchandise, furniture and fixtures therein described, in the sum of one thousand dollars. There was eight thousand five hundred dollars additional insurance upon the property, making nine thousand five hundred dollars in all. A plea in abatement was filed by appellant. Appellee filed a reply to said plea in two paragraphs, the first of which was a general denial. Appellant's demurrer ⁶⁹³ for want of facts to said second paragraph of reply was overruled. A trial of the issues joined on

the plea in abatement resulted in a verdict and, over a motion for a new trial, a judgment in favor of appellee. Appellee's demurrer, for want of facts, to the complaint was overruled. Appellant answered in five paragraphs, the first being a general denial. On motion of appellee, the second and third paragraphs of answer were stricken out. Appellee filed a general denial to the fourth and fifth paragraphs of answer. A trial by jury resulted in a verdict, and, over a motion for a new trial, a judgment in favor of appellee for the full amount of the policy.

The assignments, which are not waived, are "that the court erred (1) in overruling the demurrer to the second paragraph of reply to the plea in abatement; (2) in overruling appellant's motion for a new trial upon the plea in abatement; (3) in overruling the demurrer to the complaint; (4) in striking out appellant's second paragraph of answer; (5) in striking out the fourth paragraph of answer; (6) in overruling the motion for a new trial upon the merits of the case." We will first consider the demurrer to the complaint. The policy upon which suit was brought contained, among others, the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused.

"Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided.

"If fire occur the insured shall give immediate notice of any loss thereby, in writing, to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of ^{each} each article and the amount claimed thereon, and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire.

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this com-

pany each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers shall together then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expense of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirements, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It is admitted by appellee that said provisions of the policy respecting the proofs of loss and the arbitration of the amount of the loss are conditions precedent, and no question is made as to their validity. It is contended, however, that there was a waiver of these conditions by appellant. The allegations of the complaint concerning such waiver are, substantially, as follows: That, immediately ⁶⁹⁵ after the fire, the plaintiff notified the defendant of the loss, and on January 14, 1903, the defendant sent its adjusters to the city of Bloomington to adjust said loss, who, after an examination of the premises, the stock of goods and conditions, offered plaintiff three hundred dollars in full payment of said loss, and no more, which offer the plaintiff refused to accept in full payment of said loss, and thereupon the said adjusters agreed with the plaintiff on the loss on part of the goods, to wit, those articles which had been totally destroyed, agreeing that the loss on said goods was six hundred and sixty-one dollars; that said adjusters refused to agree with plaintiff on any other class of goods injured by said fire, and, under pretense of desiring an appraisal of the same, demanded of the plaintiff that the re-

mainder be appraised under the terms of the policy, whereupon the plaintiff, as provided by the insurance contract, named David Juday, a disinterested and competent appraiser, and the defendant named T. J. Boyd, and it was agreed that these appraisers so appointed should proceed at once to appraise said goods, and to commence the same on January 19, 1903; that this plaintiff, by telegram and at great expense to himself, procured the attendance of said Juday on said date, retained him in said city of Bloomington, awaiting the action of defendant, for six days, at an expense of thirty dollars per day, in addition to the sum of twenty-five dollars for railroad charges; that as soon as defendant procured the agreement to enter into said appraisal, it and its adjusters commenced a systematic course of evasion, deception and neglect toward the plaintiff, with the intention of coercing him, if possible, to accept the three hundred dollars in full payment of defendant's liability; that defendant did not intend to complete said appraisal, but to put the plaintiff to all possible expense in forcing him to keep his goods in a badly damaged condition, denying him the right to sell or dispose of them, and postponing said appraisal from date to date, in this: that it first falsely claimed that its appraiser T. J. Boyd, who had been appointed by it, could ~~not~~ not attend, and that it would procure a substitute for him, but has ever since refused to do so; that during the next week the goods were wasting, and the plaintiff was paying forty dollars a month rental for the room they were in, without selling or disposing of them; that his appraiser, Juday, was waiting from day to day, at heavy expense to plaintiff; that the defendant still continued evading the appraisal of said goods, refusing to communicate with plaintiff or come to the place of the fire; that on January 28, 1903, the plaintiff sent a telegram to one of the defendant's adjusters at Indianapolis, Indiana, in the words following, to wit: "Our appraiser here since Sunday, at heavy expense. When will yours be here? Answer."

Plaintiff further alleges that the defendant's adjuster received said message on the day it was sent, but willfully, and for the unjust purpose of coercing the plaintiff to accept said sum of three hundred dollars, and with no intention of completing said appraisal, refused, and has ever since refused, to answer said message, or to give the plaintiff any reason therefor, well knowing all the while that such delay was caus-

ing the plaintiff much trouble and expense, and that the plaintiff was losing money every day; that the plaintiff was led to believe, and did believe, that said appraisal had been abandoned and waived by the defendant, and, to save himself from further loss by disposing of the goods, he, on January 30, 1903, commenced a sale of said goods for whatever amount each article might bring, but, before doing so, he caused said goods to be appraised by said Juday, who selected Moses Kahn, and the two, being disinterested and competent, after being sworn according to law, appraised the loss on said goods at the sum of eleven thousand three hundred and sixty-four dollars and forty-three cents; that at the time of the fire his goods so destroyed were worth twelve thousand and eighty dollars, and the total amount of insurance held by the plaintiff in defendant's and seven other companies was nine thousand five hundred dollars, the latter amount being nearly two thousand five hundred dollars less than their cash ⁶⁹⁷ value; that the goods were in a frozen condition, foul from smoke, decaying, and losing their color, and so depreciating in value that unless disposed of plaintiff would be compelled to lose the uninsured portion of said goods; that these facts were all well known to this defendant and the adjusting agent, and they also knew that if plaintiff saved anything from the part uninsured, he was compelled to do so by an early appraisalment and disposition of the goods; that the defendant went to no expense whatever to procure said appraiser, but sought to delay and oppress the plaintiff by using its knowledge of his condition and the condition of the goods; that its evasion, neglect, refusal to communicate with him, answer his telegrams, or, in good faith, to act in the premises, and its unfairness, injustice, and oppression caused the plaintiff to lose more than five hundred dollars on said goods, as herein set forth.

Waiver of a provision requiring a proof of loss within a specified time may be inferred from such acts and conduct as are inconsistent with the intention to insist upon a strict performance: *Hartford Fire Ins. Co. v. Keating* (1897), 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; *Germania Fire Ins. Co. v. Pitcher* (1903), 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Prussian Nat. Ins. Co. v. Peterson* (1903), 30 Ind. App. 289, 64 N. E. 902; 13 Am. & Eng. Ency. of Law, 2d ed., 345, 346; *Kerr on Insurance*, pp. 550-552. In *Prussian Nat. Ins. Co. v. Peterson* (1903), 30 Ind. App. 289, 64 N. E. 902, the court said on page 294 (30 Ind. App.): "When the insur-

ance company, having notice of the loss, refers the matter to its authorized adjuster, who makes full investigation thereof and leads the insured to believe that there is nothing in the way of payment of the claim except a difference of opinion as to the value of the property, the furnishing of formal proof of loss, it was held, is waived: *Hitchcock v. State Ins. Co.* (1897), 10 S. Dak. 271, 72 N. W. 898. . . . If payment be withheld on special grounds other than the ^{ess} failure to furnish proof of loss, or the insufficiency of proof furnished, and having no reference to the want or the insufficiency of such proof, the insurance company thereby waives its right to defend upon the ground of such want or insufficiency of proof: *Aetna Ins. Co. v. Shryer* (1882), 85 Ind. 362; *Commercial Union Assur. Co. v. State* (1888), 113 Ind. 331, 15 N. E. 518; *Western Assur. Co. v. McCarty* (1897), 18 Ind. App. 449, 48 N. E. 265; *Aetna Ins. Co. v. Simmons* (1896), 49 Neb. 811, 69 N. W. 125."

In *Murphy v. North British etc. Ins. Co.* (1897), 70 Mo. App. 78, it was said: "If the insurer offers to pay what he thinks has been the amount of the loss of the insured, and is rejected by the latter, this implies that the insurer is satisfied of the integrity of the loss. It implies further that he will not require proofs of loss, but will pay the amount ascertained by the arbitrators. . . . The implications already stated continue as long as the insurer's offer of settlement is not withdrawn." In 19 *Cyclopedia of Law and Procedure*, 865, it is said: "Negotiations or proceedings by the company with reference to settlement of loss will be a waiver of failure to give notice or make proofs of loss, and proceedings to adjust the loss in the usual way will waive objection on account of defects in the proofs or failure to furnish proofs as required by the policy."

A distinct recognition of liability by the company, as by an offer to pay all or a part of the loss, will amount to a waiver of formal notice and proofs of loss or of defects therein: *Caledonian Fire Ins. Co. v. Traub* (1897), 86 Md. 86, 37 Atl. 782; *Pentz v. Pennsylvania Fire Ins. Co.* (1901), 92 Md. 444, 48 Atl. 139; *Aetna Ins. Co. v. Simmons* (1882), 85 Ind. 362; *Commercial Fire Ins. Co. v. Allen* (1886), 80 Ala. 571, 1 South. 202; *Lewis v. Monmouth Mut. Fire Ins. Co.* (1864), 52 Me. 492; *Murphy v. North British etc. Ins. Co.*, 70 Mo. App. 78.

It is well settled that an insurance company may waive conditions inserted in the policy for its benefit, and that ~~see~~ such waiver may be inferred from the conduct of its agents and representatives: *Lamson etc. Co. v. Prudential Fire Ins. Co.* (1898), 171 Mass. 433, 50 N. E. 943, and cases cited; *Kerr on Insurance*, p. 663; 4 *Cooley's Briefs on Insurance*, 3658-3673.

It is a general rule that the insured will be released from complying with a contract to submit the loss under a fire policy to arbitration, as a condition precedent to bringing a suit upon the policy, by any conduct on the part of the company's representatives which has the effect of preventing an appraisal from being had or an award being made: 4 *Cooley's Briefs on Insurance*, 3658. After the provision of the policy requiring an arbitration becomes operative, as in this case, by the execution of the agreement to arbitrate and the appointment of the arbitrators, both the insurer and the insured are bound to act in good faith to have the loss ascertained in accordance with the provisions of the policy, and, if either party acts in bad faith so as to defeat the object of the arbitration, as by refusing to proceed, or by insisting upon the selection of improper arbitrators or umpire, or by undue interference with any of them after their selection, the other party is absolved from further obligation to arbitrate, and is not bound to enter into an agreement for another arbitration: *Uhrig v. Williamsburgh City Fire Ins. Co.* (1886), 101 N. Y. 362, 4 N. E. 745; *Hickerson & Co. v. German-American Ins. Co.* (1896), 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172, and cases cited; *Brock v. Dwelling-House Ins. Co.* (1894), 102 Mich. 583, 47 Am. St. Rep. 562, 61 N. W. 67, 26 L. R. A. 623; *Powers Dry Goods Co. v. Imperial Fire Ins. Co.* (1892), 48 Minn. 380, 51 N. W. 123; *Niagara Fire Ins. Co. v. Bishop* (1894), 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *Kerr on Insurance*, pp. 666, 667, and cases cited in notes. It was said in *Read v. State Ins. Co.* (1897), 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665: "The law seems to be well ~~too~~ settled that, if either party to an agreement to arbitrate intentionally prevents or unreasonably delays the stipulated method of adjusting the rights of the parties, he will not be permitted to plead failure to arbitrate as a defense to an action subsequently brought: *Uhrig v. Williamsburgh City Fire Ins. Co.* (1886), 101 N. Y.

362, 4 N. E. 745; Powers Dry Goods Co. v. Imperial Fire Ins. Co. (1892), 48 Minn. 380, 51 N. W. 123."

In Chapman v. Rockford Ins. Co. (1895), 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405, the court said: "We do hold that the parties are bound to exercise toward each other the utmost good faith and proceed with all reasonable diligence to procure an adjustment according to the letter and spirit of the contract. It is not permissible for the insurers, under the provisions of the standard policy, arbitrarily or capriciously to demand an appraisal, simply to suspend a claim for a loss, and select an appraiser who will perversely refuse to concur in the appointment of an umpire unless he resides in Chicago or is the kind of man the insurers want. Such a course, if tolerated, places the assured very largely at the mercy of the insurers. Any attempt on the part of either party to misuse or pervert the provisions of the standard policy for an appraisal, so as unreasonably to delay an adjustment or to secure an unjust abatement of an honest loss, is a breach of good faith and should be treated as a waiver of the condition, and dispensing with the necessity of an appraisal and warranting a resort to an action without one, if the party thus prejudiced has used all fair and reasonable means and diligence on his part to secure it. To hold otherwise would be to permit the party in fault to profit by his own wrong." In Uhrig v. Williamsburgh City Fire Ins. Co. (1886), 101 N. Y. 362, 4 N. E. 475, it was laid down that, "under the arbitration clause, it was the duty of each party to act in good faith to accomplish the appraisement in the way provided in the policy, and if either party acted in bad faith, so as to defeat the real ⁷⁰¹ object of the clause, it absolved the other party from compliance therewith; and if either party refused to go on with the arbitration, or to complete it, or to procure the appointment of an umpire so that there could be an agreement upon an appraisal, the other party was absolved." It is stated in the syllabus to Northern Assur. Co. v. Samuels & Jordt (1895), 11 Tex. Civ. App. 417, 33 S. W. 239: "Where an insurer demands an appraisement of a fire loss, but fails to name an appraiser and to appear at the time and place designated, he thereby abandons his demand," and waives the right to an appraisement. In Milwaukee M. Ins. Co. v. Schallmann (1900), 188 Ill. 213, 59 N. E. 12, a letter written by the insured to an agent of the insurance company was introduced in evidence, for the purpose

of showing the insured's efforts to secure an appraisal, and that the appraisal was waived by the failure of the insurance company to respond to the request for the same as made in the letter. The court held on page 223 that whether the failure to respond to the request for an appraisement was a waiver of the appraisal, was a question to be determined by the jury. The court said on page 224: "The failure to respond to the letter was not merely a waiver of appraisal by such agents, but was a waiver of appraisal by the companies themselves."

Whether the arbitration failed on account of the fraud of either party, and whether delay or failure to demand an appraisal or to proceed with the same in a reasonable time, if agreed upon, constitute a waiver, are questions for the jury to determine: *McManus v. Western Assur. Co.* (1898), 22 Misc. Rep. 269, 48 N. Y. Supp. 820, 43 Hun, 550, 60 N. Y. Supp. 1143; *Lamson etc. Co. v. Prudential Fire Ins. Co.* (1898), 171 Mass. 433, 50 N. E. 943; *Chainless Cycle Mfg. Co. v. Security Ins. Co.* (1901), 169 N. Y. 304, 62 N. E. 392; *Hamilton v. Phoenix Ins. Co.* (1894), 61 Fed. 379, 9 C. C. A. 530; *Lancashire Ins. Co. v. Murphy* ⁷⁰² (1900), 10 Kan. App. 251, 62 Pac. 729; *Fowble v. Phoenix Ins. Co.* (1904), 106 Mo. App. 527, 81 S. W. 485; *Carp v. Queen Ins. Co.* (1903), 104 Mo. App. 502, 79 S. W. 757, and cases cited; 19 Cyc. of Law & Proc. 959.

Neither party will be permitted, by willfully or negligently postponing the appraisal, unreasonably to delay the adjustment of the controversy. Otherwise the very purpose of arbitration, which is a speedy and inexpensive settlement of disputes as to the amount of loss, would be defeated. The provision of the policy that the loss was to be paid sixty days after due notice and satisfactory proof of the same had been received, according to the terms of the policy, did not give appellant, after it had agreed to an appraisal and named its appraiser, an absolute right to sixty days within which to commence the appraisal.

When the agreement to submit to appraisal was executed by the parties, and appellant learned that the appraiser selected by it could not be present at the time fixed to commence the appraisal, it was the duty of appellant, within a reasonable time, to select another appraiser who would proceed, without unnecessary delay, to the performance of his duties. The right of appellee to have an appraisal under the

agreement therefor was not indefinite as to time, but such appraisal must be completed within a reasonable time, and what was such reasonable time depends upon the facts of the case, and was a question for the jury to determine: *Hamilton v. Phoenix Ins. Co.* (1894), 61 Fed. 379, 9 C. C. A. 530, and cases cited. As was said in *Chainless Cycle Mfg. Co. v. Security Ins. Co.* (1901), 169 N. Y. 304, 62 N. E. 392: "Either party, however, has the right to require an appraisal when there is a disagreement as to the amount of the loss: *Silver v. Western Assur. Co.* (1900), 164 N. Y. 381, 58 N. E. 284. That right is not indefinite as to time, but must be exercised within a reasonable period, ⁷⁰³ depending upon the facts of the particular case. Neither party can so use the right as to take undue advantage of the other, but both must act in good faith: *Uhrig v. Williamsburgh City Fire Ins. Co.* (1886), 101 N. Y. 362, 4 N. E. 745; *Bishop v. Agricultural Ins. Co.* (1892), 130 N. Y. 488, 29 N. E. 844. It is not a weapon of attack, but of defense, and a party who intends to use it must give reasonable notice of such intention, for its omission to do so will be evidence of waiver, more or less conclusive according to the circumstances. The insurer, for instance, knowing that the insured desires a prompt appraisal or an adjustment, so that the property may not suffer further injury before it is sold, cannot postpone its demand for an appraisal until after the insured, misled by its acts, has been placed in a position where one is impossible."

It is evident from the authorities cited that the allegations of the complaint as to the waiver of proofs of loss and waiver of arbitration were sufficient to require that said issues be submitted to a jury for determination. It follows that the court did not err in overruling the demurrer to the complaint.

Appellant's plea in abatement set up the provision of the policy sued upon providing for an appraisal of the amount of the loss; a disagreement of the parties as to the amount of the loss, the execution of an agreement for an appraisal of the amount of the loss, in accordance with the terms of the policy, and the refusal of the appellee to proceed therewith; that appellant "had not in any manner waived, refused or declined to have the loss or damages appraised; and that no suit or action upon said policy had accrued to plaintiff until such appraisal has been made." The second paragraph of reply to said plea in abatement contained sub-

stantially the same allegations concerning waiver of the appraisal clause of said policy by appellant as were set forth in the complaint. As we held, said allegations of the complaint were sufficient, upon the ⁷⁰⁴ question of waiver, to withstand a demurrer for want of facts. It follows that the court did not err in overruling appellant's demurrer to said second paragraph of reply to the plea in abatement.

Appellant complains of rulings of the trial court in admitting certain evidence on the trial of the plea in abatement, but has not pointed out the page and line of the record showing the rulings of the court in admitting such evidence nor where the evidence, so admitted, may be found. It has been uniformly held by this court that it will not search the record for alleged errors, and that, unless the page and line where such rulings may be found are cited, they will not be considered: *Ewbank's Manual*, sec. 182, p. 277; *Indiana etc. R. Co. v. Ditto* (1902), 158 Ind. 669, 64 N. E. 222, and cases cited.

Appellant contends that the fourth instruction given by the court on the trial of the plea in abatement "is wrong, in that it advises the jury that in considering whether the defendant had waived an appraisal they should consider all facts and circumstances, including the condition of the goods at and since the fire, the value of the goods at the time they were burned, the amount of the insurance, as well as the extent of the damage by fire, whether it was necessary and prudent to have an early appraisal of the goods, whether the goods were deteriorating and becoming less valuable; what expense, if any, the plaintiff and defendant were put to in an effort to secure such an appraisal." The objection stated to this instruction is that "the rights and obligations of the parties were contractual and absolutely fixed by the terms of the policy; that the condition of the goods at the time of and since the fire, and the other matters mentioned in said instruction, were immaterial and had nothing to do with fixing the time within which the defendant might investigate and reach its conclusions as to the amount of the ⁷⁰⁵ damages and loss; that is fixed by the contract. It has sixty days within which to make such investigation, including the right of appraisal." True, in case of disagreement as to the amount of loss, appellant had the right to demand an appraisal, and this right was contractual, but, when an appraisal has been agreed upon, as in this case, there is no provision in the policy

giving appellant sixty days, or any other definite time, in which to commence or complete an appraisal. The rule, as heretofore stated in this opinion, is that, after the agreement of appraisal has been made, the same must be completed within a reasonable time, and what is such reasonable time depends upon the facts and circumstances of the case, and is to be determined by the jury. It is clear from what we have said in disposing of the objections to the sufficiency of the complaint that said instruction is not open to the objections urged.

The fifth instruction given on the trial of the plea in abatement is objected to on the ground that it advises the jury that they have the right to inquire as to the motives the defendant had in asserting a contractual right. Said instruction reads as follows: "I instruct you that the provisions in the policy sued on by the plaintiff, and set forth in the plea in abatement, which require that, in the event of a disagreement as to the amount of the loss, the loss and damage shall be submitted to an appraisal, may be waived, even after an agreement is signed in writing, by conduct on the part of either party that evinces a deliberate intention and purpose to defeat the object of the appraisal, or to put one of the parties to unnecessary expense with a view to coercing an unjust settlement of such loss, but it is for you to determine from the facts in this case whether any such conduct has been proved in this cause." Said instruction is in harmony with the law as already declared in this opinion, and no error was committed in giving it to the jury.

⁷⁰⁸ Another instruction on the trial of the plea in abatement is objected to because it "advises the jury to put a liberal construction upon the provision of the policy against waiver, when it is the duty of the court, and not the jury, to construe the provisions of the policy." Said instruction did not authorize the jury to construe said provision of the policy, and it is not open to the objection urged. It is next contended that, on the trial of the plea in abatement, there was no evidence to show that appellant waived the right to an appraisal, and that, therefore, the verdict of the jury on that issue was not sustained by sufficient evidence, and was contrary to law. It would unduly extend this opinion to set out the evidence, but, after a careful examination of the same, we are unable to say that the verdict of the jury was not fully sustained thereby.

Appellant complains of the action of the court in striking out the second and third paragraphs of his answer to the

complaint, which alleged the same matters in bar of the action that it had set up in its plea in abatement, and also the action of the court in excluding all evidence offered by it on the trial of the merits of the cause, for the purpose of showing that it had not waived the appraisal clause of said policy. Appellant, by pleading the provision of the policy for the arbitration of the amount of the loss, and that it had not waived the same, in abatement of the action and procuring a trial thereon, assumed the position that the same was in abatement of the action, and induced the court so to hold, and could not thereafter change its position and successfully claim that the matter so pleaded in abatement was a matter in bar of the action, and thus secure another trial of the same question in the same action: *State v. Board etc.* (1906), 166 Ind. 162, 76 N. E. 986, and cases cited; *Bigelow on Estoppel*, 5th ed., 673, 717-723. The trial court committed no reversible error in any of said rulings.

707 Appellant assigned as grounds for a new trial of the cause on its merits, the giving of, and refusal to give, a number of instructions, but as said motion was overruled on July 1, 1903, and the exceptions "taken in writing" to the giving and the refusal to give said instructions, were not signed and dated until July 3, 1903, no question is presented as to the correctness of said instructions or any of them. True, said written exceptions state that the "defendant at the time excepted," but under section 1 of the act of 1903 (Acts 1903, p. 338; *Burns' Rev. Stats.* 1905, sec. 544a), an exception to the giving or refusal to give an instruction when in writing is not taken until the writing is dated and signed. Oral exceptions, taken under said section, to be effective, must be "entered upon the record or minutes of the court."

Assigning the giving of an instruction to the jury, or other ruling of the trial court, as a cause for a new trial, presents no question to the trial court as to the correctness of such instruction or ruling, unless an exception has been properly taken thereto: *Elliott on Appellate Procedure*, secs. 623, 624, 795.

It is true that section 1 of the act of 1903, *supra*, provides that "exceptions to giving or refusing of instructions may be taken at any time during the term," but this must be construed in connection with the eighth clause of section 568 of *Burns' Revised Statutes* of 1901 (*Rev. Stats.* 1881, sec. 559), which provides that a new trial may be granted for "error of law occurring at the trial and excepted to by the

party making the application." When so construed, it is clear that such exceptions, to have any force, must be taken at least before the motion for a new trial is ruled upon by the trial court, because said clause only authorizes the trial court to grant a new trial when the error of law complained of has been excepted to, before the motion therefor is ruled upon.

During the progress of the trial objection was made by appellee to certain evidence offered by appellant, which ⁷⁰⁸ objection was overruled and the evidence admitted, the court at the time informing the jury of the purpose for which the evidence was admitted.

Appellant excepted to this action of the court and assigned the same as one of its causes for a new trial.

It is urged by appellant that section 544a, *supra*, requires that all instructions given by the court of its own motion shall be in writing, and that therefore "the court erred in giving said instruction orally."

The provision of said section requiring the instruction "given by the court of its own motion" to be in writing applies only to instructions given at the close of the argument, and not to what the court may say during the progress of the trial calling the attention of the jury to the purpose for which certain evidence is admitted. We are satisfied from an examination of the evidence that the verdict was sustained by sufficient evidence, and was not contrary to law. Other rulings of the court are objected to, but, even if erroneous, they are not of such a character as would authorize a reversal of the cause.

Judgment affirmed.

Arbitration may, Perhaps, be Made a Condition Precedent to a right of action on a policy of insurance, although stipulations to that effect have very justly been declared unenforceable as tending to oust the courts of jurisdiction: *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555, 103 Am. St. Rep. 725; *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428. But if a stipulation for arbitration is regarded as valid, still the insurance company may, by bad faith, lose its right to rely on it: *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48; *Stephens v. Union Assur. Soc.*, 16 Utah, 22, 67 Am. St. Rep. 595; *Brock v. Dwelling-House Ins. Co.*, 102 Mich. 583, 47 Am. St. Rep. 562; *Christianson v. Norwich Union Fire Ins. Co.*, 84 Minn. 526, 87 Am. St. Rep. 379. And the insurer, once having waived the right to demand arbitration, cannot thereafter insist on an arbitration: *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218.

CASES
IN THE
SUPREME COURT
OF
IOWA.

W. T. JOYCE COMPANY v. ROHAN.

[134 Iowa, 12, 111 N. W. 319.]

PROMISSORY NOTE Given to Compound Felony.—To defeat an action on a note given to compound a felony, it is not necessary to prove that the alleged crime was in fact committed. (p. 411.)

AGENCY.—Whatever Evidence has a Tendency to prove an agency is admissible, even though it be not full and satisfactory, and it is the province of the jury to pass upon it. (p. 411.)

AGENCY.—When One Knowingly and Without Dissent permits another to act as his agent, the capacity will be conclusively presumed. (p. 411.)

Lee & Robb, for the appellant.

George W. Bowen, for the appellee.

¹³ **SHERWIN, J.** This suit is on an ordinary promissory note made payable to one E. C. Spurr and alleged to have been transferred to the plaintiff before maturity. The defendant, Rohan, in his separate answer admitted the execution of the note, but alleged as a defense thereto that it was without consideration and that it was given for the purpose of settling a criminal charge made against his cosigner, J. A. Mavity, that the note was given for the sole purpose of compromising and compounding a felony, and was so received by said Spurr, who was the plaintiff's agent, with such understanding. At the close of the testimony the plaintiff moved for a directed verdict, on several grounds; among others, that the defendant had failed to allege in his answer or to prove that a crime was in fact committed by the defendant Mavity, the compounding of which constituted any part of the consideration of the note sued on, and that the

defendant had failed to show that the plaintiff had any knowledge or notice, actual or constructive, that the note in suit was obtained by the compounding of a felony. The court was clearly right in setting aside the verdict which had been directed and in granting a retrial of the case. It is true there was no evidence tending to support the charge of embezzlement that had been made against Mavity in an information sworn ¹⁴ to and filed by Spurr, the payee of the note, but it is not necessary in a case of this kind to show that the crime which it is alleged was compounded was in fact committed: *Shaulis v. Buxton*, 109 Iowa, 355, 80 N. W. 397; *Smith v. Steely*, 80 Iowa, 738, 45 N. W. 912; *State v. Ruthven*, 58 Iowa, 121, 12 N. W. 235.

There is evidence in the record tending to show that Spurr, who was the payee named in the note, was the agent of the plaintiff in Carroll county. As we have seen, the information which was filed against Mavity was filed by Spurr. It charged Mavity with the crime of embezzling from the plaintiff in this case, the W. T. Joyce Company, alleging the company to be a corporation. It is a general rule of law that whatever evidence has a tendency to prove an agency is admissible, even though it be not full and satisfactory, and it is the province of the jury to pass upon it; and it is equally as well settled that, when one knowingly and without dissent permits another to act as his agent, the capacity will be conclusively presumed. In this case Spurr was shown to be the agent of the plaintiff in the transaction of other business, or, at least, there was evidence before the jury tending to so show. He appeared before the justice and filed an information against Mavity, charging him with the crime of embezzling from this plaintiff; thereafter this note was given for the purpose of settling that criminal charge, and still later the note was transferred to the plaintiff by Spurr, their agent, and sued upon by them. All of these transactions constituted evidence from which the jury might have found that Spurr was in fact acting as the plaintiff's agent and for it in making the criminal charge and in settling the alleged embezzlement by taking the note in suit. This being true, it was clearly error, under the rule heretofore announced, to direct a verdict for the plaintiff. It was a question for the jury, and should have been submitted to it.

The order setting aside the verdict was right, and it is affirmed.

To Render a Contract Void on the ground that its consideration was the suppression of a prosecution, the crime charged need not have been committed: *Insurance Co. v. Hull*, 51 Ohio St. 270, 46 Am. St. Rep. 571.

BEECHLEY v. BEECHLEY.

[134 Iowa, 75, 108 N. W. 762.]

ANTENUPTIAL DEED in Fraud of Wife not yet Selected.—A voluntary conveyance, made to defeat the marital rights of the future wife of the grantor, is not relieved of invalidity by the fact that she has not yet been selected. (p. 415.)

ANTENUPTIAL DEED.—Misrepresentation of the Value of his property by the grantor in an antenuptial deed is incompetent to prove fraud in its execution. (p. 415.)

ANTENUPTIAL DEED—When not Fraudulent.—An antenuptial deed, if not voluntary, will be set aside as in fraud of the woman whom the grantor thereafter marries, only on proof that the grantee was a party to the fraudulent intent. (p. 416.)

ANTENUPTIAL DEED to Children by Former Marriage.—A voluntary conveyance to the children of the grantor by a former marriage is not fraudulent as to his prospective wife, when only a reasonable provision is made for them, and no misrepresentation is made to her. (p. 416.)

AN ESTOPPEL in Pais is Based on Fraud, actual or constructive. There must be deception, and change of conduct in consequence thereof. (p. 417.)

ESTOPPEL.—There can be No Estoppel by Silence unless there is a duty to speak. (p. 417.)

Dawley, Hubbard & Wheeler and Lewis Heins, for the appellant.

Charles W. Kepler & Son, for the appellee.

⁷⁶ SHERWIN, J. The plaintiff is the widow of Jesse Beechley, having been his third wife. The defendant is the oldest son of said Jesse Beechley by his first wife. The second wife of Jesse Beechley was a sister of the plaintiff, and died in the latter part of December, 1889. At the time of her death, and for many years prior thereto, Jesse Beechley owned about six hundred and sixty-five acres of land, including the land in controversy herein, four hundred and fifty acres. A deed to this four hundred and fifty acres of land was executed and delivered by said Jesse Beechley to the defendant December 17, 1890. About two weeks after the death of his second wife, Mr. Beechley asked the plaintiff

to become the third Mrs. Beechley, but she refused to do so, and they did not meet again, nor was there any correspondence between them until in August, 1891, at which time Mr. Beechley again made the plaintiff an offer of marriage, which was accepted, and followed by a marriage on the eighth day of September, ⁷⁷ 1891. At the time of their marriage the plaintiff was about sixty-six years old and Mr. Beechley nearly seventy. In the spring of 1890, and again in July, 1891, Mr. Beechley proposed marriage to another widow, and was both times rejected. Not until after the plaintiff and his father had been married did the defendant have any information or intimation that his father contemplated another marriage. At the time he executed and delivered to the defendant the deed in question, Mr. Beechley still had two hundred and fifteen acres of land left, which was occupied as a homestead by himself and the plaintiff until 1893, when it was deeded by Mr. Beechley to a son by his second wife, the plaintiff's sister, in pursuance of a promise made to her before her death, the plaintiff voluntarily joining in the conveyance thereof. When the land in question was conveyed to the defendant, it was encumbered by a mortgage that he assumed and which, at the time of the trial below, amounted to nearly \$13,000. At the time of this conveyance the grantor also owed other debts amounting to \$3,000 or \$4,000, so that his total liabilities at that time were somewhere from \$15,000 to \$16,000. Before conveying the two hundred and fifteen acres of land, Mr. Beechley had provided a large amount of material for the erection of a new house thereon, and after the conveyance he rebought this material from his grantee, moved it onto the four hundred and fifty acre tract that he had conveyed to the defendant, and in 1894 built thereon a new house which he and the plaintiff occupied until his death early in 1904, and which the plaintiff still occupies. The defendant's deed was not recorded until after his father's death because of the grantor's request, made at the time of its execution and delivery, that it be not sooner recorded. The record shows that the plaintiff had no knowledge of the deed to the defendant until it was recorded, and it may fairly be said that, at the time of the marriage, the plaintiff supposed that her husband owned the four hundred and fifty acres in controversy as well as the ⁷⁸ other two hundred and fifteen acres. The plaintiff bases her right to relief on allegations of fraud in the conveyance to the de-

fendant and on an estoppel which will be hereinafter more fully noticed.

We are clearly of the opinion that fraud cannot be predicated on the facts disclosed. As we have already shown, there was no engagement nor any negotiations therefor until eight months after the conveyance was made. It is true that the grantor had theretofore proposed marriage to the plaintiff, and some months after her refusal to marry, him he had proposed to another and had been rejected; and it may be said, perhaps, that he had not entirely abandoned the thought of another marriage if he could find a willing woman; while, on the other hand, three rejections within a year would ordinarily be entirely sufficient to cool the "Douglas blood" were age, alone, insufficient therefor. Aside from the proposals which we have mentioned and the fact of his subsequent marriage to the plaintiff, there is nothing in the record tending to show that, at the time of this conveyance, the grantor contemplated another marriage, and if he did not, there can be no fraud therein. Even if he then had a fixed purpose to marry as soon as he could find some one who was willing to become his wife, no negotiations or engagement therefor were then pending, and, under the rule of our own cases, the conveyance was not fraudulent as to the plaintiff. In *Gainor v. Gainor*, 26 Iowa, 337, the conveyance sought to be set aside was made seven months before the marriage, and four months before negotiations therefor began. We held it utterly impossible that the conveyance could have been intended as a fraud, and said: "A voluntary settlement or conveyance of property by a wife or husband prior to marriage will be held fraudulent as to the marital rights of the one to whom she or he may afterward be joined in matrimony, only when made in contemplation of marriage, and pending a treaty of ⁷⁹ marriage between the parties": See, also, *Hamilton v. Smith*, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276; *Beere v. Beere*, 79 Iowa, 555, 44 N. W. 809.

The *Gainor* case undoubtedly states the rule announced in nearly all of the cases treating the subject. Indeed, we have found but one case among a great many which we have examined that holds that an antenuptial voluntary conveyance, if made with intent to defeat the marital rights of any person whom the grantor might subsequently marry, would be void as to such rights whether the person was then selected or not. Such is the rule adopted in *Higgins v. Higgins*, 219

Ill. 146, 109 Am. St. Rep. 316, 76 N. E. 86. After full consideration of the question, we are of opinion that the rule is sound. If the intent to defraud actually exists, it is immaterial whether a particular person has already been selected against whom it will operate. So far, then, as *Gainor v. Gainor*, 26 Iowa, 337, limits the application of the rule in this class of cases to cases where negotiations or an engagement exist at the time of the conveyance, it must be and is overruled. If the conveyance is made in contemplation of marriage and with intent to deprive the spouse of the marital rights which she would otherwise acquire, it is enough to invalidate the conveyance so far as it affects such rights. But if there be no treaty of marriage at the time of the conveyance, it is, in our judgment, a strong circumstance tending to disprove fraud.

There is evidence tending to show actual misrepresentation by the grantor as to the amount of his property, but it is contended that the evidence is incompetent. We think the contention is correct, but do not deem the question at all controlling on this branch of the case. In some of the earlier cases it was thought that a distinction should be made between silence or failure to disclose the true situation, and actual misrepresentation as to property. The later decisions, however, and the weight of authority in this country, at least, hold that the ignorance of the spouse of a settlement or conveyance ^{so} pending a treaty of marriage is fatal thereto, though no actual misrepresentation or deceit appear: *Chandler v. Hollingsworth*, 3 Del. Ch. 99, and cases cited. This is an exhaustive and leading case on the subject, and contains a review of the early English and many of the American cases: *Collins v. Collins*, 98 Md. 473, 103 Am. St. Rep. 408, and note, p. 418, 57 Atl. 597.

The deed to the land in question recites a consideration of \$16,000, and the uncontradicted evidence shows that the defendant assumed the payment of mortgages on the land and other indebtedness of his father amounting in the aggregate to the consideration named in the deed. The evidence shows the land to have been worth from \$16,000 to \$22,000, but in addition to the indebtedness assumed by the defendant the father retained a life interest therein and the possession. It cannot be said, then, that the conveyance was voluntary, and it not being voluntary, it can only be set aside on proof

that the defendant was a party to the fraudulent intent of the grantor, if any such intent existed.

There is absolutely no evidence of fraud on the part of the defendant, unless it be said that the request to withhold the deed from record proves fraud. There are two sufficient answers to this suggestion: The grantor gave no reason for his request, and his financial condition at that time was such that it would cause the grantee no surprise. Fraudulent intent will not be presumed, and secrecy alone does not necessarily tend to establish fraud: *Hamilton v. Smith*, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276; *Luckhart v. Luckhart*, 120 Iowa, 248, 94 N. W. 461.

The general rule that a voluntary conveyance made in contemplation of marriage will be declared fraudulent has a well-settled exception in cases of conveyance to children by a former wife, it being generally held that where no false representations are made to the prospective wife, and only reasonable provision is made for such children in proportion to his or her estate, such st conveyance is not necessarily fraudulent, but the question in such cases is, Was fraud intended? *Hamilton v. Smith*, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276; note in 103 Am. St. Rep. 418. There is no competent evidence that Mr. Beechley made any false representations as to his property before his marriage to the plaintiff, and such representations made thereafter are immaterial. He had two hundred and fifteen acres of land left, worth one-third as much as the land conveyed, at least, and amply sufficient to afford him and the plaintiff reasonable support and sufficient to afford her reasonable maintenance after his death. Fraud must be clearly proven, and from the record before us we are unable to say that any fraud was intended by the grantor, and we are very clear that no fraud on the part of the defendant is shown: *Hamilton v. Smith*, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276; *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441. It is true, as we have already said, that the grantor remained in possession and made certain improvements on the land, but he held a life estate therein which was of value to him, and such possession and improvements do not alone establish adverse possession or a trust for the benefit of the plaintiff: *Luckhart v. Luckhart*, 120 Iowa, 248, 94 N. W. 461; *McClenahan v. Stevenson*, 118 Iowa, 106, 91 N. W. 925.

When the two hundred and fifteen acres were conveyed, the defendant, at the request of his father, prepared a deed conveying the same, and later went to his father's home to witness its execution and to take the acknowledgments thereto. The plaintiff claims that, at the time of its execution and as an inducement for her to sign it, it was talked by those present that there would be four hundred and fifty acres left, and that her husband said, "That will be enough for us," and that he further said he would build a new house on it. The plaintiff says she thinks that conversation occurred in the presence of the defendant. She bases her claim to an estoppel on his failure to then disclose his ownership of the four hundred and fifty acres of land. Her testimony as to the statements of her husband at that time ⁹² is clearly incompetent under section 4604 of the Code. But aside from that, and aside from her uncertainty as to the defendant's presence when such statements were made, all of the other persons present when the deed was executed and acknowledged testify that no such conversation was had at that time.

If it were true that the plaintiff were induced to sign the deed by representations, made in the presence and hearing of the defendant, that the four hundred and fifty acres of land still belonged to her husband, we think it would have been his legal duty to inform her that he held the title thereto, for silence when one should speak may create an estoppel as effectually as a declaration. But an estoppel in pais is based on fraud, and the conduct relied upon to establish it must be such as to amount to fraud, actual or constructive. There must be deception, and change of conduct in consequence thereof: *Garretson v. Equitable etc. Life Assn.*, 93 Iowa, 402, 61 N. W. 952. To create an estoppel in the instant case, it is essential that the defendant should have spoken and disclosed his title, and that the plaintiff was induced to sign the conveyance by his silence: *Garretson v. Equitable etc. Life Assn.*, 93 Iowa, 402, 61 N. W. 952; *Jamison v. Miller*, 64 Iowa, 402, 20 N. W. 491. An estoppel by acts and declarations, or by silence, is defined by Bouvier in his *Law Dictionary*, 541, as follows: "Such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself": See, also, *Wishard v. McNeill*, 85 Iowa, 474, 52 N. W. 484. If nothing was said in the defendant's presence about the property remaining after the conveyance of the two hundred and fif-

teen acres, the defendant certainly was not bound to disclose his ownership of the four hundred and fifty acres simply because he was called upon to take the acknowledgments of the grantors of the two hundred and fifteen acres, for the plaintiff could not have acted on his silence. There can be no estoppel by silence unless there is a duty to speak. ^{ss} The transaction concerned land in which the defendant was in no way interested, and he was not bound to disclose to the plaintiff a perfectly legal transfer of other lands made two or three years before: 5 Current Law, 1288. The plaintiff is clearly not entitled to have the deed set aside, and to have her statutory interest in the four hundred and fifty acres of land.

Claim is made that the plaintiff put some of her own money into the land in question by way of improvements made thereon by her husband. She sold a little place of her own for \$800, and she testifies that some of the money received from this sale was so used. She is unable to show, however, that any certain sum was used for the purpose, and we, of course, cannot supply the want of testimony on the subject, and cannot, therefore, find that any substantial amount was so used.

The judgment must be reversed.

Justices Weaver and Ladd Dissented from the conclusion of the majority of the court that the charge of fraud was not supported by the evidence, and that the plea of estoppel had not sufficient support in the record. However, they did not question the soundness of the legal propositions advanced in the opinion.

Antenuptial Conveyances in Fraud of the prospective husband or wife of the grantor are discussed in the note to Collins v. Collins, 103 Am. St. Rep. 418. If a conveyance is voluntary, and the intention of the grantor is to defraud any person whom he thereafter should marry of her marital rights, it is immaterial, so far as concerns the validity of the transaction, that he has not yet selected any particular person as his wife: Higgins v. Higgins, 109 Am. St. Rep. 316.

TALCOTT BROTHERS v. CITY OF DES MOINES.

[134 Iowa, 113, 109 N. W. 311.]

PUBLIC STREETS—Change of Grade—Damage to Abutting Owner.—A city may, in bringing a street of which it owns the fee to the re-established grade, excavate therein so that the soil of an abutting lot will slide into the street, without incurring liability for taking property without compensation or for removing the lateral support. (p. 432.)

W. H. Bremner, M. H. Cohen and R. B. Alberson, for the appellants.

George H. Lewis, for the appellees.

¹¹⁴ **BISHOP, J.** Action to recover damages for an invasion upon and injury to real estate. Plaintiffs are the owners of certain lots abutting on what is known as "State street," in the defendant city. They allege that long prior to the matters complained of they had improved their said property, and this was done with reference to, and in conformity with, the natural surface of said street. Among other things, it is then alleged that in the year 1901, the city, by its officers and agents, entered upon said street and proceeded to make municipal improvements, and that in connection therewith, and particularly in front of plaintiffs' lots, the street was caused to be excavated up to the lot line to the depth of several feet. And plaintiffs say that their property was thereby invaded, injured and damaged in that the lateral support to the soil having been removed, such soil for some distance on the surface back from the lot line became loose and slid down into the street, and that in addition to the injury to the property arising directly therefrom, the expense of a retaining wall was made necessary. The pleading presents the conclusion that the acts of the city so had and done constituted a taking of their property without compensation being made therefor within the meaning of the constitution of this state and of the United States. Recovery ¹¹⁵ is asked on account of the diminution in the sale and rental value of the property, and for the expense of building a wall. The answer of defendant makes admission of the street excavation, but it is alleged that the work was done under proceedings authorized by statute, and was in all respects proper and legal; the object being to bring the surface thereof to the level of the grade regularly established for said

street and to permanently improve the same. The damage alleged by plaintiffs is accordingly denied. It is also denied that there was any violation of the constitutional provision invoked. To the answer a demurrer was interposed. The first six grounds thereof have relation to matters of allegation found in the answer concerning the title of the city to the fee of the street, and to the ordinances and proceedings under which the improvements in question were being proceeded with. As to all such grounds the demurrer was overruled. The remaining grounds were as follows: "(7) It appears that in excavating the street there was removed the natural support of the adjacent soil to which plaintiffs were entitled of right, and the city thereby became liable for all damages to plaintiff's property thus occasioned. (8) It appears that by reason of the acts of defendant alleged the soil of plaintiff's property as the same was left by excavation was thereby caused to crumble and slide into the street, and there was accordingly a physical invasion of plaintiff's property and a taking thereof without making due compensation as provided by the constitution." Upon these grounds the demurrer was sustained. From the ruling so far as adverse, the defendant city appeals.

There has come to us with the record in the case what are denominated "briefs" and "arguments" addressed to a cross-appeal by the plaintiffs. The ¹¹⁶ record does not show that any such appeal was taken. Since the submission of the case, there has been filed with the clerk a statement on the part of the attorneys for the city to the effect that a timely and legal notice of cross-appeal was served upon them, but that, in preparing the record for this court, they failed by oversight to include the same in such record. If this method of record presentation could be approved, still it must be said that there is nothing before us to indicate that any such notice was served upon the clerk of the court below. This was essential to the appeal. Following the statute, and under our repeated holdings, we are without jurisdiction to entertain the cross-appeal: Code, sec. 4114; *Names v. Names*, 74 Iowa, 213, 37 N. W. 163; *Plummer v. People's Bank*, 74 Iowa, 731, 33 N. W. 150; *Clayton v. Sievertsen*, 115 Iowa, 687, 87 N. W. 412.

2. The constitutional provision invoked by plaintiff—section 18 of the Bill of Rights—declares that private property shall not be taken for public use without just compensation first

being made. And it will be observed that the precise ground of the ruling of the trial court complained of was that on the facts alleged, of which the answer made admission, a case of wrongful taking of private property within the meaning of the constitution was made out. It is the correctness of this ruling that is made the subject of argument, and we shall confine our attention thereto. To begin with, it is no doubt the general rule that every owner of soil has the right to a continuance of the lateral support afforded thereto in a state of nature by the soil of his neighbor. The right is one of property, and the owner may restrain any threatened interference therewith, or, if deprived thereof, he may have recovery in the way of damages. The cases in which the doctrine is announced are extensively collected in 1 Cyclopaedia, 775 et seq., and we need not stop for further citation. And, on general view, we perceive no good reason for making any distinction between those cases involving the question of lateral support where a municipality is a party and those in which the rights of individuals simply are ¹¹⁷ brought forward for consideration. It becomes manifest upon examination and reflection, however, that, when dealing with the subject matter as related to the improvement of streets in municipalities, we are not given the situation which obtains ordinarily in cases arising between individual adjoining owners. A municipality takes title in fee to streets by authority of statute, and for a specific purpose. Having acquired title, it becomes its right—and, not only that, but subject to some qualifications as to time and manner, its duty—to “improve and repair”: Code, sec. 751. Now, it is apparent to every observing man, and hence must have been to the legislature, that a system of streets constructed to meet the requirements of the public is not possible in the average municipality by conforming strictly to the natural surface of the soil. There must be a cut here and a fill there. When, therefore, municipal authority was granted to acquire land for and to lay out streets, there was annexed the general power to establish grades and to improve in accordance with such grades: Code, secs. 751, 782. And it has never been doubted but that within the contemplation of the statute the right to grade and improve is coextensive with the limits of the street: *Gallaher v. City of Jefferson*, 125 Iowa, 324, 101 N. W. 124. Title as for a street being present, the municipality may not only enter upon and proceed to improve, but, in the language of

the cases, the character and extent of the improvements to be made, as of grading, etc., is for the exclusive determination of the municipal authorities. The courts will not interfere with their action unless fraud or oppression is made to appear: *Dewey v. Des Moines*, 101 Iowa, 416, 17 N. W. 605.

As a matter of statute, it is nowhere provided that damages may be recovered by an abutting property owner occasioned by the work of bringing the surface of a street to the grade as originally established therefor. And, except in cases where a physical trespass and taking possession of the soil has been made to appear, or we have ¹¹⁸ been presented with allegation and proof of negligence in respect of the manner of doing the work, we have steadily refused to recognize any such right as existing at common law: *Creal v. Keokuk*, 4 G. Greene, 47; *Coates v. Davenport*, 9 Iowa, 227; *Russell v. Burlington*, 30 Iowa, 262; *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17; *Reilly v. Ft. Dodge*, 118 Iowa, 633, 92 N. W. 887. It is to be observed, however, that in no one of our cases giving sanction to a recovery was the right bottomed on the lateral support doctrine. And the subject matter was not presented to the court or discussed in opinion as involving any question of constitutional right. In *Creal v. Keokuk*, 4 G. Greene, 47, the injury complained of consisted in plaintiff being compelled to raise his store building to conform to a grade established by the city for the street. The ground of the denial of a right of recovery was twofold. After speaking of the necessity for and benefits of municipal corporate organization, it is said in the opinion that every man who becomes a citizen of the municipality becomes a member of the corporation, and consents to the provisions and powers as well as the liabilities contained in the charter. One of these provisions authorized the grading of streets. "This," it is said, "was agreed to by the parties to the compact, and considered essential to the enjoyment of property and advancement and prosperity of the city. . . . It being for the mutual benefit of all that this power should exist and be incorporated into the charter, and the grading of the streets being necessary for the convenience of all, every man surrendered for his own good all objections to the prudent exercise of this power." The court then goes on to the further pronouncement that with title to the fee of the street there passed to the city as by grant the right to do all those things reasonably necessary to make it safe and convenient for the re-

quired purpose. In each of our cases which follow, the conclusion reached in *Creal v. Keokuk*, 4 G. Greene, 47, finds approval without discussion. Counsel for appellees has not in argument taken note of these cases, and ¹¹⁹ this, we assume, on the theory that the filling of a street within its borders does not amount to a taking of the abutting property or any part thereof, and hence the cases are not in point. Whether this is so or not, we shall have occasion to treat of on a later page of this opinion.

The general subject has, with more or less frequency, been dealt with by the courts elsewhere, and examination discloses that not a little conflict exists in the cases and among the text-writers. Within proper limits, we can do no more than to call attention, in a partial way, to what has been said on the subject. The English cases, and, almost without exception, the earlier cases in this country, hold to the doctrine of nonliability for damages variously denominated as "indirect," "incidental," or "consequential," arising out of the making of street improvements. Of these a leading American case is *Callender v. Marsh*, 1 Pick. (Mass.) 418. There the case was for digging down the street in front of plaintiff's dwelling-house and taking away the earth, so as to lay bare the foundations of the house and endanger its falling, in consequence of which the plaintiff was obliged to build new walls, etc.—a case in its facts, as will be seen, very similar to the one we have before us. The defendant, a street officer of the city, pleaded the statute authorizing the work of grading streets, and to this the plaintiff made reply that the statute was in excess of constitutional authority in that according to a provision of the Declaration of Rights no property of an individual can be appropriated to public uses without reasonable compensation being made therefor. In refusing to make application of the constitutional provision, the court said: "There has been no construction given to this provision which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government." Finding that the ¹²⁰ street had been properly laid out, the court proceeded to say further: "He who sells [to the city] may claim damages, not only on account of the value of the land taken, but for the diminution of the

value of adjoining lots, calculating upon the future probable reduction or elevation of the street. And all this is a proper subject for the inquiry of those who are authorized to lay out, or of a jury if a party should demand one. And he who purchases lots so situated for the purpose of building upon them is bound to consider the contingencies which may belong to them." And this language was quoted with approval in the opinion in *Creal v. Keokuk*, 4 G. Greene, 47. Following this came the case of *Radcliff's Exrs. v. Mayor*, 4 N. Y. 195, 53 Am. Dec. 357. There, also, the case arose out of a street excavation whereby the soil of plaintiff's lot was caused to fall. A recovery was denied on the ground that the defendants were acting under authority conferred by the legislature to grade, and were not answerable for the consequential damages sustained by abutting owners, the statute having made no provision for the payment of such damage. In the course of the opinion it is said: "Our constitution provides that private property shall not be taken for public use without just compensation. But I am not aware that this, or any similar provision in the constitutions of other states, has ever been held applicable to a case like this. Although plaintiff's property has suffered damage, I find no precedent for saying that it has been taken for public use within the meaning of the Constitution." This case was cited in approval in the late case of *Uppington v. New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550. The question presented in *Mayor etc. v. Omberg*, 28 Ga. 46, 73 Am. Dec. 748, was in all respects similar. It was there said: "It being conceded that these proceedings are regular, that what has been done it was lawful to do, and the corporation not having transcended its authority, our conclusion is that, although the plaintiff has been injured, it is *damnum absque injuria*. People purchase¹²¹ property and build in towns with full knowledge of public necessity to level streets by excavating or elevating as the case may demand; and they must take the chances and the consequences." And further: "It cannot, we think, with any propriety be contended that this is taking private property for public use." In *M. E. Church v. City of Wyandotte*, 31 Kan. 721, 3 Pac. 527, another excavation case, it was held that in the absence of any express provision of statute on the subject, a city cannot be made liable for incidental injuries arising from the exercise of its continuing authority to make changes in the grade of its streets; that in such there is no taking

of private property for public use. In *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89, the damage arose out of the excavation of an alley causing the soil of plaintiff's premises to cave in. It was held that here was not an exercise of eminent domain so as to require compensation. *Northern Trans. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336, was a case for damages growing out of an interference with access to plaintiff's property by a work of public improvement. And it was said: "That persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country." After citing several cases, among others *Callender v. Marsh*, 1 Pick. 418, the court proceeds: "The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." In *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830, the damage sought to be recovered was for an elevation of the street surface.¹²² The doctrine of nonliability for consequential damages was declared for, and the court adds: "The principle upon which the rule is based seems to be that the purchaser of a lot upon a street is supposed to calculate the chances that the grade of the street may be changed, and such contingency is an element which affects the price he pays for the lot." *Fellowes v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447, was an excavation case, and, as here, the complaint was of the sliding in of the soil of the abutting lots. A recovery was denied, and the holding was put on the ground that an injury of the character alleged must have been contemplated when the street was laid out, and damages consequent thereon must have been considered and compensation made or waived at such time. The foregoing reference to particular cases will be sufficient to indicate the trend of judicial decision. If the reader cares to exploit the subject further, he will find the cases well collected in Dillon on Municipal Corporations, section 989 et seq. and notes, in Cooley on Constitutional

Limitations, 251 (note), in Lewis on Eminent Domain, section 92 et seq., and notes, and in Abbott on Municipal Corporations, section 810 (note). See, also, the exhaustive dissenting opinion of Mr. Justice Hoyt in *Parke v. Seattle*, 5 Wash. 1, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68.

Judge Dillon, in discussing the subject in his work (section 989), says: "In view of the nature of the streets and of that control over them which of right belongs to the state, and of the nature of the ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in grades thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of streets) shall be found expedient, we think that adjoining property owners are not entitled of legal right, without constitutional or statutory aid, to compensate for damages ¹²³ which result as an incident or consequence of the exercise of this power by the state, or the municipality by delegation from the state." And in section 992 he states it as his conclusion that, although adjoining property may suffer indirect or consequential damages as a result of street improvements, still it is not, in a constitutional sense, taken for public use. Judge Cooley, in his work on Constitutional Limitations, page 253, sums up his view of the subject thus: "If a city . . . orders and constructs public works from which incidental injury results to individuals . . . an action will not lie for injury. The reason is obvious. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints."

Of the cases which announce a rule at variance with the class of which those cited above stand as examples are the following: *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. Rep. 758, 14 S. E. 847; *Parke v. Seattle*, 5 Wash. 1, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68; *Dyer v. St. Paul*, 27 Minn. 457, 8 N. W. 272; *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706. And the Ohio cases of which *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421, is a type. The Ohio cases have from the beginning consistently declared for a liability doctrine, not on constitutional grounds, but upon the

general principles as expressed in the maxim "Sic utere tuo," etc. For the other cases it must be said that in no one of them was the decision made to rest on strict constitutional grounds. In each thereof the court was called upon to deal with a condition of peculiar hardship arising out of the withdrawal of lateral support in making a street excavation. And while the doctrine of nonliability for consequential damages as summed up by Judge Dillon, *supra*, was not impugned—on the contrary, adherence thereto was expressly announced in the Wisconsin and ¹²⁴ Virginia cases—the several decisions were put upon the ground that the rule of lateral support as it obtains between individual land owners should obtain between a municipality and an abutting lot owner. And in this view, Mr. Lewis, in his work on Eminent Domain, section 101, concurs. Another class of cases cited to our attention may properly enough be taken note of. It has been variously held, both in this state and elsewhere, that a municipality may be charged as for a taking in the constitutional sense where in making a street fill the earth at the base of the embankment is permitted to encroach upon the abutting property. Of these cases *Hendershott v. City of Ottumwa*, 46 Iowa, 658, 26 Am. Rep. 182, furnishes a sufficient example. It was there decided that the city had no right in making an embankment to enter upon plaintiff's lot and deposit earth thereon, and that it made no difference whether the deposit was directly made, or that the earth was permitted to roll down the sides of the embankment in such manner that it passed at once upon the lot. In either event, it would amount to an encroachment on the soil of the lot, and hence a direct trespass. In closing the opinion the court said: "We need not determine whether a city is liable for digging to a line of a street by which the soil upon the adjoining land is caused to fall, to the damage of the owner. There is a clear distinction between such a case and the case at bar. In making an excavation to the line of the street, there is no encroachment upon the adjoining land. The injury is not direct and immediate. It depends upon the lapse of time, the action of the elements, the depth of the excavation, and the character of the soil." It may be said in passing that, following the case thus cited, and furnishing a legislative view of the subject, came the act of the 25th General Assembly, now Code, section 784, which provides that cities of the first class in addition to the right to purchase shall have the extraordinary

power to take by condemnation proceedings so much of the abutting lands as may be necessary to the construction of a street fill, to the end that the ¹²⁵ street, when brought to grade, shall be of uniform surface to the full width thereof as laid out. Upon the abutting property being brought to grade the city shall reconvey to the owner upon repayment of the original purchase or condemnation price.

Still another class of cases are cited on the brief of counsel for appellee, of which mention only need be made. In several of the states a change has been made in the form of constitutional expression, so that as now existing the mandate forbids, not only the taking of private property, but declares that it shall not be injured or damaged. Expressly based on such a provision, it has been variously held that for indirect injuries or consequential damages caused to abutting property by the making of street improvements a recovery may be had. We shall not attempt a discussion as to the soundness of the conclusion reached in these cases, because manifestly enough they cannot be accepted as authority, where, as in this state, no such constitutional provision exists.

With the general state of authority before us, we come to consider what shall be the rule adopted for the determination of the instant case. The question is of much importance because common observation teaches that the facts as disclosed by the petition are not unusual in practical experience. In most of the cities and towns of this state grading work is necessary to the convenient use of streets, and elevations and excavations are frequent. As the question is presented to us it may be divided thus: 1. Must it be said that in the case of a street excavation which has resulted in the caving in of the soil of the abutting lots along the street line there has been a taking in contravention of the provision of the Bill of Rights? 2. If not a taking in the constitutional sense, then shall the rule of our former cases be repudiated and the lateral support doctrine as the same has application in cases arising between individual owners be made to govern?

¹²⁶ Quite naturally we address ourselves first to the constitutional question. It should be kept in mind in this connection that plaintiffs do not complain as of a direct and physical invasion upon their soil. They are not seeking to recover the value of the earth which caved off into the street. Their action is for damages to their premises as a whole, in

the respect that the convenience of use has been destroyed in part, and the sale and rental value diminished. Now, as a general proposition, it would seem that there can be no disturbance of or interference with the property rights of an abutting owner without involving to some extent a taking. The right to light, air, of access, to be free from nuisance, etc., as well as the right of lateral support, are property rights, and it follows as a matter of course, that he who deprives the owner thereof in any degree is guilty of a taking. If without right, he may be held answerable. And, reasoning from one point of view, there can be no difference whether the taking is by an individual or by the public. It is manifest, however, that in many respects the relations existing between individuals, separately considered, cannot be accepted as in all respects the correct measure to judge of the relations between the citizen and the municipal body of which he is a part. In every citizen there is vested dual rights—those individual to himself, as of life and property, and those which concern the general public of which he is a part. The former he may defend as against every other citizen, but it is the very essence of government and fundamentally so, that private rights shall at all times be held subordinate to the public good. And to this every citizen is held, as by imperative decree, to have given his consent. Hence it is that reduced to a last analysis the Bill of Rights is no more than a bill of favors. It follows that whoever associates himself with the community in legal contemplation proclaims primary allegiance to the common good of that community as within bounds it finds expression in the voice of constituted authority. And his rights are those that the law gives ¹²⁷ him. One of those rights, as we have seen, is that property accumulated by him shall not be taken for the use of the public without compensation. But with consistency this grant cannot be given force according to a literal reading of the language used. Thus it has never been considered that every property right conceivable, nor every possible taking, was included in the grant. And it could not well be. It would be subversive of public interests in the highest degree, and wholly intolerable, if every act done in the name of the government which should have effect, near or remote, to restrict or impair individual property holdings, could be made the basis of a legal demand for compensation. A recovery of damages for an injury which is merely an incident of com-

munity life, or which flows from the general and necessary operations of government, must be regarded as waived in virtue of the compact existing between the individual and the public, and, so considered, the force of reasoning in the statement respecting the subject as quoted by Judge Dillon becomes fully apparent. It is in this view that courts in giving construction to the constitution have held almost universally that there can be no recovery for indirect or consequential damages resulting from the work of public improvement. As applied to such cases, and to maintain a harmonious balance, the constitution must be construed to mean not only that the taking must be direct, but it must amount to an actual invasion and appropriation of the abutting property or some part thereof in such manner as to deprive the owner of the use thereof, as was complained of in *Hendershott v. Ottumwa*, 46 Iowa, 658, 26 Am. Rep. 182. See the cases cited foregoing, and, generally on the subject, *Cooley on Constitutional Limitations*, 666. Also the cases collected in *8 Words and Phrases*, 6852. To say otherwise would be to practically tie the hands of the state, acting through its municipalities, and prevent the making of most, if not all, those improvements which are universally considered essential, not only to the comfort and convenience of individual members¹²⁸ of the general public, but to the growth and development of our cities and towns. Not a street, park or other public place could be opened, improved or vacated; not a bridge, levee, market-house or other public building could be built, put into use, abandoned or torn down, except upon payment of damages to every property owner making proof that the use of his property was being interfered with, or that the value thereof, in whole or in part, had thereby suffered or been taken away. Thus that one who suffers inconvenience in the use of his property, or loss in the value thereof, by reason of the vacation of a public street, cannot recover damages therefor on the ground that such constitutes a taking for public use, see *Barr v. Oskaloosa*, 45 Iowa, 275, and cases cited. Looking, now, to the case as here made by plaintiffs, it is clear that they have suffered no physical invasion or appropriation of their premises, nor have they been deprived of the free use thereof from one boundary line to the other. The city had the right, as we have seen, to make the excavation, and, had the soil been such as that the earth wall would have remained standing, by all the authorities there would have

been no injury for which damages could be recovered. As it is, by combined force of what was rightfully done by the city, and the operation of a law of nature, plaintiffs have been deprived not of the possession, use and control of their premises, but—and this is the extreme—of a quantity of earth from along the margin of the lot. And in saying this we do not overlook the fact that plaintiffs allege the necessity for the building of a retaining wall. The fact could only be considered, if at all, as an element of damage following a finding that there been an actionable taking.

But we need not rest our holding for nonliability in cases like the one before us wholly on the ground as above stated. And in our further consideration we shall not be met with any question of constitutional right. Within our view the reasoning in *Callender v. Marsh*, 1 Pick. 418, and approved ¹²⁰ in *Creal v. Keokuk*, 4 G. Greene, 47, to the effect that the grant to the city, whether by dedication, by condemnation, or purchase, carried with it the right to injure, if this need be in reason, the abutting property in making such improvements as the necessity of public travel should reasonably require, is unanswerable. And, indeed, in no one of the cases holding to the liability doctrine was there a serious attempt made to answer it. At the time, the land owner knew, of course, the purpose for which the city was acquiring the land, and that sooner or later the making of improvements would be entered upon. If his land was situated on a hilltop or in a ravine, he knew that when improvements came to be made there would be necessity for excavations and fills, and he must be held to have taken this into consideration when he made the dedication, or fixed the price on sale, or made his claim for damages on condemnation proceedings, as the case may have been. And the conclusive presumption must be indulged not only that the city in accepting of the dedication, or in paying the purchase or condemnation price, understood that there was included in the grant the right to inflict indirect injury, if necessary to a proper work of improvement, but that there was in fact included in the consideration for the grant compensation for such injury as might be reasonably expected to follow. And, this being true, it would be unjust in the extreme to permit a grantor to thereafter stand upon the position that having transferred to the city either by way of dedication, or for the highest price obtainable, he secretly reserved the right to sue for and recover a further

sum as damages to his property when improvements should be undertaken, and this on a basis of its valuation, enhanced, it may be, a hundred-fold, as of the time of the making of such improvements. It is plain, also, that one holding as a purchaser from such grantor would be in no different position. He must be held to have taken with knowledge and to have been governed in making his purchase accordingly. And this conclusion is of itself amply sufficient ¹²⁰ to support a finding in the case against the contention of the plaintiffs.

This leaves as the phase of the subject remaining to be considered the question whether we shall depart from the rule of our former cases and announce a liability rule, either predicated upon the general maxim, "Sic utere tuo," or by holding that to cases such as we have before us the doctrine of lateral support should be given specific application. This we are wholly unwilling to do. Apart from the doctrine of stare decisis, to which we should be disposed to yield in the absence of any other reason, it must be manifest from what we have said on the foregoing pages of this opinion that a departure could have but one result, and that is the working out of positive injustice. And it must be presumed, and that is what we hold, that compensation for injuries resulting from a proper exercise of power in making street improvements was either waived or paid, according as the city acquired the fee of the street by dedication or through private or condemnation sale, then it can require no argument to make evident the injustice should payment of a further sum be decreed as of the time of making the improvement, and the amount thereof to be determined with reference to the conditions then existing.

This opinion is already overlong, and we shall not attempt to pursue the subject further. It follows from what we have said that the court below was in error in its ruling sustaining the demurrer as appealed from.

Reversed.

Weaver, J., dissents.

For Authorities on the Question Involved in the principal case, see the notes to Smith v. St. Paul etc. Ry. Co., 109 Am. St. Rep. 911; O'Brien v. Philadelphia, 30 Am. St. Rep. 837. For authorities discussing the particular question of a city's liability for removing the lateral support of abutting property in changing the grade of a street, see Nichols v. Duluth, 40 Minn. 389, 12 Am. St. Rep. 743; Stearns v. Richmond, 88 Va. 992, 29 Am. St. Rep. 758; Parke v. Seattle, 5 Wash. 1, 34 Am. St. Rep. 839. The three cases last cited, together with

Cabot v. King, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, and Damkoehler v. City of Milwaukee, 124 Wis. 144, 101 N. W. 706, show that the supreme court of Iowa is not in line with the weight of authority on the subject in declaring that the interference with a lot owner's right of lateral support, though done by a city in grading, or changing the grade of, a street, is not a taking of property not permissible without first making compensation.

FOWLER v. CHADIMA.

[134 Iowa, 210, 111 N. W. 108.]

DOWER—Release Without Joining With Husband.—It is not necessary for a husband and wife to unite in the same deed to effect a release of her dower. She may relinquish her dower to his grantee by a quitclaim deed in which he does not join. (p. 437.)

S. H. Fairall, for the appellant.

Remley & Remley, for the appellees.

²¹⁰ **WEAVER, C. J.** On and for some time prior to August 14, 1888, the plaintiff herein was the wife of one David H. Fowler, who was then the owner of a quarter section of ²¹¹ land in Jackson county, Iowa. On July 26, 1888, plaintiff made and delivered to her said husband a quitclaim deed, purporting to convey to him all her interest in said land. On August 14, 1888, said David H. Fowler sold and conveyed said land to one Novak by warranty deed in which plaintiff did not join. On October 4, 1888, plaintiff conveyed the same land to Novak by a quitclaim deed in which her husband did not join. Thereafter, and during the lifetime of David H. Fowler, said Novak conveyed the land in question to the defendant herein. In the year 1904 Fowler died, and thereafter plaintiff instituted this proceeding on the theory that her contingent dower right in the land had never been effectually released, and that upon his death she became vested with the fee to a one-third interest in said property. To the petition of the plaintiff setting forth the facts above related, the defendant demurred on the ground that the averments of said pleading affirmatively show a release of her dower right. This demurrer having been sustained, plaintiff elected to stand upon her petition, and judgment was thereupon rendered against her for costs. From this judgment, she appeals.

The one question thus presented is whether husband and wife must unite in the same deed in order to effect a release of the latter's contingent right or dower. In a brief showing much industry and research, counsel for appellant has arrayed a large number of authorities for our consideration, many of which may fairly be cited in support of his proposition that at common law a joinder of husband and wife in the same deed was necessary to an effectual release of the wife's right of dower; but modern innovations by statute and otherwise, upon common-law rules affecting the property rights of married women, have been so great and are of such radical character that the earlier precedents upon the subject are of but little value, save as matters of history. According to the ancient theory, the individuality and independence of the wife were so merged (or submerged, rather) ²¹² in the person and authority of her husband that, generally speaking, she was held incompetent to transact any business, great or small, with reference to her own estate, or with reference to her interest in the estate of her husband, unless he united with her; and while the husband could not by the conveyance of his real estate defeat his wife's contingent interest therein, yet, even after an absolute conveyance by him of his own estate or interest in such property, his wife was disqualified to release the possibility of a right on her part, which could not ripen into enjoyment except by his death, until he was willing to unite with her in executing the necessary writing for that purpose. If there was ever any good reason for this rule, it has ceased to exist. In many, if not all, of the later cases cited by the counsel for appellant, the decision has been reached, not so much because of reliance upon the common-law rule, as because the terms of the statute of the particular state seemed to require the deed or release to be executed by both husband and wife. Our own statute does not attempt to prescribe the manner or form in which dower may be released. It does provide (Code, sec. 2919) that a married woman may convey or encumber real estate or any interest therein belonging to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons. Technically speaking, dower, in the common-law sense of the term, has long been abolished in this state, and the wife's interest in her deceased husband's lands is a distributive share of one-third in fee of all the real property possessed by him dur-

ing his marriage, which has not been sold on judicial sale, "and to which the wife has made no relinquishment of her right." Now, although a contingent dower right may not be an estate, it certainly does constitute an interest in land which is recognized by the statute as being the subject of relinquishment by her in the life of her husband. Such being the case, it would seem that, under the general terms of Code, section 2919, cited, its ²¹³ relinquishment may be accomplished by her "in the same manner" as other persons not laboring under the disabilities of coverture would relinquish a contingent or remote interest in like property. So long as the husband retains his title to the land, there is good reason for saying the wife should not be empowered to convey or transfer her dower right to a stranger. There is also obviously good reason for saying that, when a husband has by his separate deed conveyed the fee to a third person, it should not be competent for his wife to convey or transfer her contingent interest to a stranger to the title, and the statute has wisely provided that a wife's contingent interest in her husband's property shall not be the subject of contract or traffic between them; but when the husband has once conveyed the fee, why should the wife not be at liberty to relinquish her dower interest to the purchaser with or without her husband's consent?

The wife's deed, under such circumstances, is not a grant or conveyance, in the legal sense of the term, though we frequently used those terms as applicable to her act. She has no estate in the land which she can grant or convey to another. She has at most a contingent interest, a possibility of an estate which may accrue to her in the event that she outlives her husband, and, while she cannot sell or convey it to another, she can release or relinquish it in favor of the owner of the fee, save only where the owner of the fee is her husband. Her relinquishment adds nothing to the quality of the estate of the fee owner, but it removes a burden or encumbrance therefrom. By enabling a married woman to engage in business in her own name, and to buy, sell, own and control property as freely and effectively as her husband can do, our statute necessarily subjects her to the ordinary rules of the law of estoppel, and when upon a sufficient consideration moving directly to her, or upon a consideration moving to her husband in the sale of the fee of his land, she, by deed or by formal release, relinquishes her dower right, she should be held estopped to say that, not-

withstanding ²¹⁴ such conveyance or relinquishment, she still demands an admeasurement of dower upon the husband's death. Indeed, it was the general rule, even at common law, that the wife's release of dower was held operative as an estoppel, rather than as a contract: *Gillilan v. Swift*, 14 Hun, 574; *Reiff v. Horst*, 55 Md. 42. And decisions holding her estopped by her separate deed were not unknown before the modern statutes emancipating women from most of the disabilities of coverture: *Shepherd v. Howard*, 2 N. H. 597; *Fowler v. Shearer*, 7 Mass. 14; *Irving v. Campbell*, 4 N. Y. Supp. 103; *Nelson v. Holly*, 50 Ala. 3. She has often been held estopped by her conduct, on which the purchaser of the fee has relied, although no deed of any kind was executed by her: *Wright v. DeGroff*, 14 Mich. 164; *Connolly v. Branstler*, 3 Bush (Ky.), 702, 96 Am. Dec. 278; *Hart v. Giles*, 67 Mo. 175; *Smiley v. Wright*, 2 Ohio, 506.

This court has had no case before it raising the question precisely as it is presented by the record now before us; but we have on several occasions considered questions involving principles which we think must govern our conclusion. For instance, it has several times been held that, till modified by the enactment of Code, section 3154, our statutes empowered husband and wife to enter into contracts with each other for the sale or relinquishment of their contingent rights in each other's property: *Robertson v. Robertson*, 25 Iowa, 350; *Poole v. Burnham*, 105 Iowa, 620, 75 N. W. 474; *McKee v. Reynolds*, 26 Iowa, 578. In the last case, the court held that, even if the circumstances of the case made the release from husband to wife invalid as a contract, yet where the release has been executed, and the consideration paid, "the law will estop the husband to disregard the agreement." In the same case, Mr. Justice Dillon, who wrote the opinion, says: "Aside from the statute, it is a well-established rule that a wife cannot relinquish her contingent right of dower, except by joining with her husband in a conveyance to a ²¹⁵ third person, or, at least, after a sale and conveyance by him, executing to the purchaser from him a release or relinquishment." It is true this remark appears to have been made *arguendo*, but it is significant of the view held by that distinguished jurist as to the broadening effect of the statute upon the rights of married women and of the manner in which a release of dower may be effected thereunder. Again, in *Dunlap v. Thomas*, 69 Iowa, 358, 28 N. W. 637, we find

that even an oral relinquishment by a wife, made upon consideration paid, and upon which the purchaser relies, will be respected and enforced. Now, Code, section 3154, does no more than to render husband and wife incompetent to contract between themselves concerning their contingent interest in each other's lands. It in no manner affects the right of either as it stood before its enactment to relinquish his or her contingent interests to a third person, holding the fee by conveyance from his or her spouse. If, except for this statute, the wife could of her own right and volition, relinquish her contingent interest to her husband, and thus enable him by his individual deed to convey an unencumbered title to his grantee, it would seem clear that she could accomplish the same end by making the relinquishment direct to such grantee—and, while the statute last referred to disables her to relinquish to her husband, it does not in terms or by implication take away her rights in any other respect.

The statutes of the several states bearing upon this subject and kindred subjects are quite dissimilar in terms, and most of the decisions of the courts of other jurisdictions are for that reason not in point with the instant case. In our judgment, to hold that a wife cannot effectively release her dower interest in land to the grantee of her husband, without joining the latter with her in the relinquishment, is to ignore the spirit and purpose of our statute, and revert to burdensome forms and restrictions which the law has long since outgrown. We do not overlook the objection that the instrument in this case is in form a conveyance or quitclaim; ²¹⁶ but we think that, under the circumstances as pleaded in the petition and admitted by the demurrer, the court is bound to give it effect as a release of dower.

The ruling of the district court is right, and the decree appealed from is affirmed.

On the Release of Her Dower Right by an instrument in which her husband does not join, see Slocomb v. Ray, 123 N. C. 571, 68 Am. St. Rep. 830.

IN RE ESTATE OF HENDERSHOTT.

[134 Iowa, 320, 111 N. W. 969.]

WILL CONTEST.—Testamentary Capacity—Former Adjudication.—On the contest of a will by the heirs of the testatrix, the pleadings and decree in a suit by her guardian against the proponent canceling certain of her contracts made about the time of the execution of the will, on the ground of unsoundness of mind, are admissible on the issue of testamentary capacity. (p. 439.)

WILL CONTEST.—The Order of Introduction of Evidence in a will contest is largely in the discretion of the court. (p. 439.)

WILL CONTEST.—The Costs of a Will Contest between the proponent who claims the estate of the decedent under the will and the contestants who claim as heirs at law are properly charged to the unsuccessful party. (p. 440.)

Contest of a will on the ground that the testatrix was of unsound mind, that the will was procured by undue influence, and that it was subsequently revoked. From a judgment for the contestants, the proponents appeal.

G. C. Hoover and Wright, Leech & Wright, for the appellant.

Henry Negus and Baker & Ball, for the appellees.

321 **McCLAIN, J.** 1. Contestants offered in evidence the pleadings and decree in a proceeding by Robert B. Smith as guardian of Hannah Hendershott against C. M. Gruwell, the proponent in the case, to have canceled certain assignments of notes by her to said Gruwell, on the ground that said assignments were fraudulently procured; and, further, to have canceled and set aside on the same ground a certain contract between Hannah Hendershott and said Gruwell by which she agreed to make the will in his favor, which is offered for probate in this proceeding, in consideration of care to be rendered and conditions performed by said Gruwell. Proponent's objections to the introduction in evidence of these pleadings, on the general ground that they were incompetent, irrelevant and immaterial, and of the decree on the further ground that it in no way affected the parties in the case, were overruled. If the decree was admissible, the pleadings in the case in which the decree was rendered were also admissible, as showing the force and effect of the decree. In this decree the court found that Hannah Hendershott was of unsound mind and incompetent to execute a contract at the time said alleged contract was executed, and said alleged assignments were made, and

ordered that said contracts and assignments be set aside and canceled. By the allegations of the pleadings under which the decree was entered, and by the other evidence introduced in this case, it was made to appear that the assignments and contract were executed at about the same time as the will, probate of which is proposed in the present case, and as parts of a general plan to convey, devise and bequeath all of testatrix's property to this proponent; and, if she had not sufficient capacity to make the assignments and execute ³²² the contract, she was not capable of making a valid will. If, then, the contestants of his will are privies to the adjudication in the action by the guardian, this proponent, who is asking to have the will probated for his benefit, cannot say that the decree in no way affects him, for it directly relates to the capacity of testatrix to execute the will. It cannot be doubted that, if testatrix herself during her lifetime had brought the action which was brought by her guardian, and this decree had been entered in such action, the finding would have been competent evidence against this proponent, as to her capacity to make the will. The proceeding in behalf of testatrix by her guardian was in law a proceeding instituted by her, for the guardian conclusively represented her: 1 Herman on Estoppel, 377. The contestants, claiming interests in the estate of Hannah Hendershott as heirs at law and next of kin, are privy, therefore, to the adjudication, and proponent, who was defendant in that proceeding, cannot question the conclusion of the court expressed as an essential finding in that decree that Hannah Hendershott had not mental capacity to make the contract. That finding was admissible in evidence against proponent on the question of the capacity of testatrix to make the will. As tending to support this conclusion, see *Sly v. Hunt*, 159 Mass. 151, 38 Am. St. Rep. 403, 34 N. E. 187, 21 L. R. A. 680; *Manley's Exr. v. Staples*, 62 Vt. 153, 19 Atl. 983, 8 L. R. A. 707. The decree and pleadings were therefore properly received in evidence.

2. Complaint is made of the action of the trial court in admitting what was claimed to be a revocation of the will when offered by contestants in rebuttal, although it had been excluded when first offered by them as a part of their evidence in chief. The order of introduction of evidence is largely in the court's discretion. It may be that when first offered so strong a case of mental incapacity continuing from a time prior

to the making of the will up to testatrix's death had ³²³ been made out that the court could not properly assume that testatrix had capacity to execute a valid revocation; but that, after the evidence for proponent had been introduced, there was a question as to capacity which could properly be submitted to the jury. No complaint is made as to the instructions on the subject, and we assume that the question was properly submitted. No prejudice to proponent appears, for he did not ask an opportunity to introduce further evidence, and simply reasserted the objection made when the instrument of revocation was offered in chief.

3. The costs were properly taxed to proponent. The trial was simply a contest between proponent, claiming the estate of deceased under the will, and contestants, claiming it as heirs at law and next of kin; and the costs were properly taxed to the unsuccessful party, under the general rule: See Code, sec. 3853; *Allen v. Seaward*, 86 Iowa, 718, 52 N. W. 587; *In re Nicholson's Will*, 123 Iowa, 630, 99 N. W. 300; *Beebe v. McFaul*, 125 Iowa, 514, 101 N. W. 267.

The judgment of the lower court is correct, and it is affirmed.

A Decision upon the Contest of a Will that the testator was of sound and disposing mind at about a particular time is conclusive of that question in a subsequent controversy between the same parties in which the same issue is again involved: *Sly v. Hunt*, 159 Mass. 151, 38 Am. St. Rep. 403.

BOND v. MILLIKEN.

[134 Iowa, 447, 109 N. W. 774.]

BANKRUPTCY—Judgment for Breach of Promise.—A judgment recovered in an action for breach of contract to marry, wherein there is no allegation of seduction, is for a breach of contract, not for a willful and malicious injury, and hence does not survive the discharge of the defendant in bankruptcy. (p. 442.)

BANKRUPTCY—Appeal.—The Question cannot be Raised for the first time on appeal that a discharge in bankruptcy is not effectual as against a judgment because the latter was not scheduled. (p. 443.)

Action in equity to establish a judgment against the defendant as a lien on land acquired by him since the rendition of the judgment. The defendant pleaded his discharge in bankruptcy, subsequent to the time when the judgment was

rendered, and asked for a cancellation of the judgment. From a decree for the defendant the plaintiff appeals.

F. M. Williams, for the appellant.

J. H. Scales, for the appellee.

⁴⁴⁸ McCLAIN, C. J. It appears from the record that the judgment which the plaintiff seeks to have established as a lien against the property of defendant was rendered in an action brought by this plaintiff against this defendant to recover damages for breach of promise of marriage, and is for the recovery of damages in the sum of three thousand dollars, on that cause of action. Two questions are presented on this appeal: First, as to whether the discharge in bankruptcy pleaded by defendant relieved defendant from liability for the damages recovered in that action, the claim on behalf of the appellant being that her claim is one of those excepted by the bankrupt act from the effect of the discharge: second, that the discharge was not effectual because it was not made to appear, either in the allegations of the answer or by the evidence introduced on the trial, that plaintiff's claim was scheduled among the liabilities of defendant in the bankruptcy proceeding, or that plaintiff had any notice or actual knowledge of such proceeding.

1. The contention that judgment for breach of promise of marriage is not within the operation of a discharge ⁴⁴⁹ under the bankrupt law is based on the second subdivision of section 17 of the bankruptcy act of July 1, 1898, chapter 541, 30 Statute, 550 (U. S. Comp. Stats. 1901, p. 3428), under which the discharge in question was granted, by which it is provided that the discharge shall not release the bankrupt from liability on a judgment "for willful and malicious injuries to the person or property of another." The action for damages for breach of promise is not only technically an action for breach of contract, but, in the action in which this judgment was rendered, was in fact only for breach of contract, for there were no allegations of seduction or other wrong. The allegations were that the defendant by "promises and artifices won the affection of the plaintiff, and she greatly became interested in the defendant and looked upon him as her future husband, but that the defendant, in violation of said promise and agreement [of marriage to plaintiff], wrongfully entered into marriage . . . with one Mary Rush and

thereby placed it beyond his power to consummate and carry out his agreement with this plaintiff; that by reason of said wrongful act on the part of defendant the plaintiff has been outraged in her feelings and humiliated in the estimation of her friends and acquaintances and suffered great mental anguish, agony and mortification, by reason of which she has been damaged by the defendant in the sum of five thousand dollars." It is plain that, under these allegations, defendant could not have been held liable for any injury to plaintiff without proof of a contract of marriage, and that the sole damage which could be proven was the damage resulting from the breach of such contract. The allegation of subsequent marriage to another did not in any way change the nature of the cause of action. It seems to have been uniformly held, in cases involving the effect of a discharge in bankruptcy on a claim for breach of promise of marriage, that the claim is not within the exception of the bankrupt act above referred to: *Finnegan v. Hall*, 35 Misc. Rep. 773, 72 ⁴⁵⁰ N. Y. Supp. 347; *In re Fife* (D. C.), 109 Fed. 880; *In re McCauley* (D. C.), 101 Fed. 223; *Biela v. Urbanczyk* (Tex. Civ. App.), 85 S. W. 451.

It is evident that the statutory exception referred to relates to torts and not to breaches of contract. See, for instance, *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. Rep. 595, 48 L. ed. 754, wherein it is held that a claim for criminal conversation is within the statutory exception and is therefore not released by discharge in bankruptcy. We are not concerned here with the question involved in some of the cases already cited as to whether the discharge relieves the bankrupt from liability for damages in an action for breach of promise of marriage in which seduction is alleged. It may be well that, although the action is technically for breach of contract, if there is seduction as an accompanying fact, the claim, so far as it is for the special recovery of damages due to the seduction, may be held to be a claim for willful and malicious injury to the person; and no doubt, under the amendment to section 17 of the bankruptcy act of February 5, 1903 (32 Stats. 798, c. 487 [U. S. Comp. Stats. Supp. 1903, p. 684]), which enlarges the exceptions from the effect of a discharge so as to include liabilities for the seduction of an unmarried female or for criminal conversation, the claim of damages for seduction in an action for breach of promise of marriage is reserved. But we have no question of that kind

in this case, and are satisfied with the correctness of the conclusion of the trial court that the discharge relieved defendant from further liability to the plaintiff under her judgment, unless, for the reason discussed in the next paragraph of this opinion, the defendant has failed to make out a discharge with reference to this particular liability.

2. It is further contended that defendant was relying on the discharge, and that he had the burden of showing that plaintiff's judgment was scheduled, or that the plaintiff had notice or knowledge of the bankruptcy proceeding: See subdivision ⁴⁵¹ 3 of section 17 of the bankruptcy act of 1898. In fact, however, defendant's discharge was set up in plaintiff's petition with the accompanying allegations that it was ineffectual because plaintiff's judgment was within the exception already referred to covering injuries to the person, and it is further alleged that for this reason the judgment remains a lien on defendant's land. Defendant had no occasion to allege or prove the scheduling of the judgment, for its effect was not attacked on that ground, in this court, for the first time, as it appears plaintiff raises the point that the discharge was not effectual because the judgment was not scheduled. As plaintiff assumed the burden in the first instance of attacking the insufficiency of the discharge as to her judgment, she cannot rely on a ground of objection not raised, and which defendant was not, therefore, called upon to disprove.

The decree of the trial court is affirmed.

Weaver, J., takes no part.

A Judgment for Criminal Conversation is for a willful and malicious injury to both the person and property of a husband, and, by virtue of section 17 of the bankruptcy act, is exempt from the effect of the discharge of the defendant in bankruptcy: Colwell v. Tinker, 169 N. Y. 531, 98 Am. St. Rep. 587.

NEW YORK LIFE INSURANCE COMPANY v. CHITTENDEN.

[134 Iowa, 613, 112 N. W. 96.]

ADMINISTRATION on Estate of Absentee—Validity.—A statute authorizing administration on the estate of a person who has absented himself and concealed his whereabouts for seven years is constitutional, and an administration thereunder is valid although he is in fact not dead. (p. 446.)

ADMINISTRATION on Estate of Absentee—Life Insurance.—Where the estate of an absentee has been administered, and the insurer of his life, rather than stand suit on the policy, and litigate the question of death, has paid the loss to the administrator, the money thus paid cannot be recovered back when it thereafter appears that the absentee is alive. (p. 448.)

PAYMENT BY MISTAKE—Recovery of Money.—The rule that money paid under a mutual mistake of fact can be recovered back is not applicable where, under an assumption of fact known to both parties to be doubtful, a voluntary payment has been made in extinguishment of a claim. (p. 449.)

INSURANCE AGENT—Scope of Authority.—When an insurance agent has been authorized to deliver drafts in settlement of a claim, his acts and declarations in effecting a settlement bind his principal, regardless of restrictions on his authority contained in the policy. (p. 450.)

Action to recover back money paid on a life insurance policy under a mistake as to the death of the insured. From a judgment for the defendants the plaintiff appeals.

Seerley & Clark and James H. McIntosh, for the appellant.

Blake & Wilson and Power & Power, for the appellees.

614 **McCLAIN, J.** Two policies were issued by plaintiff to one Jarvis on the ninth day of September, 1889, each for thirteen hundred and fifty dollars, payable on his death to his wife, or, if not living, to his children, or, if no children should survive, then to the executors, administrators or assigns of the insured. Prior to the twenty-fifth day of December, 1894, the wife of the insured had died, and he was without children, and he had assigned the policy to the defendants Chittenden & Eastman, a partnership to whom he was indebted, and forwarded a copy of this assignment to the plaintiff. It appears, also, that prior to the assignment to Chittenden & Eastman there had been another assignment by way of security to the Iowa State Savings Bank which had not been forwarded to the plaintiff, and was not known to it

when the assignment to Chittenden & Eastman was received and recognized. On the last above date Jarvis, the insured, disappeared from his home in Burlington, and was not heard of for more than seven years. At the April term, 1902, of the district court of Des Moines-county, the Iowa State Savings Bank applied as creditor for the appointment of an administrator for the estate of Jarvis, alleging his disappearance, and that his whereabouts had continued unknown to his friends and the members of his family, and that he had not been heard from. Proper proceedings were had, under which defendant Waldeck was appointed administrator of the estate of Jarvis, and a claim was then made jointly by Waldeck as administrator and Chittenden & Eastman as assignees for payment of the policies held by Jarvis in the plaintiff company; and proofs of death were furnished by Waldeck, in ³¹⁵ which were the following statements: "(7) Date of death: During Christmas week, 1894. (8) Place of death: The assured disappeared, and since that date he has not been heard from. There was nothing in his family or business relations to explain his absence. His brother at the time of his disappearance was a resident of Burlington, Iowa, and has ever since continued to reside there and the most pleasant relations existed between them. . . . (10) In what capacity, or by what title, do you claim this insurance? As administrator of the estate of the assured." Negotiations were had between attorneys representing the administrator and an agent of the insurance company in which it was insisted for the administrator that the insurance money was due and payable, and that, unless it was paid, suit would be instituted on the policies. Subsequently two drafts for the amount specified in the policies payable jointly to Chittenden & Eastman, assignees, and C. W. Waldeck, administrator, were tendered to the attorneys for the administrator by the agent of the plaintiff, with the condition that the administrator and assignees should give a bond of indemnity to the company for the return of the money in case it should be subsequently discovered that Jarvis was not dead at the time of this settlement. The attorneys for the administrator refused in behalf of their client to furnish such bond, and thereupon the drafts were delivered without further insistence upon this condition. The proceeds of the drafts were paid in part to the Iowa State Savings Bank and in part to Chittenden & Eastman. It is conceded that after this payment and the distri-

bution of the proceeds thereof by the administrator Jarvis was alive, and, on the discovery of this fact in April, 1905, the company tendered back the policies of insurance and demanded the return of the money paid, and on refusal this suit was instituted. As the payment of the insurance was by drafts made jointly to Chittenden & Eastman and Waldeck, this suit is no doubt properly instituted against them jointly, although the money has ⁶¹⁶ been in part distributed to the Iowa State Savings Bank, which is not a party to this action; but, as our conclusions in the case are not dependent on the extent of the liability, respectively of Waldeck and Chittenden & Eastman, we shall give that subject no further consideration.

1. If Waldeck as administrator was entitled to maintain a suit against plaintiff under the authority given him in the administration proceeding and to recover the insurance money which was in fact paid, plaintiff had no right to recover as against him individually, for he had done what by law he was authorized to do, and could not be held individually liable. The first question, then, as we think, is whether the proceedings for administration on the estate of Jarvis were valid. It seems to be conclusively settled by adjudications that a probate court acquires no jurisdiction by proceeding to administer on the estate of a person on the ground that he is dead if in fact he is alive, and such proceedings are entirely invalid, and any judgments or orders made in pursuance thereof, and any action taken thereunder, are absolutely void as against the person who is erroneously adjudged to be dead. Without citing the many authorities supporting this proposition, it is sufficient to say that any such proceeding, if sustained, would result in depriving the person erroneously adjudged to be dead of his property without due process of law: *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896.

But, in the exercise of its jurisdiction over property within the state, it may be provided by the legislature that after the absence of the owner unheard of for a specified period such property may be administered upon in the same form of proceeding as is provided for administration upon the property of a person deceased, and such administration will be valid as against the absentee and all persons interested, although he is in fact not dead: *Cunnius v. Reading School Dist.*, 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125.

§17 Section 3307 of our Code provides for such an administration on the estate of one who has absented himself from the state and concealed his whereabouts from his family for a period of seven years, and under the decision last above cited we have no doubt that this section is constitutional and provides for a proceeding which may properly be resorted to in such cases, and which is conclusive on the absentee and those claiming under him. The administration granted as to the property of Jarvis was in accordance with the provisions of this section, and we think it was valid.

Waldeck, as administrator, had the right, therefore, to receive from the plaintiff the proceeds of the policies on Jarvis' life so far as such proceeds were payable to his administrator, and, as Chittenden & Eastman assented to such payment and to the distribution of the proceeds by Waldeck as administrator, there was a final settlement under the policies, which, if Jarvis had been in fact dead, would have been binding on all parties. It may be conceded that the policies did not mature simply on the granting of administration on the estate of Jarvis as an absentee. The conditions of the policies were that the sums named therein should be paid on Jarvis' death, and, as already indicated, the administration was not conclusive as to the fact of his death, but only as to the fact of his absence and the concealment of his whereabouts from his family for seven years. But the facts which justified the administration would also as evidence have established a right of action on the policies by the administrator and the assignees to recover the insurance money, for those facts would have been sufficient evidence of death to sustain a judgment based on that fact. The plaintiff company was thereupon brought face to face with the question whether it would pay the amounts of the policies or stand suit thereon, and question the fact of the death of Jarvis.

It may further be suggested that the obligation of the plaintiff under its policies was to pay the amount named §18 therein to the proper beneficiary within sixty days after due notice and satisfactory proof of death, and that proof of death stating the facts which, if established, would show the liability of the company was furnished, and no objection thereto on the part of the company was made. Under these conditions, and for the purpose of avoiding an action on the policies, the plaintiff company elected to pay over the amount thereof to the persons entitled to receive the insurance money

if Jarvis were in fact dead, and this compromise and settlement of a claim based on the assertion of his death was, we think, binding and conclusive on the company. Had a judgment been secured in an action by the administrator with authority to represent the rights of all persons interested in the proceeds of the policies, such judgment would have been conclusive as to the death of Jarvis, and the company could not, after paying the amount of such judgment, have recovered back the money paid on discovering that the essential fact in issue in the case, to wit, the death of Jarvis, had been erroneously adjudicated. The judgment would have been conclusive as to that fact. Therefore, we think that a settlement by which the money was paid for the purpose of avoiding a suit in which such a judgment might have been rendered is also conclusive, and that plaintiff cannot now recover back the money thus paid.

In a case quite similar in its essential facts to the one now before us the court of appeals of New York held that an arrangement for the payment of the amount of the policies entered into in view of the assumed death of the assured as indicated by his absence unheard of for more than seven years was binding after it had been ascertained that he was still living; such arrangement having been made with regard to the chances of success of the claimant under the policy at the time when the insured was thought to be dead. In that case, as in this, "clearly but one thing was dealt with or could be in the agreement of settlement, to wit, the possibility that the insured should prove to be alive": *Sears v. Grand Lodge*, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204. In the case before us there was no compromise, it is true, as to the amount to be paid; but there was a compromise on the question whether anything was payable, and for the purpose of avoiding litigation the plaintiff elected to make payment. A voluntary payment is usually conclusive, and cannot be recovered back: *Manning v. Poling*, 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30; *James v. Dalbey*, 107 Iowa, 463, 78 N. W. 51; *Davenport & St. P. R. Co. v. Rogers*, 39 Iowa, 298; *Bailey v. Paullina*, 69 Iowa, 463, 29 N. W. 418; *Baldwin v. Foss*, 71 Iowa, 389, 32 N. W. 389; *Lyman v. Lauderbaugh*, 75 Iowa, 481, 39 N. W. 812; *Weaver v. Stacey*, 93 Iowa, 683, 62 N. W. 22; *Windbiel v. Carroll*, 16 Hun, 101; *National Life Ins. Co. v. Jones*, 1 Thomp. & C. 466.

2. Counsel for appellant insist that this payment was one made under a mutual mistake of fact, and that in accordance with a well-recognized equitable principle money thus paid may be recovered back. The rule thus invoked is not applicable, however, where, under an assumption of fact known to both parties to be doubtful, there has been a voluntary payment in extinguishment of a claim. The principle is thus stated in 1 Pomeroy's Equity Jurisprudence, second edition, section 855:

"Where parties have entered into a contract or arrangement based upon uncertain or contingent events purposely as a compromise of a doubtful claim arising from them, . . . and there is . . . an absence of bad faith, violation of confidence, misrepresentation, concealment and other inequitable conduct, . . . if the facts upon which such agreement or transaction was founded . . . turned out very differently from what was expected or anticipated, this error, miscalculation or disappointment, although relating to a matter of fact and not of law, is not such a mistake within the meaning of the equitable doctrine as entitles the disappointed party to any relief. . . . In such classes of agreements and transactions the parties are supposed to calculate the chances, and they certainly assume the risks."

⁶²⁰ And at another place in the same work (section 849) the author uses this language: "It should be carefully observed that this rule [allowing recovery of money paid under mistake] has no application to compromises where doubts have arisen as to the rights of the parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or fact, are governed by special consideration." The foregoing quotations are made part of the opinion in *Sears v. Grand Lodge*, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204, as applicable to a case very similar to the one before us. In *Riegel v. American Life Ins. Co.*, 140 Pa. 193, 23 Am. St. Rep. 225, 21 Atl. 392, 11 L. R. A. 857, and on a subsequent appeal, 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166, it was decided that the holder of a policy accepting its surrender value under the assumption that the assured was still alive might, on proving that in fact the insured had already died, recover the balance of the face of the policy which had matured by the death of the assured without the knowledge of either party. But it is evident that,

under these circumstances, there was a mistake as to a fact not within the contemplation of either party in entering into the arrangement. In the case before us the question whether Jarvis was dead was distinctly within the contemplation of both parties, for it was expressly recited in the proof of loss that he had been absent for more than seven years, and had not been heard of within that time. The only question of controversy between the parties in determining whether or not the insurance money should be paid was as to whether Jarvis was dead, and the plaintiff conceded its liability by voluntarily paying the claim. In the absence of fraud or concealment, the means of knowledge as to the fact in controversy being equally accessible to each party, the payment is conclusive: *Eagan v. Aetna F. & M. Ins. Co.*, 10 W. Va. 583; *Mutual Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354.

3. With reference to the consideration of the negotiations between the agent of plaintiff and the attorney for the administrator, it is contended that the acts and statements of the plaintiff's agent were not binding upon it, for the reason that they are not shown to have been within the scope of his authority, which was limited by stipulations in the policy. It is enough to say that this agent had authority to represent the company in delivering the drafts to the defendants in payment of the claims under the policies, and that what he did and said in connection with the effecting of this settlement must be binding upon the plaintiff. It is to be remembered that he at first refused to deliver the drafts until a bond of indemnity was furnished, and that afterward, on a representation made to the company by counsel for the administrator, that no bond would be furnished, and that, if not voluntarily paid, the right of recovery under the policies would be litigated, the agent delivered the draft without further condition. Certainly what his agent said and did was within the scope of his authority, regardless of any provisions in the policy. The company is now relying on the delivery of these drafts as constituting the very payment which they make the basis of their right to recover back the money paid, and cannot question the authority of the agent through whom such payment was made.

The judgment of the trial court is therefore affirmed.

Statutes Authorizing Administration upon the estates of absentees as though they were deceased have been held unconstitutional in some states, but in others have been upheld as valid: Selden v. Kennedy,

104 Va. 826, 113 Am. St. Rep. 1076, and cases cited in the cross-reference note thereto.

Recovery of Payments of Money voluntarily made is the subject of a note to New Orleans etc. Co. v. Louisiana etc. Co., 94 Am. St. Rep. 408.

PUGH v. JONES.

[134 Iowa, 746, 112 N. W. 225.]

GARNISHMENT.—A Guardian cannot be Garnished after the death of his ward by creditors of her heirs. (p. 452.)

THE GARNISHMENT of an Administrator by creditors of the heirs after the heirs have assigned their interest in the estate is ineffectual. (pp. 452, 453.)

R. W. Pugh, for the appellee.

J. M. Dower, for the appellees.

⁷⁴⁷ DEEMER, J. One M. Dwyer was the guardian of Mary L. Murphy. The latter died May 28, 1904. After her death her guardian was garnished by plaintiff as a supposed debtor or as holding certain property belonging to Richard M. Murphy and Eugene A. Murphy, against whom plaintiff held judgments. These judgment defendants were heirs and legatees of Mary L. Murphy, deceased. D. M. Vannest, a son in law of Mary L. Murphy, was, on the thirteenth day of June, 1904, appointed a special administrator of Mary L. Murphy's estate, but he never qualified as such. Thereafter, and on July 9, 1904, John Jones was appointed and qualified as administrator of her estate, and on the thirteenth day of July, 1904, he too was garnished by plaintiff. Garnishment was also had on Vannest; but, as he never qualified and never held any money or property belonging to the heirs of the deceased, no attention need be paid to this garnishment. In the meantime, and before July 9, 1904, defendants, R. M. and E. A. Murphy, had assigned to various parties, interveners in this case, all their rights, titles and interests in and to the estate of Mary L. Murphy, deceased. These assignments were each and all prior to the garnishments of the administrator ⁷⁴⁸ and seem to have been made in good faith, at least their bona fides is not questioned, so that this garnishment cuts no figure in the case.

But plaintiff contends that his garnishment of the guardian of Mary L. Murphy, although run after her death, was and is sufficient to hold the funds which might eventually pass to her heirs and legatees. It is a general rule that, when property is in custodia legis, the officer holding it is not liable to garnishment: Rood on Garnishment, sec. 27, and cases cited; *Martin v. Davis*, 21 Iowa, 535. When such right exists, it is in virtue of some statute, and, as there is no statute in this state authorizing it, there seems to be no authority for holding a guardian as garnishee: *Brooks v. Cook*, 8 Mass. 246; *Waite v. Osborne*, 11 Me. 185; *Short v. Moore*, 10 Vt. 446; *Stout v. La Follette*, 64 Ind. 365.

Administrators and executors may, under our statute (Code, sec. 3936), be garnished, but not guardians. But it is argued that Dwyer was no longer guardian when garnished, for the reason that his ward was then dead. But this is not so. Although the ward was dead, the guardianship continued for the purpose of settlement until a proper adjustment of the trust in the probate court: *State Fair Assn. v. Terry*, 74 Ark. 149, 85 S. W. 87. After the death of the ward, he was still an officer of court until discharged, and subject to its control and order. He was not holding the funds in his hands for the heirs of his ward, but his accountability was as the administrator of his ward's estate. He could not pay the money in his hands to the heirs of his ward with impunity, and could not close up his trust without accounting under the direction of the court to the administrator of his ward's estate. While for certain purposes it is held that the estate of an ancestor vests immediately in his heirs, yet this does not entitle them to the personal estate or to any aliquot part thereof unconditionally. It is all subject to administration, and passes as in this case from the guardian ⁷⁴⁹ to the administrator, and not directly to the heirs. But in this case it is plain that the guardian was holding the property when garnished as an officer of court, and, as such, was responsible to the court appointing him and to the administrator, and not to the heirs of his ward. Under no view could he be held as garnishee until discharged as guardian, and, as such discharge could not be had until he had turned the property over to the administrator of Mary L. Murphy's estate, he was manifestly not subject to garnishment.

When the proper administrator was garnished, the heirs had assigned all their interest in their ancestor's estate, and

as plaintiff had no greater rights in and to the fund than his debtors had or would have had, he got nothing by that garnishment. The whole proposition here is answered by the suggestion that the property was in custodia legis, while in the hands of the guardian, although his ward was dead, and that there is no provision of statute authorizing the garnishment of a guardian. As we have said, the garnishment of Vannest is of no moment (*Mechanics' Bank v. Waite*, 150 Mass. 234, 22 N. E. 915; and the garnishment of the administrator was after all the assignments had been made.

Further, it is argued that the assignments to interveners are not sufficiently established. This is purely a fact question. Turning to the record, we find that they are properly proved.

The judgment discharging the garnishees is correct, and is affirmed.

A Guardian is not Chargeable as Trustee, at the suit of creditors of his ward, until there has been an accounting and a balance found in his hands: *Davis v. Drew*, 6 N. H. 399, 25 Am. Dec. 467. Nor can an administrator, in advance of a decree of distribution, be charged as a garnisher in respect to funds in his hands belonging to an heir: *Orlopp v. Schueller*, 72 Ohio St. 41, 106 Am. St. Rep. 583.

CASES
IN THE
SUPREME COURT
OF
MAINE.

WHITMORE v. BROWN.

[102 Me. 47, 65 Atl. 516.]

NUISANCE, Removal of.—A court of equity will not, except in extreme cases, exercise its power to compel the removal of existing structures upon land, though they may constitute a nuisance, but will leave the plaintiff to his remedy at law. (p. 456.)

NUISANCE, Acquiescence in, Removal of.—A court of equity will not intervene to remove an alleged nuisance when the plaintiff has long tolerated it, but will leave him to establish his claim at law. (p. 456.)

NUISANCE—Structures on Another's Land.—The mere fact that structures are or will be erected on the land of another without the required statutory license, does not make them nuisances or outlaws to be lawfully assailed and destroyed by anyone, or abated at the private suit of any person. (p. 457.)

NUISANCE—Erection of Building—Injunction Against.—A court of equity will not, at the suit of a private person, restrain the erection of a building on the land of another, not in fact a nuisance, merely because its erection is forbidden by statute or ordinance. (pp. 457, 458.)

NUISANCE—Structures on Land of another lessening plaintiff's enjoyment thereof for residence purposes, and also lessening its commercial value, do not give a right to an abatement of them as a nuisance, or even to damages. (p. 458.)

NUISANCE—Structures on Land.—A land owner, to enable him to have structures upon the land of another declared a nuisance, must show that they infringe some individual right recognized by the law as a legal private right of his. That they infringe the legal rights of others gives him no cause of action. (p. 458.)

NUISANCE—Structures Infringing Public Rights only, such as navigation and boating, can be dealt with only by the public, by a proceeding in the name of the state, or by some authorized person in behalf of the public. An individual affected has no separate right of action in his own name. (pp. 458, 459.)

NUISANCE.—Proximity or Ugliness of Otherwise Harmless Structures upon the land of another, although they obstruct the view
(454),

of the adjoining owner, do not constitute them a nuisance. The hurt to plaintiff must come from the structure, qua nuisance, to give him a cause of action. (p. 459.)

NUISANCE—Injunction Against Erection of Structure.—To enable a plaintiff to have a wharf on the land of another declared a nuisance and the extension thereof enjoined, on the ground that it materially impedes the passage by water to and from his land, the proof of that fact must be clear and convincing. (p. 461.)

Hale & Hamlin, for the plaintiff.

A. W. King and J. A. Peters, for the defendants.

⁵⁴ EMERY, J. From the bill, answer and evidence we find the following facts: On the south side of Mt. Desert Island is a small cove of tide water called "Gilpatrick's Cove." The defendants have a warranty deed of a lot of upland on this cove at its head or extreme northern end, and also of so much of the shore or flats of the cove as is included within the extension of the side lines of their upland across the shore or flats so as to include the structures hereinafter described. The plaintiff owns a lot of upland bordering on the cove next southwest of the defendants' upland, but, so far as appears in this case, she does not own any part of the shore or flats of the cove: Whitmore v. Brown, 100 Me. 410, 61 Atl. 985. The defendants, being in possession under a warranty deed, must therefore be held to have a prima facie title to the flats named in their deed, at least as against the plaintiff. The defendants' grantor some twelve years ago erected on the land included in his deed to them a wharf extending from the upland out upon their flats in front, and also erected upon this wharf a building for trading purposes. This wharf and building have been maintained ever since, and are now maintained by these defendants and are wholly upon their land. They are now proposing to widen the wharf by an addition to its eastern side within the side lines of their flats and not extending any further out from the upland. The present wharf was erected and has ever since been maintained without ⁵⁵ the license required therefor by the statute (Rev. Stats., c. 4, secs. 96-99, inclusive), and no such license has been obtained for the proposed extension. The statute prohibits the erection and maintenance of an unlicensed wharf. The plaintiff by her bill asks the court to enjoin the proposed extension of the wharf and also the further maintenance of the present structures on the flats upon the ground that being forbidden by the statute they are a nuisance in law, and injure the plaintiff

"in her comfort, property and the enjoyment of her estate" (Rev. Stats., c. 22, sec. 13), her land being used and valuable as a summer residence.

If the existing structures alone were the subject matter of this suit, the bill would need be dismissed under the settled doctrine of this court that it will not, except in extreme cases, exercise its equity powers to compel the removal of existing structures upon the land of the defendant, though they may be a nuisance in law, but will leave the plaintiff to his remedy at law which in this state is "plain, adequate and complete": See the statute on nuisances, Rev. Stats., c. 22; *Davis v. Weymouth*, 80 Me. 307, 14 Atl. 199; *Tracy v. Le Blanc*, 89 Me. 304, 36 Atl. 399; *Sterling v. Littlefield*, 97 Me. 479, 54 Atl. 108. In *Maine Wharf v. Custom House Wharf*, 85 Me. 175, 27 Atl. 93, the structure was not on the defendant's land and the rights had been settled at law. No such hurt or danger of hurt is shown by the evidence in this case as would take it out of that rule.

The bill would also need be dismissed under the general principle of equity jurisprudence that an equity court will not intervene where the plaintiff has long tolerated the alleged nuisance, but will leave him to establish his claim at law. These present structures had been tolerated for ten years, during all which time they were as much nuisance as now, having the same effect on persons and property at *Gilpatrick's Cove*. The danger of future hurt from them is no more imminent now than at first. After ten years the claim of the plaintiff for their removal is much too stale for the court to enforce by decrees in equity.

But the claim of the plaintiff for an injunction against the proposed extension is cognizable in equity and hence requires consideration in this suit; and the already extensive and increasing occupation⁵⁶ of lands bordering on the tide waters of the Maine coast for summer residences by citizens of this and other states and countries justifies, we think, a somewhat elaborate exposition of the law governing cases like this. The wharf extension, if erected, will, so far as appears, be wholly on flats owned by the defendants. Under our law, based on the Colonial Ordinance of 1641-1647, their ownership of their flats is as full and complete as their ownership of their upland, except that it is subject to some extent to certain public rights: *State v. Wilson*, 42 Me. 9; *Moore v. Griffin*, 22 Me. 350; *King v. Young*, 76 Me. 76, 49 Am. Rep. 596. In this

case, however, we have to do only with the public right of navigation, since no complaint is made of infringement of any other public right. Prior to the statute cited (Rev. Stats., c. 4, secs. 96-99, inclusive), the owner of flats could erect wharves on them as freely as upon his upland, provided he did not thereby actually interrupt or impede navigation: *Commonwealth v. Charleston*, 1 Pick. 180, 11 Am. Dec. 161; *Commonwealth v. Alger*, 7 Cush. 53; *Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100; *State v. Wilson*, 42 Me. 9. Whether a wharf did actually obstruct or impede navigation and thereby become a nuisance at common law or under Revised Statutes, chapter 22, section 5, was a question of fact, and sometimes a difficult one, to be determined in each case upon the evidence in that case. The legislature has now intervened and created a tribunal to determine that question, viz., the municipal officers of the town, and has prohibited the erection of wharves in tide waters without a license from that board (Rev. Stats., c. 4, secs. 96-99, inclusive). If that license is duly granted, the wharf cannot, under the state law, be abated as an obstruction to navigation, even if it be such in fact, though, of course, the license will not protect the wharf from complaints for infringement of private rights. If the license is not obtained, the wharf erected without it is an unlawful structure even if it does not in fact obstruct navigation. That the legislature has the power to thus require a license for the erection of wharves on flats is not questioned: *Commonwealth v. Alger*, 7 Cush. 53.

Such being the rights of the defendants and of the state in and over their flats, we proceed to consider what right the plaintiff may have to an injunction against the proposed extension of the defendants' ⁵⁷ wharf and also to an abatement of the existing structures, assuming for convenience of statement and argument the present suit to be appropriate for that purpose.

The mere fact that the structures are, or will be, erected and maintained without the required statutory license does not make them outlaws, to be lawfully assailed and destroyed by anyone, or abated at the private suit of any person: *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711. Indeed, the statute does not declare them to be a nuisance in law. An equity court will not at the suit of a private party restrain the erection of a building, not in fact a nuisance, merely because its erection is forbidden by statute or ordinance: *St.*

John Village Corp. v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671; *Mayor of Manchester v. Smith*, 64 N. H. 380, 10 Atl. 700. Again, the mere fact that the existence of these structures upon the defendants' flats do or will lessen the plaintiff's enjoyment of her lot, even as a summer residence, and lessen its commercial value, does not give her a right to an abatement or even to damages. A neighbor's building on his own land, by its ugliness of architecture or by its mere proximity, may lessen one's enjoyment of his own residence and lessen its market value; or a competing, neighboring factory may lessen one's business profits and the value of his own factory, and yet no legal right be infringed. It is not enough, therefore, for the plaintiff to show that the structures on the defendants' flats are there without the required statutory license, and that they lessen the enjoyment and market value of her land. She must go further and show that they infringe some individual right recognized by the law as a legal, private right of hers. That they infringe the legal rights of others gives her no cause of action against them.

The present structures and the proposed extension are forbidden by statute, and to that extent are, and will be, illegal. Do they or will they infringe any individual legal right of the plaintiff? There is no evidence nor complaint that they do or threaten any injury to the plaintiff or her land by vitiating the air or water, by unhealthy or offensive odors, by disturbing noises, or by obstructing the passage of light or air, or by otherwise unfavorably affecting her health or physical comfort. The plaintiff practically advances but three propositions, viz.: 1. That the structures are in law and in fact an obstruction ⁵⁸ to the navigation of the cove and thereby reduce the value of her land in the cove; 2. That the structures are unsightly and also obstruct the view of the scenery from her land, and thus lessen the enjoyment and value of her estate; and 3. That the structures materially impede the passage by water to and from her land, and thus lessen its value.

As to the first proposition, whatever the damage to the plaintiff or her land, the right infringed, that of the unimpeded navigation of the cove, is a public right common to all the people of the state, and not a right peculiar to owners and occupants of land bordering on the cove. It is the settled law of this state that structures which only infringe public

rights can be dealt with only by the public—that is, by proceedings in the name of the state or some authorized person in behalf of the public. An individual affected has no separate right of action in his own name. To enforce the public right for his benefit he must set the public agencies in motion. It is only when the structures inflict upon him some special legal injury different in kind as well as degree from that suffered by others that he has an individual right of action against them: *Holmes v. Corthell*, 80 Me. 31, 12 Atl. 730; *Penley v. Auburn*, 85 Me. 278, 27 Atl. 158, 21 L. R. A. 657; *Taylor v. Portsmouth K. & Y. St. Ry. Co.*, 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560.

The plaintiff contends, however, that boating privileges in and about the cove are attached to her lot, that these are a large and peculiar element in its market value, and constitute a legal right appurtenant thereto apart from the public which has no right to make use of it to facilitate their use of their public right, and that the structures restrict and abridge these privileges: There may be appurtenant to her lot a right of passage by boats, etc., to and from it (*Maine Wharf v. Custom House Wharf*, 85 Me. 175, 27 Atl. 93), but that is only the right of access to and departure from her land by water. Any other use of the water for boating or other navigation would be under the public right alone.

But the plaintiff further urges that, conceding the right violated to be a public right only, the violation of that public right has damaged the value of her land, and that this damage is individual and peculiar, one not suffered by the public at large. The question, ⁵⁹ however, is not whether the plaintiff's land has been damaged, but whether any of her legal rights have been infringed. The land owner has no legal right that the market value of his land shall not be disturbed.

Though by reason of her land being on this cove the plaintiff may have more need or occasion than other persons to make use of the public right to the unimpeded navigation of the cove, and her land may be more damaged by the violation of that right, the right itself is still public and not private. Her ownership of land on the cove gives her no greater nor different right to navigate it. Every other citizen has the same right in kind and degree. The plaintiff may have a greater interest than others in the right and a greater need of its enforcement, but that does not change the public right into a private right: *Frost v. Washington Co. R. R. Co.*, 96

Me. 76, 51 Atl. 806, 59 L. R. A. 68. It may be that an individual actually obstructed by an unauthorized structure while in the actual exercise of the public right may maintain an action for damages resulting, as was held in *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; but that is a different case from this, where the only complaint is of the unfavorable effect upon the enjoyment and value of the land.

The plaintiff further urges the hardship of her being left to the action of public officials to enforce the public right and relieve her from the damage done her by these unlicensed structures. She suggests that the officials, influenced by local, political or other immaterial considerations, may improperly neglect and even refuse to act upon application and thus leave her helpless. Even if this apprehension be well founded, the court cannot afford relief in this suit. Her remedy against recalcitrant public officers is in some other procedure.

To the second proposition there are two answers. The law of this state does not recognize any legal right to an unobstructed view of scenery over and across the lands, even the flats, of others unless acquired by grant; nor does the law recognize as a cause of action the annoyance caused by the proximity or ugliness of otherwise harmless structures upon the land of another. The pleasure of an unobstructed view and of a prospect free from unsightly objects may ⁶⁰ be great, but in the present state of the law it is too refined for legal cognizance. Again, the annoyances complained of, and the consequent loss in value of land, were not caused by the fact that the structures are or will be erected and maintained without the required statutory license. The plaintiff must prove that her damage was caused by the particular element in the character or use of the structure which renders it a nuisance: *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373, 46 Am. Rep. 400. The hurt to the plaintiff must come from the structure, qua nuisance, to give her a cause of action for maintaining it: *Bowden v. Lewis*, 13 R. I. 189, 43 Am. Rep. 21, a case in many respects similar to this. In the first case the plaintiff's buildings were destroyed by fire communicated from the defendant's steam mill situated on its own land, but without the required statutory license therefor. The statute declared any stationary steam engine so erected without the license "to be a common nuisance," and the statute (Rev. Stats., c. 22, sec. 13) giving a right of action for injury from a common nuisance was then in force. It was held, never-

theless, that the absence of the required license did not give the plaintiff a right of action, and that unless the steam mill was a nuisance in fact, its erection and use were not wrongful as to the plaintiff. In the second case the plaintiff was lessee of certain oyster lots from the state, and erected a building on them without the required statutory license therefor. This building somewhat impeded navigation, was unsightly, and also obstructed the view from the defendant's villa lots near by. After the denial of a request for the removal of the building, the defendant himself removed it. In an action of trespass for such removal, it was held that neither the absence of the required license nor the described damage to the defendant's villa lots justified his action. The plaintiff had judgment. In the case at bar had the license been obtained and the structures made lawful, the inconvenience to the plaintiff from the obstruction to navigation, the lessening of her enjoyment of her estate and of its value from the proximity and ugliness of the structures, would have been the same in kind and degree. Hence she was not injured by the lack of the license and cannot maintain this suit on that ground. The two cases cited by the plaintiff, being from other states, are not compelling authority ⁶¹ however closely in point, but we think they are each distinguishable from this case. In *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. 22, the plaintiff's residence fronted on a public park. The defendant undertook to inclose a large part of the park for his own use. The court enjoined him at the suit of the plaintiff. The park, however, was not established or reserved simply as a highway for purposes of passage, but to be kept open for air and prospect as well. Residences fronting on this park practically had annexed to them the privilege of air and prospect over the park, a distinct privilege appurtenant, and as such of material value. It was as if A had granted to B a privilege of prospect over his land as appurtenant to B's residence, and C should undertake to obstruct it. In the case at bar the flats are the defendants' private property, subject only to certain public rights. Neither the public, however, nor the plaintiff has any privilege of prospect over them. In *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 466, 32 South. 144, 59 L. R. A. 399, the plaintiff owned a store on a business street. The defendant owned an adjoining lot on the same side of the street, and proposed to extend its building into the street of which it owned the

fee subject to the easement of a public street. The plaintiff alleged that the proposed extension would obstruct not only the view of the street from his store, but also the view of his store from the street. It was held on demurrer that the plaintiff had stated an injury different in kind and degree from that suffered by the public. Granting that the owner of a store on a business street has, as appurtenant thereto, the right that nothing shall be erected by his neighbor on the street to hide his store from the passing throng upon whose custom his store depends, the case is obviously not the one at bar.

Undoubtedly these structures do annoy the plaintiff and the occupants of her land, and do reduce its renting and selling value, but, so far at least, it appears to be a case of *damnum absque injuria*. It is clear, we think, that her first and second propositions do not, under our law, sustain her suit.

We come now to her third and last proposition, viz., that the structures in fact materially impede the passage by water to and from her land, and thereby infringe a legal right appurtenant to her ⁶² land, and distinct from the public right. As to the structures in existence at the time she filed her bill, she must be remitted to her action at law under the rules stated in the early part of this opinion. As to the proposed extension, the evidence does not make it plain to us that it will materially impede passage by water to and from the plaintiff's land. It is by no means so plain a case as that of *Maine Wharf v. Custom House Wharf*, 85 Me. 175, 27 Atl. 93. The defendant's upland and wharf are at the extreme head of the cove. The plaintiff's land is wholly west of them. The proposed extension is on the east side of the wharf and no farther out toward the sea. Not being fully convinced of the fact alleged, we cannot make it the basis of a decree in equity for a permanent injunction, but must leave the plaintiff to establish it at law. A decree of absolute injunction is too sharp and heavy an instrument to be used unless the right to be protected thereby has been established by a judgment at law or made indisputable in equity.

We find no ground upon which this suit can be maintained in equity, and hence the decree dismissing the bill must be affirmed; but since the plaintiff may possibly be able to establish in an action at law some infringement of her individual legal rights, such as the right of access, the decree

of dismissal should be without prejudice to such an action. Since the wharf and the proposed extension are confessedly in violation of the statute requiring a license, we think the defendants should not recover costs of appeal.

Final decree to be made in accordance with this opinion.

A Private Individual may Sue to Enjoin or Abate a public nuisance which causes him to suffer a special injury, different in kind and degree from that suffered by the public in general: Kauffman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368; Sloss-Sheffield Steel etc. Co. v. Johnson, 147 Ala. 384, 119 Am. St. Rep. 89; Dennis v. Mobile etc. Ry. Co., 137 Ala. 649, 97 Am. St. Rep. 69. This rule has been applied to obstructions of a public street in the nature of a nuisance: Roberts v. Mathews, 137 Ala. 523, 97 Am. St. Rep. 56; Sloss-Sheffield Steel etc. Co. v. Johnson, 147 Ala. 384, 119 Am. St. Rep. 89; Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 113 Am. St. Rep. 170; Knowles v. Pennsylvania R. R. Co., 175 Pa. 623, 52 Am. St. Rep. 860; Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858; and also to the erection of structures interfering with the easement of light and air from the public street: First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441.

The Right of a Private Individual to Erect Wharves on submerged lands is discussed in Cobb v. Commissioners of Lincoln Park, 202 Ill. 427, 95 Am. St. Rep. 258.

AMERICAN MERCANTILE EXCHANGE v. BLUNT.

[102 Me. 128, 66 Atl. 212.]

CONTRACTS Partly in Writing and Partly in Parol.—Under a written contract for the collection of claims according to a "system" of the collector, such system as explained by the agent securing the contract becomes part thereof, although not in writing, and the written and oral parts of the contract are to be construed together in determining what the whole contract expresses. (p. 465.)

CONTRACTS—Abrogation by Statute.—If an entire contract is lawful when made and a statute afterward renders performance of it unlawful, neither party is prejudiced, but the contract is to be considered at an end; and although a party is thus released from liability for damages for nonperformance, he has no right to maintain an action for recovery on the contract, the performance of any part of which is prohibited, even though it has been partly performed. (pp. 466, 467.)

CONTRACTS—Abrogation by Statute—Part Performance.—If any material stipulation in an entire contract is rendered illegal by the enactment of a statute before performance, the contract cannot be enforced. The contract fails and no recovery can be had even for the part performed. (pp. 467, 468.)

T. P. Wormwood, for the plaintiff.

Martin & Cook, for the defendant.

¹³⁰ SPEAR, J. This action is based upon a contract wherein the plaintiff avers that the defendant has failed of performance on his part, and in consequence of such failure is indebted to the plaintiff in the sum of seventy-five dollars. The essential part of the contract under which the plaintiff claims is as follows:

"AMERICAN MERCANTILE EXCHANGE.

"Incorporated Nov. 24, 1897.

"In consideration of an annual contract in above Agency, I hereby agree to pay said Agency, or order, all sums of money as collected out of accounts placed in said Agency's hands by me, whether such collections or settlements are made through said Agency's office or by me through my office or by any other person in my behalf, until the same shall amount to Twenty Dollars, and I further agree to send to the said Agency on or before ten days from date, ten accounts, otherwise the payment of Twenty Dollars shall become due and payable to said Agency, or order, on demand."

This agreement was properly executed by the plaintiff and defendant.

"To American Mercantile Exchange.

"We hereby agree to subscribe to your Exchange under the following special terms and conditions.

"1. You will employ your system to collect all claims we may place in your hands, suing where you deem advisable, and using legal means to enforce payment from debtors in any part of the United States and Canada, and all such claims shall be subject to our control or withdrawal; unless legal action has been taken, and all debts that may be advertised for sale shall be held at the figures quoted by us."

It will be observed by the use of the language in the first clause of this stipulation, "you will employ your system to collect all claims," etc., that the written contract herein set forth did not state or contain all the elements of the contract. What the plaintiff's system ¹³¹ above alluded to was, is not stated. The testimony, however, fully describes the "system" employed by the agency in the collection of accounts. In answer to the question, "You have stated that when you went to Mr. Blunt, you explained to him the method of the agency. Now, will you explain to us what that method was?" the agent of the plaintiff who executed the contract answered in detail as follows: "At that time the method

was to take the list of claims on a blank form, collecting ten cents for each claim to cover postage. A series of four letters were employed by the agency, the first notifying that the account was due and unpaid, and asking them to call on their creditor and make some settlement, and informing them at the same time that the agency in no case handled the money. After a certain length of time which shows on the list, I can't remember now, a second letter was sent informing them of the fact that they who did not pay would be reported to the trade if it was still left unpaid. After a certain length of time a third one was sent informing them that they would be sued if it was not paid, and a fourth one that when judgment was obtained, the account would be advertised for sale by public posters, and inclosing them a copy of one of the posters that had been already published."

This "system," the terms of which were not incorporated in the written contract, nevertheless, in view of the purposes and object of the defendant, became, by the specific written allusion to it, a material and important feature in the performance of the contract on the part of the plaintiff. The defendant in the written stipulation, prescribing its duties, required that the plaintiff should use its "system." Its "system" at the time the contract was executed was explained by the plaintiff's agent as above set forth. When so explained, the terms of his interpretation became as much a part of the contract as though they had been contained in a separate written document. Therefore, the whole contract of the parties, or so much of it as is necessary to the decision of this case, is contained in the written clauses before quoted in this opinion, and the explanation of the "system" as made by its agent to the defendant; that is, the written and the oral parts of the contract are to be construed together in determining what the whole contract expressed.

¹³² This contract was entire, and constituted a continuing agreement, and was binding upon the defendant to pay his subscription yearly unless abrogated by consent of the parties or operation of law. There is no pretense that the contract was mutually canceled, but the defendant avers that its further performance was made illegal by the enactment of chapter 112 of the Public Laws of 1899, which went into effect April 16, 1899, seven months before the maturity of the second year's subscription. By the contract the subscription was not due until the end of the year. This act is now in-

incorporated in chapter 130, section 7 of the Revised Statutes, as follows: "No person, firm or corporation shall publicly advertise for sale in any manner whatever, or for any other purpose whatever, any list or lists of debts, dues, accounts, demands, notes or judgments, containing the names of any or all of the persons who owe the same. Any such public advertisement containing the name of but one person who owes as aforesaid shall be construed as a list within the meaning of this section. Any person, firm or corporation violating the provisions of this section shall be liable in an action of debt, to a penalty not exceeding one hundred dollars, and not less than twenty-five dollars, to each and every person, severally and not jointly, whose name appears in any such list."

It is clear that this statute, when it took effect April 16, 1899, absolutely prohibited the plaintiff from using that part of its "system" wherein it had stipulated that accounts would be advertised for sale by public poster. It is presumed that the plaintiff did not violate this statute, and did not, subsequently to the date when it took effect, post any list of delinquent debtors. Therefore the case stands as if the plaintiff on the sixteenth day of April, 1899, had ceased to perform its contract in respect to posting lists of debtors' names and advertising the judgment for sale. While the plaintiff's contract as to the method of advertising does not specifically state that the posters shall contain the name of the debtor, yet the only inference to be derived from the language used clearly sustains that conclusion.

But the full performance of its contract was a condition precedent to the right of the plaintiff to recover the annual payment agreed upon, whether the nonperformance was caused either by the fault ¹³³ of the plaintiff, by impossibility, as by an act of God, or by a statute prohibiting performance. Upon this point the circuit court of the United States for the district of Pennsylvania in *Odlin v. Insurance Co. of Pennsylvania*, Fed. Cas. No. 10,433, 2 Wash. C. C. 312, says: "It is a general principle of law that where a contract is lawful when made and a law afterward renders performance of it unlawful, neither party to the contract shall be prejudiced, and the contract is to be considered at an end." This does not mean that a contract legal at its inception becomes illegal by subsequent statutory prohibition as to acts done before the enactment of the statute, but that the statute puts an end

to the contract, and there can be no legal recovery by the plaintiffs even if it should perform the unlawful acts, as it is contrary to the policy of the law to permit a party to recover for the performance of his own illegal acts or benefit by his own wrong. The law, however, excuses the plaintiff from performing its contract, and releases it from liability to damages for nonperformance, but it does not leave it in a position to maintain an action for recovery upon an entire contract, the performance of any part of which is prohibited, even if performed.

In *Greenough v. Balch*, 7 Me. 461, the court fully approved of this rule of law and says: "Nor are we disposed to find fault with the doctrine that where the consideration, or a part of it, is *malum prohibitum*, it violates and invalidates the promise as much as if it had been *malum in se*; both being unlawful, and neither entitled to favor or indulgence."

Shaw, C. J., in *White v. Buss*, 3 Cush. 448, in discussing the status of illegal contracts, says: "The law will not lend its aid to carry into effect an illegal contract, if it be executory, nor to restore the party who has paid money on it, if executed."

In *Goodwin v. Clark*, 65 Me. 280, it was held: "A person cannot recover for his personal services, portions of which are rendered in an unlawful employment, the contract being an entirety."

In *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299, the court say: "As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral or unlawful, and there has been no apportionment made, or means of apportionment furnished¹²⁴ by the parties themselves, it is well settled that no action will lie upon the promise." But these propositions are elementary. While these two cases do not involve the same state of facts presented in the case at bar, yet by analogy they are clearly applicable. In the cases cited, it is held that when any stipulation of an entire contract is illegal, the contract cannot be enforced. In the case at bar the contract is entire, and a part of it became illegal, *malum prohibitum*, at once upon the effect of the statute. The advertisement of a single account for sale, however soon after the statute became a law, would have subjected the plaintiff to the penalty prescribed. Therefore, if the plaintiff during the second year of the contract, and before it was performed, was prohibited

by law from the performance of any material stipulation, the entire contract for the year failed, and it cannot recover even for the part performed.

For the third and subsequent years for which it has brought suit the prohibited part of the contract was illegal from the beginning of the year, and no recovery can be had for any of these years.

Under the contract the balance of the first year's subscription—eleven dollars and fourteen cents—is barred by the statute of limitations.

Judgment for the defendant.

THE EFFECT OF STATUTES MAKING PRE-EXISTING CONTRACTS ILLEGAL.

I. General Principles Controlling.

a. In General, 468.

b. Illustrations of General Doctrine, 472.

II. Laws Relating to Remedy.

a. In General, 475.

b. Illustrations of the Doctrine, 476.

III. Laws Relating to Exemptions, 478.

IV. Laws Relating to Limitations, 479.

V. Laws Relating to Redemption, 479.

I. General Principles Controlling.

a. In General.—How far legislation of a retrospective character can proceed without infringing upon the provision of the federal constitution inhibiting state legislation which impairs the obligations of contracts is not a question of easy solution. The cases involving this point are numerous, and the distinctions which have been drawn in determining whether the obligations of pre-existing contracts were impaired by subsequent legislation are exceedingly close. One of the justices of the supreme court of the United States has said: "The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, 'obligation of contracts,' will be found a subject of extreme difficulty": Johnson, J., in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162. The difficulty arises in part because the words "retrospective laws" are sometimes used as of similar import with *ex post facto* laws. There is no express provision in the consti-

tion against the passage of the former, though there is against the latter. A retrospective law, to come within the prohibition, must be one which takes away the right of property or dissolves the obligation of a contract. Hence, unless a statute violates directly some right by a pre-existing contract, it is not unconstitutional: *Erie & Northeast R. Co. v. Casey*, 26 Pa. 287. There are many cases, too, where the questions presented are of polity, rather than of constitutional power, and in such cases retrospective laws are not unconstitutional, though they may infringe to some extent upon vested rights. Thus, retrospective laws passed to correct innocent mistakes, remedy mischiefs, execute the intention of the parties and promote justice will be sustained. This general principle is upheld in *Woodruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777; *Mechanics' etc. Sav. Bank v. Allen*, 28 Conn. 97; *Oriental Bank v. Freeze*, 18 Me. 109, 36 Am. Dec. 701; *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76; *Kunkle v. Franklin*, 13 Minn. 127; *Rich v. Flanders*, 39 N. H. 304; *Lane v. Nelson*, 79 Pa. 407. So, too, retrospective laws which validate antecedent marriages, or municipal ordinances which were legally enacted but were inoperative for want of registration, have been sustained. And retrospective laws which tend to preserve the public health and safety are not prohibited, for there can be no vested right to do wrong. As was said in *Baughn v. Nelson*, 9 Gill (Md.), 299, 52 Am. Dec. 694: "When vested rights are spoken of by the constitution as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without violating any principle of sound morality. In the language of Judge Duncan in *Satterlee v. Mathewson*, 2 Pet. 380, 7 L. ed. 458, 'there can be no vested right to do wrong.' In the nature of things, there can be no vested right to violate a moral duty or resist the performance of a moral obligation." The doctrine above stated is supported in *State v. Worden*, 56 Conn. 216, 14 Atl. 801; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Jamieson v. Indiana Nat. Gas & Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. ed. 253. It is also held that a law, though retrospective, which relates merely to procedure is valid: *Davis v. Central R. & B. Co.*, 17 Ga. 323; *Read v. Frankfort Bank*, 23 Me. 318; *Hinkle v. Riffert*, 6 Pa. 196. Hence, a statute requiring that suits must be brought by the real party in interest is valid: *Hancock v. Ritchie*, 11 Ind. 48; *Crawford v. Branch Bank of Alabama*, 7 How. U. S.) 279, 12 L. ed. 700. And a contract which is ultra vires cannot be affected by the constitutional provision as to impairment of obligation of contracts: *Westminster Water Co. v. Westminster*, 98 Md. 551, 103 Am. St. Rep. 424, 56 Atl. 990, 64 L. R. A. 630. But contracts granting immunity from taxation are within the provisions of the federal constitution: *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654.

This brings us to the question, When is the obligation of a contract impaired within the meaning of the constitution? There have

been many decisions which we will note later, wherein will be found the principle announced, that a contract, though legal when made, is abrogated when its performance is rendered illegal by a subsequent law. A careful examination of these cases, however, will show that in most of them the language referred to is mere dicta; that the decisions were based on the particular facts presented, and that while some of the distinctions were very close, the contracts in those cases were either illegal when made, or the statute in question tended to preserve the public health or safety. Before taking up these cases, it is well to note some general tests which have been adopted by the courts in determining what is meant by the words, "impairing the obligations of contracts." In *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638, it is held that the obligation of a contract is impaired if conditions are imposed which were not required when the contract was executed; and to a similar effect is the ruling in *Bailey v. Philadelphia W. & B. R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593, and in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579. Hence in applying the test whether the obligation of a contract has been impaired, the only question is whether its value has been diminished by subsequent legislation, without reference to the extent of the change which a subsequent law may make in it, for any deviation from its terms by imposing conditions not expressed in the contract, however minute and apparently immaterial, come within the constitutional prohibition: *People v. Bond*, 10 Cal. 563; *Bailey v. Philadelphia W. & B. R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Winter v. Jones*, 10 Ga. 190, 54 Am. Dec. 379; and *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 12 L. ed. 447, where it is said: "It [the contract] is not by the prohibition of the constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." In *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, Mr. Justice Swayne said: "The lexical definition of 'impair' is to make worse, to diminish in quality, value, excellence or strength, to lessen in power, to weaken, to enfeeble, to deteriorate: Webster's Dictionary. And the test does not depend upon the extent of the change which the law effects; any deviation in its terms by which conditions not expressed in the contract are imposed, or those stipulated in the contract are dispensed with, renders the act unconstitutional as impairing its obligation."

In applying the above tests, it is amply upheld that the law in existence at the time a contract is adopted becomes a part of the contract: *Aycock v. Martin*, 37 Ga. 124, 92 Am. Dec. 56; *Phinney v. Phinney*, 81 Me. 450, 10 Am. St. Rep. 266, 17 Atl. 405, 4 L. R. A. 348; *People v. Common Council of Buffalo*, 40 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485; *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489; *State v. Superior Court*, 21 Wash. 186, 57 Pac. 337; *Walker v. Whitehead*, 16 Wall. (U. S.) 314, 21 L. ed. 347. The case of *Aycock v. Martin*, 37 Ga. 124, 92 Am. Dec. 56, seems to have com-

manded the most serious consideration, and after an extensive review of the authorities on the question now under investigation Chief Justice Werner said: "The first inquiry, therefore, which is presented for our consideration and judgment is, Does the act of the legislature of the 13th of December, 1866, impair the obligation of the contract between the parties in this case, as prohibited by the constitution of the United States? The constitution, it will be perceived, does not prohibit the states from passing laws impairing contracts. The prohibition is expressly directed against laws which impair the obligation of contracts. What is the obligation of a contract as contemplated by the constitution? 'The obligation of a contract is a legal, not a mere moral, obligation; it is the law which binds a party to perform his undertaking. The obligation does not inhere or subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract': 1 Bouvier's Law Dictionary, 652, and authorities there cited. When the parties entered into the contract now before the court which the plaintiff seeks to enforce, what was the legal obligation of the defendant? His legal obligation was to do and perform just what the laws of the land, applicable to the contract, required him to do and perform at the time the contract was made, in accordance with its terms and stipulations; that was the exact measure of his legal obligation at the time the contract was made—nothing more, nothing less. The defendant's legal obligation was to perform his contract as the laws of the land applicable to that contract required him to perform it at the time it was made. That was the extent of his legal obligation to the plaintiff, and just to that extent the plaintiff had the legal right to have it performed, in order to maintain the integrity of the legal obligation of the defendant's contract. If it was not the existing law of the state, applicable to the contract at the time it was made, which created and defined the defendant's legal obligation to perform it, in accordance with its terms and stipulations, what is it that does define his obligation to perform it? If there had been no existing law applicable to the contract prescribed by the supreme power of the state at the time it was made, creating and defining the defendant's obligation to perform it, then he would have incurred no other than a mere moral obligation, over which human tribunals have no jurisdiction. It therefore necessarily follows that the existing law applicable to the contract prescribed by the supreme power of the state, at the time the contract was made, creates and defines the defendant's obligation to perform it in accordance with its terms and stipulations. A perfect right is that which is accompanied by the right of compelling those who refuse to fulfill the correspondent obligation. A perfect obligation is that which gives to the opposite party the right of compulsion: Vattel, 62. The defendant's obligation to perform his contract in accordance with its terms was a perfect obligation, because the plaintiff at the time the obligation was made had the legal right under the then existing law of the state to have compelled its performance. The defendant's obligation to perform his contract was just

what that existing law made it, just what that existing law required and would have compelled to be done for its performance, in behalf of the plaintiff, the other party to it. The defendant's obligation to perform his contract under the then existing law, was perfect, and the plaintiff's right to have that obligation performed as prescribed by that existing law was also a perfect right. . . . The conclusion of the majority of the court in this case, therefore, is, both upon principle and authority, that the binding force and coercive power of the law applicable to the contract as the same existed at the time it was made constitutes the obligation of the contract. The defendant was legally bound by that existing law to perform it in accordance with its terms and requirements, and the plaintiff had the legal right under that existing law to enforce the performance of that legal obligation. Any subsequent act of the legislature, therefore, remedial or otherwise, which alters or changes the then existing law which created and defined that legal obligation to such an extent as to make its legal force and power less binding upon the defendant to perform it, postponing or obstructing its enforcement, or imposing conditions for its performance not prescribed by the law which created and defined that legal obligation at the time the contract was made, necessarily impairs it and is prohibited by the constitution."

We have quoted from this case at length because of its general application, though the act under consideration related to the remedy only, and further, because some of the cases which seemingly announce the doctrine that a contract lawful when made is abrogated by a subsequent law declaring it unlawful, are based upon the idea that a law which affects the remedy only does not fall within the constitutional prohibition.

b. *Illustrations of General Doctrine.*—One of the best illustrations of the doctrine that a law which impairs the obligation of a contract is void is found in *Helm v. Webster*, 85 Ill. 116, where it is held that where by the terms of a conveyance of land for a street, made under the law in force at the time of opening the street, the title of the land embraced by the street should revert to the grantor on its abandonment or vacation, an act of the legislature subsequently passed divesting the grantor of this right and vesting title in another was void. And one of the most celebrated cases in which the invalidity of a law affecting pre-existing contracts is discussed is that of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629, where it was held that an act of the legislature altering the charter of Dartmouth College in a material respect without the consent of the corporation was an act impairing the obligation of a contract, and was unconstitutional and void. And to the same effect are *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, 938. The cases which have been often referred to as upholding the doctrine that a contract, though legal at the time it is made, is abrogated by a statute which afterward renders its performance unlawful will now be considered. One of the oldest of these

cases is that of *Odlin v. Insurance Co.*, 2 Wash. C. C. 312, Fed. Cas. No. 10,433, decided in 1808. In this case can be found the following language: "Where a contract is lawful at the time it is made, and a law afterward renders performance unlawful, neither party shall be prejudiced, but the contract shall be considered at an end." Yet the point at issue in this case was whether an insurance company was liable on its policy for the safe voyage of a vessel from Philadelphia to Havana, when by a subsequent act of the government an embargo was laid on the vessel and she was prevented from completing the voyage, and the company was held liable.

In *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479, 21 L. R. A. 58, a deed to certain land within the corporate limits of a city provided that the land should be used for cemetery purposes only, and by a subsequent act of the legislature the use of the land for cemetery purposes was prohibited. It was held that even if the clause in the deed was a condition subsequent, it was destroyed by the act, and the title reverted to the grantor. The act in this case declared further use of the land for cemetery purposes a public nuisance, and dangerous to the public health and safety, and, as we have seen, such acts are a proper exercise of the police power of the state; hence, this case does not conflict with the general principles above stated. In *Brick Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538, the city had conveyed land within its corporate limits for cemetery purposes with covenants of quiet enjoyment, and a law subsequently passed prohibiting its use for such purpose was upheld upon the same principle as was announced in the *Scovill* case just mentioned (62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479, 21 L. R. A. 58).

In *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430, the lessee of a wooden building, who had covenanted to rebuild in case of loss or destruction by fire was released from the obligation of the covenant because of the passage of a subsequent ordinance prohibiting the erection of wooden buildings. It is expressly stated in the opinion in this case that no question as to the validity of the ordinance was raised. A similar case to this is *Books v. Seaton*, 1 Phil. 106, where a lessee charged with a covenant to rebuild was prevented from performing by a subsequent statute, and it was held that either party could rescind the contract of lease, but that if the lessee refused to rescind, and held possession of the premises under the lease, he would have to pay his lessor the equivalent in money for the building he had contracted to erect. In *Brown v. Delahunty*, 4 Smedes & M. (Miss.) 713, 43 Am. Dec. 499, it is held that the obligor on a bail bond was discharged by a subsequent act making it unlawful for the plaintiff in execution to arrest the defendant, but this ruling is based on the principle that a state insolvent law which exonerated a debtor from imprisonment did not impair the obligation of the contract, because the means of enforcement of the debt by imprisonment belonged to the remedy. A similar rule is laid down in *Beers v. Haughton*, 1 McLean, 226, Fed. Cas. No. 1230, which was afterward affirmed by

the supreme court of the United States in 9 Pet. 329, 9 L. ed. 145. In *School District No. 160 v. Howard*, 5 Neb. (Unoff.) 340, 98 N. W. 666, a school was closed by an ordinance on account of the prevalence of smallpox. A teacher who had previously been employed for a specific period sought to recover under his contract of employment for the unfinished term during which the school was closed by reason of the subsequent ordinance, but the ordinance was upheld, on the ground that it was necessary for the protection of the public health and safety.

In *Macon & Birmingham R. R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442, it is held that a railroad company which was authorized by its charter to locate and construct its line where it saw fit could nevertheless be enjoined from locating its route over a route subsequently prohibited by statute, although the railroad had entered into executory contracts for the building before the statute was passed. This decision, however, was rendered upon the ground that when the company's charter was granted, the right to change, modify, or destroy at will or to amend the charter was reserved by the general statutes of the state, and the court was of the opinion that the company was bound to take notice of the general law of the state under which the power exercised was reserved; and for the further reason that the subsequent statute did not have any direct, but only an incidental, effect upon the contracts which the company had entered into.

In *Lowey v. Granite Stone Provident Assn.*, 8 Misc. Rep. 319, 28 N. Y. Supp. 560, a law prohibiting the sale of stock in a building and loan association was held to prevent the recovery of commissions by one who had sold shares of the stock, though the sales were made before the passage of the law prohibiting them. The opinion in this case recites that it is made upon the authority of the decision rendered in *Honegger v. Webbstein*, 942 N. Y. 252, but an examination of that case will show that the contract was illegal at the time it was made.

In *Jamieson v. Indiana Natural Gas and Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652, a company generating gas and supplying it to customers contracted with a construction company to locate and secure a right of way and construct a line of pipe through certain portions of Indiana and Illinois to the city of Chicago, and to furnish necessary machinery and appliances to enable the gas company to deliver gas in Chicago. Proceeding under the contract the construction company had at great expense laid many miles of pipe and bought the necessary machinery required under the contract. The gas could only be transported to Chicago by pumping, and under pressure exceeding three hundred pounds to the square inch. Subsequently to the adoption of the contract mentioned, a law was enacted prohibiting the use of more than three hundred pounds to the square inch in the transportation of gas, and an injunction was sought to prevent further work under the contract between the gas company and the construc-

tion company. It was admitted that if the statute was valid that the plant and system of the gas company would be practically useless, and it would entail great loss. It was held that the statute was not in contravention of the constitutional provision impairing the obligation of contracts. This decision seems based, however, entirely on the ground that a performance of the contract would result in such great danger to the public that its prevention by law was within the proper police power of the state.

The latest case which seems to hold that a contract, though lawful when made, is abrogated by the passage of a subsequent law rendering its performance illegal, is that of *American Mercantile Exchange v. Blunt*, 102 Me. 128, ante, p. 463, 66 Atl. 212, 10 L. R. A., N. S., 414. Here it is held that a contract for an annual consideration to collect accounts by a system which included posting lists of debtors was abrogated by the passage of a subsequent law prohibiting such posting, and that no recovery could be had upon the contract even for the portion of the year which had elapsed before the passage of the act. The main question to which the attention of the court seems to have been directed in this case was that when part of an entire contract is illegal, the whole contract is vitiated, and there can be no recovery for the performance of any part of it. The question as to whether the subsequent law was unconstitutional does not seem to have been very much considered, though reference is made to the *Odlin Case*, Fed. Cas. No. 10,443, which we have seen can only be cited as dicta upon the question now under consideration.

And even on the principal question decided in the *Blunt case* just mentioned (102 Me. 128, ante, p. 463, 66 Atl. 212, 10 L. R. A., N. S. 414), its ruling is contrary to *Jones v. Judd*, 4 N. Y. 411, where it is held that a subcontractor who was prevented from completing his contract because of a subsequent act making the work illegal was entitled to recover for the work performed prior to the passage of the act at the contract price.

II. Laws Relating to Remedy.

a. *In General.*—In some cases where close distinctions are drawn as to the effect of subsequent legislation on pre-existing contracts, it will be found that the act has been upheld because, as stated by the court, it affected the remedy only, and did not therefore impair the obligation of the contract. These statements must not be given too much weight, for the means of enforcing performance of a contract are as much a part of the contract as the conditions contained in it. These statements evidently only mean that no particular remedy can be considered as a part of a contract, and that subsequent legislation which merely gives direction as to the methods of enforcement, without materially changing the rights of the parties, are not unconstitutional. For, as was said by Mr. Justice Curtis, in *Curran v. Arkansas*, 15 How. (U. S.) 304, 14 L. ed. 705: "It by no means follows that because a law affects only the remedy, that it does not impair the obliga-

tion of a contract. The obligation of a contract, in the sense in which the words are used in the constitution, is that duty of performing it which is recognized and enforced by the laws; and if the law is so changed that the means of enforcing this duty are materially impaired, the obligation of the contract no longer remains the same." And, again, in *State v. Carew*, 13 Rich. 498, 91 Am. Dec. 245, we find the principle announced "That a contract is impaired if the means of enforcing it are withdrawn or materially diminished. It is immaterial whether this result is accomplished by acting upon the remedy or directly on the contract itself." So, too, in *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190, 30 L. ed. 1161, it is said: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of the obligation; and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void."

We have already seen that the laws in force at the time a contract is adopted form a part of the contract, and this applies equally as well to existing laws relating to the remedy as to those which affect the contract itself. "The laws which exist at the time and place of the making of a contract, and when and where it is to be performed, enter into, and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The idea of validity and enforcement are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment": *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357. The great trouble in determining whether a retrospective act which relates only to the remedy falls within the constitutional prohibition is due to the difficulty in determining a legal definition for the word "material." The word is vague and uncertain, and no general rule can be given as governing all cases; but whether a subsequent law which relates to the remedy only is or is not constitutional must depend upon the facts in each case, and the following illustrations will best serve to show how the test has been applied.

b. *Illustrations of the Doctrine.*—One of the oldest cases in which this question was raised, and in which will be found one of the most learned discussions as to the invalidity of a retrospective law affecting the remedy, is that of *Johnson v. Duncan*, 3 Mart. (O. S.) 530, 6 Am. Dec. 675. The point involved was the constitutionality of an act suspending all proceedings in civil cases. *Martin, J.*, speaking for the court, said: "The obligation of contracts consists in the necessity under which a man finds himself to do, or refrain from doing, something. This obligation exists generally both in *foro legis* and in *foro conscientiae*, though it does at times exist in one of these only. It is certainly of the first, that in *foro legis*, which the framers of the constitution spoke, when they prohibited the passage of any law impairing the obligation of contracts. Now, a law absolutely recall-

ing the power which the creditor enjoys, of compelling his debtor in *foro legis* to perform the obligation of the contract, would be a law destroying the obligation of the contract in *foro legis*; since a right without a legal remedy ceases to be a legal right. It would impair the obligation of the contract, by destroying its legal obligation; in other words, by reducing an obligation both in *foro legis* and in *foro conscientiae* to an obligation in *foro conscientiae* only; a legal and moral right to a moral right only. The remedy in *foro legis*, constituting the legal right of the creditor, constitutes also its correlative, the legal duty or obligation of the debtor; and a law which reduces a legal to a moral obligation is one which in *foro legis* destroys the obligation. It appears, therefore, to me incorrect to say that the legislature may effectually do, as to the remedy or effect of the obligation, that which it cannot do as to the right; and I conclude that a law destroying or impairing the remedy is as unconstitutional as one affecting the right in the same manner: for in *foro legis* the effects of both laws must be the same. . . . I therefore find no difficulty in concluding that an act of a state legislation, the obvious object of which is to relieve debtors, by postponing the recovery, and consequently the payment of debts, impairs the obligation of contracts, and as such is unconstitutional; and the court is bound to disregard it, whatever may be the hard necessity which, in the opinion of those who exercise the legislative power of the state, appeared to require that they should come to the aid of their suffering fellow-citizens, *Fiat justitia, verat coelum.*"

In *International B. L. Assn. v. Hardy*, 86 Tex. 610, 40 Am. St. Rep. 870, 26 S. W. 497, 24 L. R. A. 284, it was held that where a trust deed stipulated that in default of payment of the obligation, the creditor should have the right to sell the property at a certain place upon giving certain notice, that a subsequent law prescribing the mode of sale under all trust deeds was inoperative as to this deed, as impairing the obligation of contracts.

The case of *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489, is very interesting and instructive on the question now under discussion. The act involved in this case had been passed as an emergency measure to relieve debtors during a period of severe financial stringency and prevent their property from being sold at great sacrifice at a time when there was practically no demand for real estate. The act provided that before sale of land under execution the land should first be appraised, and if it did not bring eighty per cent of its appraised value at the sale, the sale should be set aside. It also provided that no sale should be made before a year had elapsed after the issuance of an execution. The court was called upon to pass on the validity of this act as to pre-existing contracts. After very careful review of the authorities relating to the question, the court said: "Is the act unconstitutional so far as its application to contracts made prior to the passage of the act is concerned? It will thus be seen that this case involves the principle of inviolability

of contracts. This principle the courts have always protected, no matter from what quarter or under what guise it has been assailed, whether by a party to the contract who has sought to vary its terms, or by legislative enactments in his interests. It is a principle which is founded upon honesty and good faith, and finds its support in ethics as well as law, and was recognized and enforced before it became a constitutional guaranty. It gives stability to business transactions. In fact, it makes them possible. It gives value to contracts, and without the upholding of this principle, neither civilization or governments could exist. A contract is an agreement to do or not to do a particular thing. The obligation is the binding force of the contract. The constitution prohibits the passing of laws which impair the obligation of a contract. The practical question then is, What is an impairment of a contract? Webster's definition of 'impair' is, 'To make worse; to diminish in quality, value, excellence, or strength; to deteriorate.' Then, if the value of a contract is deteriorated or lessened by the passage of an act, the obligation of a contract is most certainly impaired. Then the question arises, Was the contract of this mortgagee deteriorated or made less valuable by the passage of the act? It is a principle of law so often enunciated and so uniformly maintained, that the law which is in existence at the time a contract is made becomes a part of the contract that it would be idle to cite authorities on that proposition, or to further mention it. . . . Under the law in existence at the time the contract was made, the mortgagee had a right to the sale of this land at once upon the issuance of his execution, subject only to the redemption provided for by law. This was a valuable right, and a right, no doubt, that was taken into consideration by the judgment creditor, or in this case, the mortgagee, when the contract was made. The law now compels him to wait more than a year after judgment before he can have the sale made. It seems to us to be beyond controversy that, as to antecedent contracts, this provision of the law is void."

In *Canadian & American Mtg. Co. v. Blake*, 24 Wash. 102, 85 Am. St. Rep. 946, 63 Pac. 1100, it was decided that an act giving the actual occupant of a homestead the right of redemption without accounting for issues or value of occupation is unconstitutional when applied to contracts executed prior to the passing of the act. And in *Jones v. Crittendon*, 1 Car. L. Rep. 385, 6 Am. Dec. 531, it is held that an act which suspends executions for a limited time is void as impairing the obligation of contracts.

The general doctrine that an act which tends to postpone or retard the enforcement of a contract impairs its obligation and is void has been so universally upheld by both state and federal courts that it seems useless to cite further authorities.

III. Laws Relating to Exemptions.

Whether laws which exempt the property of a debtor which was not exempt at the time the contract was made are valid is a ques-

tion about which there is some conflict of authority. There are cases which hold that statutes creating such exemption do not fall within the constitutional prohibition as to the impairment of the obligation of contracts: *Maxey v. Loyal*, 38 Ga. 531; *Oriental Bank v. Freeze*, 18 Me. 109, 36 Am. Dec. 701; *In re Nichols*, 8 R. I. 50; *Sommers v. Johnson*, 4 Vt. 278, 24 Am. Dec. 604. But the weight of authority seems to be that if the exemption materially diminishes the amount of property which was not exempt under the existing law when the contract was made, that such exemptions are unconstitutional: *Jones v. Brandon*, 48 Ga. 533; *Kibbey v. Jones*, 7 Bush (Ky.), 243; *Lessly v. Phipps*, 49 Miss. 790; *Homestead Cases*, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212. Thus in *Lessly v. Phipps*, 49 Miss. 790, where, under the law existing at the time a contract was made, a homestead of one hundred and sixty acres of the value of fifteen hundred dollars was allowed, it was held that a subsequent law exempting two hundred and sixty acres without reference to its value was unconstitutional.

IV. Laws Relating to Limitations.

It seems well settled that when rights have been barred by limitation, the legislature cannot revive them: *Ackinson v. Dunlap*, 50 Me. 111; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Kinsman v. Cambridge*, 121 Mass. 558; *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *Rockport v. Walden*, 54 N. H. 167, 20 Am. Rep. 131; *Girdner v. Stephens*, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700; *Yancy v. Yancy*, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793.

V. Laws Relating to Redemption.

Statutes relating to redemptions, in so far as they affect pre-existing contracts, are not favored by the law, for the very sound reason that a purchaser pays his money under a contract that he shall have title at such time as the law then prescribes, and that a subsequent law extending the time for redemption alters the substance of the contract as much as if it extended the time for its payment or discharge under the obligation. In *Tuolumne R. Co. v. Sedgwick*, 15 Cal. 515, it is held that the right to redeem is no part of the indebtedness, and that as property sold under an execution pertains only to the remedy, the legislature can repeal the statute at any time before it has been availed of by the parties interested. But this decision is contrary to the great weight of authority. We have already seen from decisions of the highest court of the land that a right without legal remedy ceases to be a right, and that the idea of enforcement and validity are inseparable, and that both are parts of the obligation protected by the constitution. Upon this principle stay laws have generally been declared void, and the almost universal rule is that retrospective legislation extending the time for redemption clearly falls within the constitutional inhibition against laws impairing the obligation of contracts:

Seale v. Mitchell, 5 Cal. 401; Maloney v. Fortune, 14 Iowa, 417; Dikeman v. Dikeman, 11 Paige (N. Y.), 484; Robinson v. Howe, 13 Wis. 341; Gantly v. Ewing, 3 How. (U. S.) 707, 11 L. ed. 794; Howard v. Bugbee, 24 How. (U. S.) 461, 16 L. ed. 753.

DAVIS v. POLAND.

[102 Me. 192, 66 Atl. 380.]

COTENANCY—Trespass Quare Clausum.—If the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his cotenant therein, the injured owner has a right of action trespass quare clausum. (p. 481.)

COTENANCY—Trespass Quare Clausum.—If a cotenant is in possession of the premises, the removal of doors and windows from the residence thereon by his cotenant, without his consent, for the purpose of rendering such residence uninhabitable, and not in good faith, as for the making of repairs, constitutes such a destruction of the common property, as makes such cotenant a trespasser, and liable in damages. (p. 481.)

COTENANCY—Damages for Trespass.—If one cotenant is in the possession of the premises, the removal of the doors and windows from the residence thereon, by his cotenant, without his consent, for the purpose of rendering such residence uninhabitable, renders the trespassing cotenant liable in actual damages, but the injured cotenant cannot recover for actual suffering endured by voluntarily assuming the discomfort of living in the house for several weeks before attempting to make the necessary repairs. (p. 482.)

DAMAGES cannot be Recovered for that which might have been avoided by reasonable diligence. (p. 482.)

D. N. Mortland, for the plaintiff.

• F. B. Miller and A. S. Littlefield, for the defendant.

¹⁹⁴ **PEABODY, J.** This is an action of trespass quare clausum, and comes before the law court upon motion of the defendant for a new trial, and exceptions to the charge of the presiding justice directing a verdict for the plaintiff.

The plaintiff was in possession and occupation of a dwelling-house claiming as owner of two-thirds in common. The defendant, admitted to be the owner of one-third in common, and claiming title to the whole, entered and removed certain of the doors and windows, for the evident purpose of rendering the house untenable, and thus compelling the plaintiff to vacate. The plaintiff remained in occupation of the premises, and brought this action to recover dam-

ages, for injury to the freehold and to her other property, and for her own physical discomfort resulting from the acts of the defendant.

The presiding justice, finding that the evidence conclusively established the plaintiff's title to two-thirds in common of the premises, and that the defendant's acts were of such a character that they amounted to trespass as against his cotenant, directed a verdict for the plaintiff.

¹⁹⁵ Two questions are raised by both motion and exceptions: Whether trespass quare clausum can be maintained by one tenant in common against another for such injuries to the freehold as are shown in this case, and whether ownership in common existed between the parties to this action. It is a general rule of law that a tenant in common cannot maintain an action of trespass quare clausum against his cotenant: *Porter v. Hooper*, 13 Me. 25, 29 Am. Dec. 480; *Mad-dox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553. But to this general rule there are exceptions, and it is well settled in this state that where the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his cotenant therein, the injured owner has a right of action, and under these circumstances trespass quare clausum is the proper remedy: *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504. Assuming that the plaintiff was an owner in common and in possession of the premises, the removal of the doors and windows, without her consent, in the absence of any circumstance indicating that the act was done in good faith, as for the purpose of making repairs, must be held to constitute such a destruction of the common property as would make the defendant a trespasser. But the defendant claimed in justification of his acts that the plaintiff had lost title to her two-thirds share by the foreclosure of a mortgage given by her to secure the performance of a bond for the support and burial of her father, Edward Crouse. The evidence was not sufficient to show a breach of the conditions of this bond, and therefore the foreclosure of the mortgage was not effective to divest the plaintiff of her title, and the defendant, succeeding by purchase to the rights of the mortgagee, acquired no title thereby: *Davis v. Poland*, 99 Me. 345, 59 Atl. 520. The presiding justice was accordingly right in directing a verdict for the plaintiff.

The motion raises the further question whether the damages are excessive. The jury were correctly instructed by the presiding justice that they should allow the plaintiff two-thirds the value of the windows and doors removed, and two-thirds of any other damages done to the house; also whatever injuries were done to her furniture, and something for what pain and suffering she sustained; but that ¹⁹⁶ in estimating this element of damages they were to allow only for a reasonable time required for making the repairs to the house. There is little or no evidence of injuries beyond that occasioned to the dwelling-house by the removal of doors and windows. These, without doubt, could have been replaced within a few days, and at comparatively small cost. The jury must have considered, as bearing upon the question of damages, the actual suffering of the plaintiff, who seems to have voluntarily assumed the discomfort of living in the house for several weeks in the early spring before attempting to make the necessary repairs. She is not entitled, and the presiding justice so instructed the jury, to recover for damages which she might have avoided by reasonable diligence: *Fitzpatrick v. Boston & M. R. R.*, 84 Me. 33, 24 Atl. 432; *Grindle v. Eastern Express Co.*, 67 Me. 317, 24 Am. Rep. 31; *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341; 8 Am. & Eng. Ency. of Law, 605; 13 Cyc. 71, 78.

The verdict in excess of one hundred dollars may be remitted within thirty days after the certificate of this decision is filed; otherwise the entry will be, motion sustained.

Exceptions overruled.

That a Tenant in Common has a right of action against his co-owner for acts tending to destroy the common property, see Sullivan v. Sherry, 111 Wis. 476, 87 Am. St. Rep. 890; *Leatherburg v. McInnis*, 85 Miss. 160, 107 Am. St. Rep. 274.

WHITE v. FITTS.

[102 Me. 240, 66 Atl. 533.]

STATUTE OF FRAUDS—Oral Contract for Work or Labor.—

An oral contract for the performance of work or labor, not specifying the time within which it is to be performed, must be interpreted in the light of its subject matter and the circumstances surrounding it, and if the manifest intent and understanding of the parties were that it was not to be performed within the year, it falls within the statute of frauds. (p. 485.)

STATUTE OF FRAUDS—Oral Contract for Work.—If, considering the terms and subject matter of an oral contract, the nature and extent of the work to be done under it, and the knowledge of the parties of all the circumstances governing the progress of the work, the conclusion is irresistible that it was not contemplated or understood by the parties that the contract was to be performed within one year from the making of it, it is within the statute of frauds. (p. 491.)

STATUTE OF FRAUDS—Oral Contract for Labor—Death of Party.—If an oral contract for the performance of labor cannot by its terms be performed within one year from its execution, it is not taken out of the operation of the statute of frauds by the death of one of the parties within the year. (p. 491.)

Martin & Cook, for the plaintiff.

C. H. Bartlett, for the defendant.

242 WHITEHOUSE, J. This is an action to recover damages for the breach of an oral contract to cut and saw into logs the stave wood standing on a lot of land owned by the defendant. The breach alleged is the refusal on the part of the defendant to allow the plaintiff to complete the work after he had entered upon the execution of the contract and cut a part of the wood.

In the brief statement of defense it is alleged, first, that the agreement between the plaintiff and defendant set forth in the plaintiff's declaration was an oral one, which was not to be performed within one year from the making thereof, and that there was no memorandum of the agreement in writing, and signed by the party to be charged therewith; and, second, that the defendant was justified in discharging the plaintiff from the work and terminating the contract by reason of the wasteful and unworkmanlike manner in which the trees were cut and felled and sawed into logs by the plaintiff.

After the introduction of the testimony the defendant requested the presiding judge to direct a verdict for the defendant on the ground that the undisputed evidence clearly

showed that the contract was within the statute of frauds, because not in writing and not to be performed within one year as set forth in the defendant's brief statement, and that the action was therefore not maintainable. The presiding judge declined to order a verdict for the defendant as requested, and ruled *pro forma* that the action was maintainable upon oral evidence.

The jury rendered a verdict for the plaintiff for five hundred dollars, and the case comes to the law court on exceptions to this ruling of the presiding judge, and also on a motion to set aside the verdict as against the law and the evidence.

In his declaration the plaintiff avers that "in consideration that the plaintiff promised the defendant to cut the timber, suitable for staves, on a certain tract of land of about three hundred and eighty acres, and saw the same into logs, etc., as fast as the defendant should need the same for use in his mill, the defendant promised the plaintiff to pay him one dollar ²⁴³ per cord, payable weekly, for cutting all of said timber suitable for staves on said tract, etc., said timber to be cut and sawed as aforesaid as fast as the defendant should need the same for use in his said mill." In the brief statement of defense it is alleged that the plaintiff and defendant agreed that the plaintiff should enter on the land of the defendant consisting of three hundred and fifty acres and there cut timber suitable for staves, etc., at the rate of one dollar per cord as fast as the defendant should need the same for use in his mill situate on the land."

Thus it will be perceived that according to the pleadings of the parties there was no controversy in regard to the terms of the contract, and the evidence is in entire accord with these allegations in the pleadings. It was undisputed that the plaintiff was to cut down and saw into the desired lengths all of the standing timber on the three hundred and fifty acres of defendant's timber land, as fast as the defendant needed it for use in his mill. There were no specifications and no further stipulations in regard to the time within which the work was to be completed and the contract performed.

The provision of the statute for the prevention of frauds and perjuries here involved is found in chapter 113 of the Revised Statutes, section 1, as follows: "No action shall be maintained . . . (V) upon any agreement that is not to be performed within one year from the making thereof . . .

unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith," etc.

It is contended in behalf of the defendant that according to the principles of law governing the construction and application of this clause of the statute—

1. The contract must be interpreted in the light of its subject matter and the circumstances surrounding it, and if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, it falls within this clause of the statute of frauds.

2. Any contingency terminating a contract within the one year clause of the statute of frauds must leave the contract fully and ²⁴⁴ completely performed in order to take it out of the operation of this clause of the statute.

In Browne on the Statute of Frauds, fifth edition, sections 273, 279 and 281, the author says: "Postponing the questions, what is the performance of such an agreement, and what the meaning of the limitation as to time, we are first to ascertain the force of the words 'to be performed.' And on these words much reasoning has been expended. The result seems to be that the statute does not mean to include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed, within the space of a year from the making; but that it means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making."

"The statute, finding them perfectly free to make a certain contract without a writing, provides simply that if that contract does by its terms, expressed, or, from the situation of the parties, reasonably implied, require more than a year for its performance, they must put it in writing. In other words, it must affirmatively appear from the contract itself and all the circumstances that enter into the interpretation of it that it cannot in law be performed within the space of a year from the making." And in section 281: "Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the

year, the mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying. . . . Such an accomplishment must be an exception of the contract according to the understanding of the parties."

In 1 Chitty on Contracts, eleventh edition, page 99, the principle is thus stated: "This enactment applies to all contracts, the complete performance whereof is of necessity to extend beyond the space of a year; the rule being, that where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to ²⁴⁵ extend over a longer period longer than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void if it appears to have been the understanding of the parties at the time that it was not to be completed within a year, although it might be, and was, in fact, in part performed within that period": See, also, 29 Am. & Eng. Ency. of Law, p. 94; 20 Cyc. 198.

In the English case of *Boydell v. Drummond*, 11 East, 142, the plaintiff proposed to publish a series of illustrated scenes from Shakespeare in eighteen numbers, one number at least annually. After receiving two numbers the defendant refused to take any more. Although there was no express agreement that the contract should not be performed within a year, the court held that it was "impossible to say that the parties contemplated that the work was to be performed within a year," but that, on the contrary, "the whole scope of the undertaking shows that it was not to be performed within a year, and was therefore within the statute of frauds." That decision has been confirmed by both English and American courts in numerous cases: *Hill v. Hooper*, 1 Gray, 131.

In *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142, the court say: "It must have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. But who can doubt what the express and specific understanding of the parties in the case at bar was, and that it was not to be performed within one year, or, at any rate, that it appears to have been so understood by them?"

In *Doyle v. Dixon*, 97 Mass. 208, 83 Am. Dec. 80, it was held that an agreement not to go into business in a certain place for five years was not within the statute, as the death of the promisor would complete the performance of the con-

tract, but the court, after comparing the case with *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142, say: "On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute": See, also, *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117, 35 L. R. A. 512; ²⁴⁶ *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938; *Warner v. Texas & Pac. Ry.*, 164 U. S. 418, 17 Sup. Ct. Rep. 147, 41 L. ed. 495; *Metropolitan Trust Co. v. Topeka Water Co.*, 132 Fed. 702.

But it is needless here to attempt a separate examination and analysis of each of the great number and variety of decisions upon this subject in view of the fact that the correct principle has been deduced from the authorities and the question satisfactorily determined by the decisions of our own court.

In *Herrin v. Butters*, 20 Me. 119, which has been extensively cited, there was an agreement to clear and seed a piece of land in three years, and it was contended that the defendant might have cleared up the land and seeded it down in one year, and thereby have performed his contract, but it was held that while this was within the range of possibility, the contract would not be taken out of the operation of the statute of frauds unless such a performance of it within a year was in accordance with the understanding and intentions of the parties. In the opinion by Whitman, C. J., it is said: "We must look to the contract itself, and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the case is clearly with the defendant. But the contract is an entirety, and all parts of it must be taken into view together, in order to a perfect understanding of its extent and meaning. We must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other; and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Here the defendant was not to avail himself of the consideration for his engagement, except by a receipt of

the annual profits of the land, as they might accrue, for the term of three years. But whether this be so or not, it is impossible to doubt that the parties to this contract perfectly well understood and contemplated that it was to extend into the third year for its performance, both on the part of the ²⁴⁷ plaintiff and defendant. Its terms most clearly indicate as much; and by them it must be interpreted."

In *Hearne v. Chadbourne*, 65 Me. 302, the court say: "It is true that in the absence of any words or acts of the parties indicating the contrary, an agreement to work for a year means to work for that time commencing forthwith. The referee reports no express stipulation in the contract to overcome this presumption; but he sets out the acts of the parties showing the contemporary interpretation which both put upon it, and this places the case directly within the doctrine laid down in *Herrin v. Butters*, 20 Me. 119, *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142, and *Boydell v. Drummond*, 11 East, 142, where the old idea that it must be expressly and specifically agreed that the contract is not to be performed within the year, as expressed in *Moore v. Fox*, 10 Johns. 244, 6 Am. Dec. 338, and *Fenton v. Embler*, 3 Burr. 1278, is so far modified as to include cases where such appears to have been the understanding of the parties."

In *Bernier v. Cabot Mfg. Co.* (1880), 71 Me. 506, 36 Am. Rep. 343, it was held that an oral contract wherein a laborer agreed not to leave the services of his employer for two years, nor in summer, nor without two weeks' notice, is within the statute. The court say: "It was oral and was within the statute of frauds. It could not in any contingency have been fully performed within one year. The death of the plaintiff within the year, or some casualty, might have excused performance, but could not have fulfilled the contract."

In *Farwell v. Tillson*, 76 Me. 227, the defendant had a government contract to furnish stone for the custom-house at St. Louis, and made a verbal contract with plaintiff for the transportation of the stone from Maine to Baltimore. The government contract required defendant to furnish the stone "at such times as may be required" by the government. No time was specified. The court held that the circumstances showed that the parties did not intend or understand that the contract was to be performed within one year, and hence the contract was within the statute of frauds.

The presiding judge instructed the jury *inter alia* as follows: "Was it within the understanding and intention of the two contracting parties, as declared by the contract, that it might ²⁴⁸ be performed within a year? The subject matter of a contract might be a thing which could not possibly be done within a year. A consideration of the subject matter would show just as clearly that it was not to be performed within a year as if there was an express agreement in the terms of the contract that it was not to be performed within a year. So, also, a consideration of the circumstances and subject matter might show that performance of it, within a year, would require such extraordinary methods, such extraordinary appliances or resources as could not by fair construction be regarded as within the intention of the parties, at the time when the contract was made; and the question is, considering the subject matter and the situation of the parties as known to each other, and reading the contract in the light which these give, whether by fair construction it was within the understanding and intention of the parties as expressed in the contract that it might be performed within a year or not." These instructions were held to be correct.

In the opinion the court say: "The meaning of the terms of a contract, it need not be said, is to be ascertained by interpreting them in the light of the subject matter to which they relate. They may mean one thing when used in reference to one subject, or by parties in one situation, and another thing when used under other circumstances in regard to another subject, and the true construction in each instance will be that which applies the contract to the res about which the parties were dealing, and reproduces the intent which they themselves have expressed in it. A description of the nature and extent of the work stipulated to be done, in the absence of express provision on the subject, may be an indispensable element in determining whether the work was by the contract to be done in a year, or whether the contract was one not to be performed in that time. It may show performance impossible in that period, or so impracticable as to be plainly beyond the scope and intent of the agreement as expressed in the language used. The duty of the defendant to deliver the granite 'at such times and in such quantities as might from time to time be ordered,' as was said in the ruling, did not require of him immediate per-

formance, upon demand, of the whole contract. Time must be allowed to execute the work and ²⁴⁹ the limitations upon the right of demand, which necessarily result from that fact, must apply. . . .

"Notwithstanding dicta and some decisions, especially among the earlier cases, which tend to sustain the position assumed for the plaintiffs, we regard the rule of law as established in this state by the opinions in *Herrin v. Butters*, 20 Me. 119, and *Hearne v. Chadbourne*, 65 Me. 302, in conformity with the rulings which were made at the trial."

What was in the contemplation of the parties in the case at bar? What was understood by them as a matter of contract respecting the time within which the work of cutting all the stave wood on the three hundred and fifty acres of timber land was to be completed? As already seen, it was not in controversy that the plaintiff was to cut the whole lot except that one hundred acres which had already been cut over, and that it was to be cut only as fast as the defendant needed it for use in his mill. Before the agreement was concluded, the plaintiff went upon the lot and gave the defendant a "sample" of what he would do, by cutting for a week or more within a quarter of a mile from the mill. He was a contractor of twenty years' experience, and substantially all of that time he had been engaged in the business of cutting logs and wood. Not only had the defendant explained to him in Massachusetts the nature and extent of the work, and how fast he desired to have it cut, but before closing the trade the plaintiff entered upon the work, noted the situation and circumstances and the capacity of the mill, and as a practical man must have made some estimate of the time required to complete the work. He admits in his testimony that he had "made up his mind" to live here for a year or two—"perhaps more." In answer to an inquiry by the court he says he "could finish the lot in a year and a half if it was necessary, or a year, for that matter." If he had been permitted by the defendant to strip the lot in violation of the agreement to cut only as fast as the wood was needed for use at the mill, it is probably true that he could have finished the work in a single year by employing a sufficient crew. But the contract did not allow him to do this, and that he so understood it is evident from his conduct in suspending operations during July and August, at the re-

quest of the defendant, and resuming the ²⁵⁰ work September 1st, when the defendant was ready to start the mill.

Four experienced lumbermen, two of them entirely disinterested witnesses, testify that with a mill of the capacity of the defendant's, operated as it ordinarily was by the defendant, at least three years and probably four years would be required to complete the work. And this testimony is confirmed by a mathematical calculation based upon undisputed facts. The capacity of the mill was three and one-half cords per day. Of the three hundred and fifty acres of timber land, about one hundred acres had been cut over before the plaintiff went there. The plaintiff estimated that there were thirty-five cords to the acre where he began to cut, and at this rate two hundred and fifty acres would yield more than eight thousand cords. But the minimum of all the estimates was two thousand four hundred cords, and upon this basis it would require between three and four years for this mill to saw it, as it was ordinarily operated. During the time the plaintiff was cutting in 1904, it is not in controversy that he cut at the rate of less than one thousand cords a year, and the plaintiff was satisfied with the progress of the work. Such was the practical interpretation placed upon the contract during the execution of it by the plaintiff himself.

Considering, then, the terms and subject matter of the contract, the nature and extent of the work to be done and the knowledge of the parties respecting the capacity of the mill, and all the circumstances governing the progress of the work, the conclusion is irresistible that it was not contemplated or understood by the parties that the contract was to be performed within one year from the making of it, and that no other reasonable inference can be drawn from the testimony.

Nor would the death of the plaintiff within the year have taken the contract out of the operation of the statute of frauds, for the reason that in such an event the contract would not have been fully performed.

It is accordingly the opinion of the court that the action is not maintainable upon the evidence, and that a verdict for the defendant should have been ordered by the court.

Exceptions sustained.

A Contract for Personal Services is within the statute of frauds if it is by its terms for a year, and is to commence at a date in the

future, though, as a matter of law, it might be terminated within a year by the death of one of the parties: *Chase v. Hinckley*, 126 Wis. 75, 110 Am. St. Rep. 896, and see the cases cited in the cross-reference note thereto.

INHABITANTS OF HOULTON v. TITCOMB.

[102 Me. 272, 66 Atl. 733.]

MUNICIPAL CORPORATIONS—Ordinances—Town Vote in Contravention of.—A vote at a special town meeting authorizing a property owner in such town to repair and put in habitable condition a certain wooden building situated within a certain district cannot contravene or modify the application of a duly adopted and valid town ordinance which expressly prohibits such work within such district, unless a license is granted therefor by the town authorities. (p. 496.)

MUNICIPAL ORDINANCES in derogation of the common law must be construed strictly and not enlarged by implication. (p. 496.)

INJUNCTION Against Nuisance—Municipal Ordinances.—A bill in equity cannot ordinarily be maintained for the mere violation of a municipal ordinance, and, to authorize an injunction against a threatened act of violation, it must amount to a nuisance if done. (p. 497.)

MUNICIPAL CORPORATIONS—Power to Declare a Nuisance. A thing is not a nuisance merely because a municipal ordinance declares it to be such. (p. 497.)

NUISANCE—Power to Declare by Statute.—The state may declare what may, at law, be deemed a nuisance. (p. 497.)

NUISANCE—Injunction Against.—Equity will restrain by injunction the threatened violation of a municipal ordinance when such violation contemplates an act which amounts to a nuisance at law, not because the act is a violation of the ordinance, but because it is a nuisance. (p. 497.)

NUISANCE—Injunction Against.—A municipal corporation may enjoin nuisances or threatened nuisances affecting matters with reference to which a portion of the power of the state has been confided to it. But the right is limited to such matters, and with respect to other matters the right depends upon the same conditions as the right of individuals, namely, special damages. (p. 498.)

I. G. Hersey, for the plaintiffs.

Shaw & Lewin and Powers & Archibald, for the defendants.

²⁸⁰ SPEAR, J. This is a bill in equity brought by the inhabitants of Houlton in the name of their selectmen against Frank W. Titcomb and the Houlton Savings Bank, to restrain them from the alleged and intended violation of the town ordinances regulating the erection, alteration and enlargement of wooden buildings within the fire district of said

town. The case comes to this court upon the bill, answer, replication and agreed statement of facts.

The bill properly sets out the ordinances alleged to have been violated, their adoption at a legal town meeting, the ownership of property by the respondents and their violation and intended violation of the ordinances, and that, if their intention is carried into effect, it will produce the existence of a public and permanent nuisance ²⁸¹ against the by-laws and ordinances of the town and statutes of the state. We think it is unnecessary to specifically refer to any of the allegations of the bill except the third and fourth items which we insert in full. The third is as follows: "Said Frank W. Titcomb and said savings bank are now erecting, altering, raising, roofing, enlarging and otherwise adding to, and building upon with wood, a certain two-story wooden or frame building upon their said lot or parcel of land hereinbefore named and described, without any license from the municipal officers of said town of Houlton to do the same, and in violation of said by-laws and ordinances, and in violation of law."

The fourth reads: "Said Frank W. Titcomb and said savings bank threaten, purpose, intend and are about to proceed forthwith to fully complete, erect, alter, raise, roof, enlarge, add to and build upon with wood, said wooden building, without any license from the municipal officers of said town of Houlton to do so, and are now at work upon the same in violation of said by-laws and ordinances."

These are the two items, it will be observed, that respectively charge the defendants with the actual and intended violations of the ordinances of the town. The Houlton Savings Bank in its answer avers that the only interest which it has in the premises described is by virtue of a mortgage thereon held by the bank. But by the agreed statement this defendant admits its joint ownership and the acts complained of in paragraph 3 and 4 of the bill. It must, therefore, stand or fall with the defendant Titcomb.

Titcomb in his answer admits the truth of the allegations of fact in the third and fourth items of the plaintiffs' bill, but denies, in the fourth item of his answer, that the acts done and proposed to be done are in violation of the town ordinances, and avers that he had authority and license from the inhabitants of the town of Houlton to alter, raise, roof and enlarge said building as he was proceeding to do. He

also denies in the fifth item that his proposed alterations upon the building would make it a public nuisance.

The ordinances upon which the plaintiffs rely to prevent the defendants from the prosecution of the work which they have undertaken upon the building in question read as follows:

"Sec. 2. ²⁸² No wooden or frame building shall hereafter be erected, nor any building now erected, or hereafter to be erected, be altered, raised, roofed, enlarged or otherwise added to or built upon with wood, nor any wooden building be removed from other territory, to and upon the territory described in section one, nor from any portion of said Fire District to another portion thereof, except as hereinafter provided, and any such building so erected, added to, or removed contrary to the provisions of this ordinance, shall be deemed a public and common nuisance and abated as such.

"Sec. 3. The municipal officers may grant licenses to erect, alter, raise, roof, enlarge, or otherwise add to or build upon, or move any wooden building within said district, upon such terms and conditions and subject to such limitations and restrictions as they may prescribe; but before any such license is granted, a notice of the application therefor shall be published in a newspaper printed in said Town, at the expense of the petitioner."

The defendants concede that the above by-laws and ordinances were legally enacted and adopted by the town, and since their enactment and adoption have been in full force and virtue. The agreed statement also shows that the defendants admit the acts complained of by said plaintiffs in paragraphs 3 and 4 of their bill, but claim to justify said acts by the action of the special town meeting, set forth in paragraph 6 of the answer of the defendant Titcomb, that on the twenty-second day of April, 1903, the town of Houlton, at a legal meeting called for the purpose, authorized him to operate upon the building as he was doing and intended to do. Article 3 of the warrant calling this town meeting, under which he claims to justify his acts, was as follows: "Art. 3. To see if the Town will authorize and allow Frank W. Titcomb to repair, and put in an inhabitable condition the old Sleeper House, so called, on the north side of Bangor Street, in said Houlton, opposite the Foundry." The town voted upon this article as follows: "Art. 3. Voted to authorize and allow Frank W. Titcomb to repair and put in an

inhabitable condition the old Sleeper House, so called, situate on the north side of Bangor Street, in said Houlton, opposite the Foundry."

It is further conceded that the premises described in said article ²⁸³ 3 are the ones involved in this controversy and are within the fire limits described in the ordinances herein set forth "except so far as the same may have been removed from said fire limits by the act of the said special town meeting." Nor is it claimed that the defendants had ever received the license, authorized by article 3 of the ordinances above quoted, to perform any of the acts prohibited by the ordinances and complained of in plaintiffs' bill. The defendants in their argument also admit the legality and constitutionality of the fire ordinances in question.

The only issue, therefore, raised in this case is whether the vote of the special town meeting above quoted under article 3 of the warrant relieved the defendants from the operation of the ordinances with reference to the wooden building, which they were seeking to alter as set forth in the plaintiffs' bill and admitted in their answer. The defendants claim in item 6 of their answer that on account of the vote in this special town meeting, the town should be estopped to invoke the application of the ordinances to their proposed action. Without determining whether the doctrine of estoppel would apply if the vote in the special town meeting had authorized the defendant to do all that the ordinance prohibited, let us first discover whether, as a matter of fact or legal inference, the vote in the special town meeting did authorize the defendants to do any of the things which the ordinances prohibited. In other words, does the subject matter of the vote conflict with the subject matter of the ordinances?

The language of section 2 of the ordinances which directly applies to the issue raised in this case reads, "No wooden or frame building shall hereafter be erected nor any building now erected or hereinafter to be erected be altered, raised, roofed, enlarged or otherwise added to or built upon with wood," etc. The defendants admit in their answer that they were "about to raise, roof and enlarge the building"—that is, they were about to do just what the ordinances inhibit. Now, did the vote of the town at its special meeting authorize the defendants to do any of these inhibited things? We think not. This vote, strictly following the article in the

warrant, simply authorized the defendants "to repair and put in an inhabitable condition the old Sleeper House," etc., which is the house ²⁸⁴ in question. By a comparison of the phraseology of this vote with the language of the ordinances, it will be observed that it does not repeal or modify the inhibitions or become inconsistent with the complete application of the ordinances to the facts set out in the plaintiffs' bill and admitted by the defendants' answer. The ordinances do not pretend or assume to prevent the ordinary repair of a house and putting it into inhabitable condition. It was not intended by the ordinances to prohibit such action on the part of the householder. It would be clearly unreasonable if it did. Undoubtedly many of the houses in Houlton require more or less repairs every year to make them inhabitable. A house might become uninhabitable for want of shingling, yet it would hardly be contended that the above ordinances were intended to prevent the repair of shingling to make it inhabitable, without a license from the municipal officers. We are indeed at a loss to know just what the town meant by the passage in its town meeting of the above vote. There is nothing in the case or the vote which tends to show the condition of the house which it authorized the defendant to repair, or what repairs would be necessary to make it inhabitable, whether it was shingling, clapboarding, inserting sills or putting on a roof; or that any of the repairs permitted by the vote came within the scope of the ordinances. Our conclusion consequently is, that the vote of the town authorizing the defendants to repair and make their house inhabitable in no way contravenes or even modifies the application of the ordinances invoked by the plaintiffs.

The ordinances are in derogation of the common law, and must be construed strictly. They cannot be enlarged by implication. The defendants had a right, therefore, to do anything to their property not strictly inhibited by the ordinances. Hence it seems, so far as the case or the vote shows, that the town only authorized the defendants to do what they had a right to do without any such vote, and without any violation of the ordinances in question. But when the defendants proceed to go further, and, as is alleged in the plaintiffs' bill and admitted in the answer, attempt "to complete, erect, alter, raise, roof, enlarge, add to and build upon with wood said wooden building without any license from the municipal ²⁸⁵ officers," they then clearly bring themselves with-

in the prohibition of the ordinances. But the mere fact that the proposed act of the defendants is in violation of the ordinances will not enable the plaintiffs to sustain their bill.

A bill in equity cannot ordinarily be sustained for the mere violation of a municipal ordinance. The threatened act of violation must amount to a nuisance, if done: 13 Am. & Eng. Ency. of Law, 401; *Mayor of Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700; *President etc. of Village of Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446; *Dillon on Municipal Corporations*, sec. 405.

Nor is a thing a nuisance merely because a municipal ordinance declares it to be such: *Hutton v. City of Camden*, 10 Vroom, 122, 23 Am. Rep. 203; *Ex parte O'Leary*, 65 Miss. 80, 7 Am. St. Rep. 640, 3 South. 144; *Jackson v. Castle*, 82 Me. 579, 20 Atl. 237; *Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763. But the state may declare what may, at law, be deemed a nuisance: *Metropolitan Board of Health v. Heister*, 37 N. Y. 661, 23 Am. Rep. 212, note; *Dillon on Municipal Corporations*, 1, sec. 93.

This state has declared (Rev. Stats., c. 4, sec. 93, par. 8) that buildings erected contrary to the ordinances for which this section provides are nuisances. The court in equity at common law has jurisdiction to restrain nuisances, and has specific jurisdiction in this state "in cases of nuisance and waste": Rev. Stats., c. 79, sec. 6, par. 5.

Therefore, it is clear that equity will take jurisdiction for the threatened violation of a municipal ordinance when such violation contemplates an act which amounts to a nuisance in law, not because the act is a violation of the ordinance, but because it is a nuisance.

Another question which arises in the discussion of this case is, how and when a municipal corporation may maintain a bill to restrain a nuisance in the violation of an ordinance which constitutes a nuisance. Some cases uphold the right when it appears that the municipality would sustain special damages or be put to additional responsibility by reason of the threatened acts: *Coast Co. v. Borough of Spring Lake*, 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657, note; *Easton & A. 286 R. R. Co. v. Inhabitants of Greenwich*, 25 N. J. Eq. 565; *Jersey City v. Central R. R. Co.*, 40 N. J. Eq. 417, 2 Atl. 262; *Hutchinson Tp. v. Filk*, 44 Minn. 536, 47 N. W. 255. And when no special damages or additional responsibility was shown, relief was denied: *Ward v. City of Little*

Rock, 41 Ark. 526, 48 Am. Rep. 46; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Mayor v. Smyth*, 64 N. H. 380, 10 Atl. 700; *Town of Sheboygan v. Sheboygan & Fond du Lac R. R. Co.*, 21 Wis. 667.

But some courts have held that a municipal corporation as the representative of the equitable rights of the inhabitants may enjoin nuisances affecting matters with reference to which a portion of the power of the state has been confided to it. The right is limited to such matters; with respect to other matters, the right depends upon the same conditions as the right of individuals, namely, special damages, etc.: 51 L. R. A. 657, *supra*, note: *Metropolitan City Ry. Co. v. City of Chicago*, 96 Ill. 620; *Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; *Winthrop v. Farrar*, 11 Allen, 398; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Taunton v. Taylor*, 116 Mass. 254; *Board of Health of City of Yonkers v. Copcutt*, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485.

This last proposition seems to be logical and sound, and would appear to authorize a town to maintain injunction proceedings against threatened nuisances affecting matters of which the state has confided to it either control or regulation.

The prevention of fires is a matter which the state has confided to the town: *Rev. Stats.*, c. 28, secs. 13, 20, 22, 25, 26-45, inclusive.

As the violation of the ordinances in the case at bar constituted a nuisance against the public as a violation of a police regulation, the entry must be, bill sustained with costs. Perpetual injunction to issue.

Case remanded to the court below for a decree in accordance with this opinion.

For Injunctions against the erection or removal of buildings in violation of municipal building regulations or fire ordinances, see *Griswold v. Brega*, 160 Ill. 490, 52 Am. St. Rep. 360; *Kaufman v. Stein*, 138 Ind. 49, 46 Am. St. Rep. 368; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185; *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123.

BIDDEFORD NATIONAL BANK v. HILL.

[102 Me. 346, 66 Atl. 721.]

FORGERY—Note—Genuine Signature.—If a person, without negligence, and by fraud and deceit, is induced to sign a note, not intending to sign it as such, the instrument is a forgery. (p. 500.)

BILLS AND NOTES.—Forged paper without negligence imputed to the party affected by the forgery is not a binding contract, whether the forgery was committed by alterations or a substitution of the forged contract for the supposed or genuine one. (p. 502.)

FORGERY—Note—Genuine Signature—Bona Fide Purchaser.—If a person, without negligence, and by fraud and deceit, is induced to sign a note, not intending to sign it as such, the note is not valid in the hands of a bona fide purchaser for value. (p. 502.)

A. Dwyer, for the plaintiff.

B. F. Hamilton and Cleaves, Waterhouse & Emery, for the defendant.

348 **SPEAR, J.** This is an action of assumpsit upon a promissory note for three hundred and forty-four dollars and forty-four cents dated July 5, 1905, purporting to be signed by Etta O. Hill and D. O'Connor & Co. The undisputed facts show that Etta O. Hill at some time previous to the date of the note had sold and delivered to D. O'Connor & Co. a quantity of pressed hay, the consideration for which amounted to three hundred and forty-four dollars and forty-four cents. Early in the morning of the date of the note she called upon O'Connor & Co., meeting D. O'Connor himself, for the purpose of obtaining a settlement for the hay. When the object of her call was made known to Mr. O'Connor, he informed her that he desired to settle for the hay by giving her the promissory note of the company for the amount due. This she peremptorily declined upon the ground that being left in entire charge of her father's farm, it would be necessary for her to make use of money at once in harvesting the hay upon the farm. Thereupon Mr. O'Connor wrote her a check for three hundred and forty-four dollars and forty-four cents, the delivery of which she took from him and started to leave his place of business, when he called her back requesting her to sign a receipt for the money received for the hay. She returned to his desk, where a receipt for three hundred and forty-four dollars and forty-four cents, all written out, was lying for her signature. Mr. O'Connor stepped along,

placed his finger upon the paper and directed her where to sign. She signed the receipt as requested. It proved, however, that instead of signing the receipt as she supposed she was doing, she was deceived and tricked by O'Connor into affixing her signature either to a blank with the note in question afterward written upon it, or upon a blank already filled in with the contents of the note. It is evident from the history of this transaction that the contract manifested by the note in suit was not the contract of the defendant, Etta O. Hill. This proposition is too obvious and too well settled to require citation. If the note was not her contract, was she so negligent in placing her name upon the paper upon which the note appears, when she thought she was signing a receipt, that she is estopped from denying her act under the just and well-settled rule that of two innocent parties, he whose negligence has occasioned the loss must bear it?.

³⁴⁹ No exceptions were taken either to the ruling or the charge of the presiding justice in presenting the case to the jury, and it is therefore presumed that every element of law in the case was properly given. It therefore follows that the question of negligence imputable to Etta O. Hill in signing the note purporting to be a receipt was properly submitted to the jury as a question of fact, and their verdict shows that they found this issue in favor of the defendant. The verdict must stand. We are of opinion that it was not only not erroneous, but fairly deducible from the undisputed facts.

This brings us to the proposition of law whether, in the absence of any negligence on the part of Etta O. Hill in affixing her signature to the note, she thereby became liable for its payment. The bank was undoubtedly an innocent holder of the note for value, but in view of the fact that Etta O. Hill was fraudulently induced to sign the note without laches on her part, makes the note, not only not her contract, but a forgery with respect to her signature.

It is contended, however, that the fact that her signature is genuine relieves the note from the character of a forged paper, and, instead, renders it a paper obtained by fraud and deceit.

But that a paper, obtained like the note in question, partakes of the character of a forged instrument, has long been the doctrine of the law in this and many other states.

State v. Shurtliff, 18 Me. 368, decided in 1841, is a case wherein the grantee agreed with the grantor to purchase an

acre of his farm, and prepared the draft of a deed correctly describing the land agreed to be conveyed and exhibited it to the grantor, who examined it and found it to be correct, but the execution of it was delayed and the draft was retained by the grantee. The grantee afterward fraudulently prepared the draft of another deed, describing the grantor's whole farm, and presented it to the grantor for his signature as the deed before examined, and it was executed and delivered, but the court held this to be a forgery. In the opinion the court say: "Forgery has been defined to be a false making, a making *malò animo*, of any written instrument for the purpose of fraud and deceit: 2 Russ. 317, and the authorities there cited. The evidence fully justifies the conclusion that the defendant falsely made and prepared the ³⁵⁰ instrument set forth in the indictment with the evil design of defrauding the party, whose deed it purports to be. It is not necessary that the act should be done in whole or in part by the hand of the party charged. It is sufficient if he cause or procure it to be done. The instrument was false. . . . If he had employed any other hand, he would have been responsible for the act. In truth, the signature of that false instrument, in a merely logical point of view, is as much imputable to him as if he had done it with his own hand, . . . and the opinion of the court is, that the crime of forgery has been committed."

It is our opinion that the case at bar falls precisely within the statement of facts and conclusions of law herein laid down. In the case decided, the signature of the grantor upon the deed was genuine, and procured by the fraud of the grantor. In like manner, the signature of Etta O. Hill upon the note was genuine and procured, without negligence on her part, by the fraud of D. O'Connor.

Commonwealth v. Foster, 114 Mass. 311, 19 Am. Rep. 353, is similar in principle to State v. Shurtliff, 18 Me. 368. In this case the court state the rule to be: "It matters not by whom the signature is attached, if it be not attached as his own. If the note is prepared for the purpose of being fraudulently used as the note of another person, it is falsely made. The question of forgery does not depend upon the presence upon the note itself of the indicia of falsity." In a subsequent paragraph it is further declared "to constitute forgery where there has been no subsequent alteration; the fraudulent intent must attend the making of the instrument. But

it is not necessary that it should be in the mind of the one whose hand holds the pen in writing the signature. If that is done at the dictation or request of another, and for his purposes and use, and his designs are fraudulent so as to make it forgery if he had written it himself, then the instrument is a forged one": See, also, *Gregory v. State*, 26 Ohio St. 510, 20 Am. Rep. 774; 19 Cyc. 1374 D, and cases cited; 13 Am. & Eng. Ency. of Law, 1087, 3, and cases cited.

It would appear from these citations to be well established that ³⁵¹ the note in question, under the circumstances attending its execution, was a forgery.

But from the fact that, as between O'Connor and Etta O. Hill, the note was a forgery, it does not necessarily follow that she would be relieved from liability thereon. There are numerous cases in which a party may be held criminally guilty of committing forgery, when the parties sought to be charged by the forgery cannot avoid their liability, as made apparent upon the face of the forged instrument: *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427. But nearly all these cases involve the negligence of the parties sought to be charged by the forged instrument either by their own failure to properly examine it, or by leaving it with blanks to be filled in by the agency of some other person, or by some other neglect of duty. But we have already determined that the defendant, Etta O. Hill, was not negligent; therefore the only remaining question to be determined is, whether she is liable upon this forged paper to the making and uttering of which her negligence in no way contributed. The law is well established that she cannot be held. The note taken by the bank with her name upon it was not her contract. It is no more binding upon her than if O'Connor had written her name upon the note with his own hand. It has been held in numerous cases that a forged paper without negligence imputed to the party affected by the forgery is not a binding contract, whether the forgery was committed by alterations or a substitution of the forged contract for the supposed or genuine contract.

In *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67, Gray, C. J., in an elaborate opinion, reviewing both the common and civil law upon this point, declares: "It is a general rule of our law that a fraudulent and material alteration of a promissory note, without the consent of the party sought to be charged thereon, whether made before or

after the delivery of the note, renders the contract wholly void as against him, even in the hands of one who takes it in good faith and without knowledge or reasonable notice of the alteration"; and specifically held that the alteration of a promissory note by one of the makers by increasing the amount for which it is made by the insertion of words and figures in blank spaces left in the printed ³⁵² form on which it is written, avoids the note as to such makers who do not consent thereto, even in the hands of a bona fide holder for a valuable consideration. To the same effect is *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92.

Waterman v. Vose, 43 Me. 504, is in perfect accord with the rule above laid down, and holds that the alteration of a note by the maker, after it was indorsed, by adding the words "with interest," was material, and if made without the consent of the indorser relieved him of liability, though the alteration was made before delivery. The reason upon which this conclusion was based is that "an alteration afterward, which is material, without his consent, will make it a contract which he never executed, and which it is manifest he never intended to, and it is a new contract to which he can in no sense be charged as a party and he cannot be bound by it." See, also, *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427, and *Fay v. Smith*, 1 Allen, 477, 79 Am. Dec. 752, which is precisely in point in fact and law.

The ground upon which these cases seem to be decided is that the forgery destroyed the identity of the defendant's contract, and present a different or new contract which he never made.

Under these well-established rules of law, applicable to the case at bar, our conclusion is that the note signed by Etta O. Hill upon which she is sought to be charged was a forgery with respect to her signature, not her contract and not binding upon her.

Motion overruled.

A Person is Guilty of Forgery who, with intent fraudulently to utter a promissory note as the note of a person other than the signer, procures to it the signature of an innocent party who does not thereby intend to bind himself: *Commonwealth v. Foster*, 114 Mass. 311, 19 Am. Rep. 353.

A Note to Which the Maker's Signature is procured by false representations as to the character of the paper, he being ignorant of its true character, and having no intention to sign such a paper, and being guilty of no negligence in doing so, is regarded by some authorities as void, even in the hands of a bona fide holder: Keller v.

Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974; Willard v. Nelson, 35 Neb. 651, 37 Am. St. Rep. 455. See, too, Yakima Valley Bank v. McAllister, 37 Wash. 566, 107 Am. St. Rep. 823; Costello v. Barnard, 190 Mass. 260, 112 Am. St. Rep. 328.

STATE v. INTOXICATING LIQUORS.

[102 Me. 385, 67 Atl. 312.]

APPEAL—Exceptions.—Unless the bill of exceptions shows to the contrary, the certificate of the presiding justice in the lower court that the exceptions are “allowed” is conclusive of their being rightfully allowed. (p. 505.)

INTOXICATING LIQUORS—Interstate Commerce.—Intoxicating liquors are articles of commerce, and as such, while being transported from state to state, are within the protection of that clause of the constitution of the United States which gives to Congress the power to regulate commerce with foreign nations and among the several states, and thus are subject to the exclusive jurisdiction of Congress. (p. 506.)

INTOXICATING LIQUORS—Interstate Commerce—Delivery.—Under the act of Congress known as the “Wilson Act,” a state statute must permit the delivery of an interstate shipment of intoxicating liquors to the consignee within the state, but, after such delivery, the state has power to prevent the sale of the liquor, even in the original package. (p. 510.)

INTOXICATING LIQUORS—Interstate Commerce—Arrival in State.—Placing of an interstate shipment of intoxicating liquor in the carrier’s warehouse to be delivered to the consignee does not constitute their arrival in the state, within the meaning of the act of Congress known as the “Wilson Act,” so as to subject them to state laws or seizure thereunder. (p. 510.)

INTOXICATING LIQUORS—Interstate Commerce—Binding Effect of Decisions.—The decisions of the United States supreme court upon the question of the interpretation and application of the interstate commerce clause of the United States constitution, and the act of Congress, known as the “Wilson Act,” relating to interstate shipments of intoxicating liquors, are conclusive and binding upon the state courts. (p. 511.)

INTOXICATING LIQUORS—Interstate Commerce—Delivery.—Though interstate transportation of intoxicating liquors may end before delivery, interstate commerce therein does not end before delivery to the consignee, either actual or constructive, so as to subject the shipment to the police powers of the state. (p. 511.)

INTOXICATING LIQUORS—Interstate Commerce—Delivery.—An interstate shipment of intoxicating liquor into the state is not subject to state police regulation until there has been a delivery to the consignee, and it makes no difference whether the consignee is known to the carrier or not, nor whether the name of the consignee is fictitious. (p. 511.)

R. W. Crockett, county attorney, for the state.

McGillicuddy & Morey, for the claimant.

³⁸⁸ SAVAGE, J. These are three cases of claims by a common carrier for intoxicating liquors seized and taken from its possession, while alleged still to be in transit and within the protection of the interstate commerce provision of the constitution of the United States. The liquors seized were properly libeled. The claimant appeared before the municipal court. Its claims were denied, the liquors in each case adjudged forfeited, and the claimant appealed to the ³⁹⁰ supreme judicial court. After a hearing in that court the presiding justice ruled in each case as a matter of law that the liquors should be forfeited, and the claimant alleged exceptions, which were regularly allowed.

At the outset the attorney for the state claims that the exceptions were not allowable, should not have been allowed, and should now be dismissed, because, as he says, the cases were heard by the presiding justice without the intervention of a jury, and that the right of exceptions was not expressly reserved. It is true that in such cases exceptions are not properly allowable, and if allowed, should be dismissed when the fact properly appears: *Reed v. Reed*, 70 Me. 504; *Frank v. Mallett*, 92 Me. 77, 42 Atl. 238. The trouble in this case, however, is that the fact is not shown to be as claimed by the state's attorney. We cannot travel out of the bill of exceptions, and this bill is silent upon the matter. The attorney argues that it must appear affirmatively from the bill that the right of exception was expressly reserved before the hearing. We do not think so. We hold that in the absence of anything in the bill to show the contrary, the certificate of the presiding justice that the exceptions are "allowed" is conclusive as to their being rightfully allowed in this respect: *Dunn v. Auburn Electric Motor Co.*, 92 Me. 165, 42 Atl. 389. These bills of exceptions, therefore, are properly open to consideration.

The presiding justice made no specific findings of fact, but his ruling as a matter of law necessarily involved certain findings of fact, which must be deemed, upon exceptions, to be true. He must have found that the liquors seized were intoxicating, and that they were intended for sale in violation of law in this state. But the undisputed testimony, which is made a part of the bill of exceptions, shows certain other facts, which, in considering the exceptions, we must deem were true, and that they were so found by the justice, because his ruling was essentially based upon their truth.

In the first place, it appears that the claimant is a common carrier of merchandise, and that each of the packages seized was transported by the claimant by continuous shipment from Boston, Massachusetts, to Lewiston, in this state.

³⁹¹ 1. In the first case, as numbered on the docket, the package was a C. O. D. shipment, marked "M. Supovitz, No. 274 Main Street, Lewiston, Maine." Max Supovitz testified that he lived at 274 Main street, Lewiston, and was the only one of the name living there; that he had not ordered the liquors and did not know to whom they belonged. The liquors were brought by the claimant over the Maine Central Railroad line to Lewiston, and were taken by it from the railroad freight shed to its office on Park street, where they were shortly after seized by the officer.

2. In the next case, the liquors were marked "H. E. Perkins, Lewiston, Maine." From the evidence, we think it may be assumed that the name was fictitious. The evidence shows that the package was never in the claimant's office, but was seized and taken from the claimant's delivery wagon, apparently either while going out to make delivery or returning from an unsuccessful attempt to make delivery. And as we shall see later, it is immaterial which. Whether the driver knew who was the real consignee does not appear, but that, we think, is also immaterial in this case.

3. The third case is that of a C. O. D. shipment. The package was marked "J. P. Sutton, Auburn, Maine," and was seized from the claimant's wagon while being taken to its office. The evidence strongly tends to show that Mr. Sutton did not order the liquors, but that they were ordered by another person in his name, without his knowledge.

It is well settled that intoxicating liquors are articles of commerce, and as such, while being transported from state to state, are within the protection of that clause in the constitution of the United States which gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and thus are subject to the exclusive jurisdiction of Congress: *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, 31 L. ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128; *State v. Burns*, 82 Me. 558, 19 Atl. 913; *State v. Intoxicating Liquors*, 83 Me. 158, 21 Atl. 840. And although a state may constitutionally prohibit the sale of intoxicating liquor within its borders

(*Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205), such prohibition ³⁹² could not, prior to the Wilson act, so called, hereafter referred to, constitutionally extend to a sale of them by the importer while in the original package: *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128; *State v. Burns*, 82 Me. 558, 19 Atl. 913; *State v. Intoxicating Liquors*, 83 Me. 158, 21 Atl. 840.

At this stage of the decisions the act of Congress of August 8, 1890, called the Wilson act, was passed, which provided that all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Since the enactment of the Wilson act, the questions as to what its effect was, and at what point of time there is an "arrival" of intoxicating liquors in a state, within the meaning of that act, so as to subject them to the police powers of a state, have several times been considered by the federal supreme court, as well as by this court. In *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572, the Wilson act was held to be constitutional, and it was held that after its passage, intoxicating liquors introduced into a state from another state, whether in the original package or otherwise, were subject to the police powers of the state. In *Rhodes v. Iowa* (1897), 170 U. S. 412, 18 Sup. Ct. Rep. 664, 42 L. ed. 1088, an interstate shipment of intoxicating liquors had reached the point of destination, and had been unloaded from the railroad car to the platform. A station agent of the railroad company removed the liquors from the platform to the freight warehouse of the railroad company, a few feet away. For this act he was prosecuted under the Iowa statute, which made it unlawful for any person in the employ of a common carrier, or for any other person, to "transport or convey between points, or from one place to another within this state for any other person or persons or corporation, any intoxicating liquors," without first having the certificate which the statute provided for. The federal supreme court held, on writ of error, that the removal of such liquors from the plat-

form to the freight warehouse was a part of the interstate ³⁹³ commerce transportation, and overruled the contention of the state of Iowa that the liquors became subject to its police powers by virtue of the Wilson act as soon as they came within its geographical limits. In the opinion the court said *passim*: "The sole question presented for consideration is whether the statute of the state of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee at the point to which it was consigned. . . . Did the act of Congress referred to (the Wilson act) operate to attach the legislation of the state of Iowa to the goods in question the moment they reached the state line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee, is, then, the pivotal question. . . . We think that interpreting the statute by the light of all its provisions, it was not intended to, and did not, cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

In *State v. Intoxicating Liquors* (1901), 95 Me. 140, 49 Atl. 670, this court was called upon to interpret the Wilson act. In that case there was an interstate shipment of intoxicating liquors over connecting railroads consigned to the shippers. They arrived at the point of destination on the morning of one day, were transferred to the railroad company's freight-house, where they were seized by the officers on the afternoon of the next day. There had been no delivery of the liquors and no notice given to anyone of their arrival. The railroad company filed a claim for the liquors, on the ground that they were within the protection of the interstate commerce provision of the federal constitution when seized, and that it was entitled to their possession until delivery. The claimant relied upon *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. Rep. 664, 42 L. ed. 1088, as settling the question involved favorably to its contention.

But this court, after examination of the facts reported in the *Rhodes* case, and of the general line of reasoning adopted in the opinion of the federal supreme court, were of opinion that the question whether the liquors were so protected until delivery at the ³⁹⁴ point of destination to the consignee was

not necessarily involved in the federal court's decision. We said: "If the act of moving the package from the platform to the freight-house was a part of the interstate commerce transportation, as the court held it was, and the transportation was not consummated until the package had been moved to and deposited within the freight-house, so that the liquors had not arrived within the state, until that act had been performed, then the Iowa statute could not apply to any part of such transportation, and it was unnecessary to a decision of the point involved to hold that such transportation was not completed until delivery to the consignee." And we held in the case then before us that when the actual transportation had been entirely completed, and when the liquors had not only arrived at the place of their destination, but had been moved by the carrier from the car to its freight-house, there to await the order of the shipper, they had arrived in the state within the meaning of the Wilson act, so as to be subject to our laws. And we took occasion in that case to say: "We fully recognize that the question whether a state statute is in contravention of any provision of the federal constitution is for the final determination of the federal supreme court, and that its decision, when the question is presented, is conclusive. But we do not consider it obligatory upon this court to hold, against our own judgment, that a statute of our state is in violation of that constitution, until it has been so decided, even if it may be possible, judging, from certain remarks in that court's opinion, that our judgment may be overruled by that tribunal."

But since the cases at bar were heard at nisi prius, the federal supreme court has announced an authoritative decision upon the precise point involved. In the case of *Heyman v. Southern R. R. Co.*, 203 U. S. 270, 27 Sup. Ct. Rep. 104, 51 L. ed. 178, announced December 3, 1906, intoxicating liquors were shipped over the defendant's railroad from Augusta, Georgia, to Charleston, South Carolina, where they were unloaded by the railroad company from the car into its warehouse, ready for delivery. Shortly after the liquors were so placed, they were seized and taken from its possession by constables asserting their right to do ³⁹⁵ so under the authority of what is known as the dispensary law of South Carolina. The state court held, as we held in *State v. Intoxicating Liquors*, 95 Me. 140, 49 Atl. 670, that the interstate transportation of the goods ended when they were

placed in the warehouse, and that then the goods ceased to be under the shelter of the interstate commerce clause of the constitution. The decision was based upon the conclusion that goods warehoused under the circumstances stated must be considered as having arrived within the meaning of the Wilson act. The Georgia court also stated that they deemed that the expressions to the contrary effect in *Rhodes v. Iowa*, 170 U. S. 412, 8 Sup. Ct. Rep. 664, 42 L. ed. 1088, "were not binding, as they were merely obiter." But the federal supreme court reversed the judgment of the state court, and held, for reasons stated, that the *Rhodes* case "necessarily involved deciding the meaning of the word 'arrival' in the Wilson act, and that this required an ascertainment of when goods shipped from one state to another, generally speaking, ceased to be controlled by the interstate commerce clause of the constitution." And the conclusion reached and stated by the federal supreme court in *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. Rep. 104, 51 L. ed. 178, may be summarized as follows:

1. The elementary and long-settled doctrine is reiterated that, prior to the Wilson act, in case of interstate shipments, "delivery and sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned."

2. That the Wilson act manifested no attempt on the part of Congress to delegate to the states the right to forbid the transportation of merchandise from one state to another, "since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package."

3. That the state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but that, after such delivery, the state has power to prevent the sale of the liquors, even in the original package.

4. That the question whether the liability of the carrier, as such, has ceased, under the state laws, and has become that of a warehouseman, ³⁹⁶ is immaterial: *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. Rep. 104, 51 L. ed. 178; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572; *Vance v. W. A. Vandercook Co.* No. 1, 170 U. S. 438, 18 Sup. Ct. Rep. 674, 42 L. ed. 1100; *American Express Co. v.*

Iowa, 196 U. S. 133, 25 Sup. Ct. Rep. 182, 49 L. ed. 417; Foppiano v. Speed, 199 U. S. 501, 26 L. ed. 138, 150 L. ed. 288.

5. But in stating these principles, the court in the Heyman case reserved its opinion upon one point in the following words: "Of course we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered. We say we are not called upon to consider this question, for the reason that no facts are shown by the record justifying passing on such a proposition." But the point thus suggested by the federal court, if tenable, is unimportant in the cases at bar, since the facts in these cases do not bring them within such a rule.

This decision of the federal supreme court, upon this question of the interpretation and application of the interstate commerce clause of the federal constitution, and of the act of Congress, called the Wilson act, is conclusive and binding upon this court: *State v. Burns*, 82 Me. 558, 19 Atl. 913; *State v. Intoxicating Liquors*, 95 Me. 140, 49 Atl. 670. Under the authority of this decision, we are bound to say that though interstate transportation may end before delivery, interstate commerce does not end before a delivery to the consignee, either actual, or at least constructive within the principle left undecided by the federal court. And we cannot see that it makes any difference in principle whether the consignee was known to the carrier or not, or even if the name of the consignee was fictitious.

There was no delivery of liquors, either actual or constructive, to consignee in any of the cases at bar. Hence these liquors had not become liable to seizure and forfeiture under our statute.

It may be that in part, if not in all, of these cases, it would have been our duty to rule favorably to its claimant, on the ground that ³⁹⁷ at time of seizure actual transit was not ended: *State v. Intoxicating Liquors*, 101 Me. 430, 64 Atl. 812; *State v. Intoxicating Liquors*, 102 Me. 206, 66 Atl. 393, 11 L. R. A., N. S., 550. But we have thought it expedient,

in view of the decision in the Heyman case, to place our decision upon the ground which must hereafter control in all similar cases.

Exceptions in each case sustained.

State Regulation of the Sale of Intoxicating Liquors as an interference with interstate commerce is discussed in the recent cases of *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814; *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437; *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283.

CONANT'S APPEAL.

[102 Me. 477, 67 Atl. 564.]

MUNICIPAL CORPORATIONS.—The Laying Out Ways in a town involves the taking of private property for a public use, under statute authority, and all statute requirements must be fully and strictly complied with. (p. 514.)

MUNICIPAL OFFICERS—Judicial Duties—Laying Out Ways.—Duties of municipal officers in laying out town ways are not ministerial merely, but judicial, as they exercise their judgment as to the propriety of the way, and as to its location between termini, and especially in determining whether the prerequisite conditions exist which warrant the taking of private property for public use and awarding damages to the owners of land so taken. (p. 514.)

JUDICIAL OFFICERS — Interest — Disqualification.—The maxim, that "A person ought not to be judge in his own cause, because he cannot act both as judge and party," applies in all cases where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort. (pp. 514, 515.)

JUDICIAL OFFICERS—Interest—Disqualification.—If one of a board of town selectmen signs the report of the location of a town way, and also a petition for the way, and assists in laying it out, he is disqualified from participating in the judgment of the board, and his participation therein renders such judgment void, even if a sufficient number without him concur in the result. (p. 516.)

JURISDICTION of County Commissioners—Determination of an Appeal.—The question of the jurisdiction of county commissioners to affirm the location of a town way, made by its selectmen, and any other questions affecting the legality of their proceedings therein, may be raised and determined on appeal. (p. 516.)

Payson & Virgin, for the plaintiff.

Libby, Robinson, Turner & Ives, for the town of Cape Elizabeth.

479 PEABODY, J. This is an appeal from the decision of the county commissioners of Cumberland county dismiss-

ing the appellant's petition dated April 2, 1904, wherein he alleged the action of the municipal officers of the town of Cape Elizabeth in said county upon the petition of certain inhabitants of the town for the laying out of a public way from a point in Fowler Road, so called, to Great Pond, so called, and the subsequent action of the inhabitants of the town in accepting the report of the municipal officers accepting the way as laid out by them, and represented that this action of the municipal officers and of the inhabitants of said town was unreasonable; and considering himself aggrieved by such laying out of the town way by said municipal officers, prayed that the county commissioners would "determine that the action of said municipal officers in laying out said town way was unreasonable, and that common convenience and necessity did not require the laying out of said way by said municipal officers, and that common convenience and necessity did not require the acceptance of said town way by the inhabitants of said town; that the action of said town in accepting said way was unreasonable, and that your honors will discontinue said way."

The case is before the law court on exceptions to the rulings of the single justice of the supreme judicial court hearing the appeal, in allowing the report of the committee which affirmed in whole the judgment of the county commissioners.

The history of the case is as follows: The selectmen of the town of Cape Elizabeth, upon the petition of A. R. Brown, F. H. Peabbles, and fifty other citizens, laid out a town way leading from the Fowler Road to a pond in the town called Great Pond, and ⁴⁸⁰ filed a written return of their proceedings, signed by Charles E. Jordan and F. H. Peabbles, selectmen of Cape Elizabeth, Maine, with the town clerk, November 27, 1903, and reported the same to the town, at a meeting of its inhabitants held on the seventh day of December, 1903; and at this meeting the town accepted the report and the way as laid out by the municipal officers. Frederick O. Conant, one of the owners of land across which the way was located, presented the petition hereinbefore referred to to the county commissioners, who, after a hearing on December 14, 1904, affirmed the location made by the town, and the appellant thereupon appealed to the supreme judicial court, at the January term thereof, 1905. The appellate court, at the April term, 1905, appointed Ardon W. Combs, Barrett Potter and Scott Wilson a committee to hear the parties and re-

port whether the judgment of the county commissioners should be, in whole or in part, affirmed or reversed. The committee gave a hearing and made their report to the court, and objections thereto being filed by the appellant, a hearing was had thereon at the October term, 1905. The objections to the report were stated under seventeen specifications all of which were disallowed, and the report of the committee was allowed by the presiding justice. To these rulings the appellant excepted.

The bill of exceptions raises important questions affecting the validity of the laying out of the town way, but we find it unnecessary, and therefore deem it injudicious, to decide all the points presented by the exceptions, and consider one of the exceptions only which is, we believe, decisive against the validity of the way. The appellant moved that the report of the committee be not accepted, for the reason, among others, stated in his third specification of objections, which is as follows:

"3. It appears from the record that F. H. Peabbles, one of the two selectmen who signed the return upon the petition for the way, also signed the petition for laying out the way."

The laying out of a town way involves the taking of private property for public use, under statute authority, and all statute requirements must be fully and strictly complied with: *Leavitt v. Eastman*, 77 Me. 117.

⁴⁸¹ The bill of exceptions shows that one of the selectmen who signed the report of the location of the town way was also a petitioner for the way. The duties of municipal officers in laying out town ways are not ministerial merely, but judicial. They are to exercise their judgment as to the propriety of the way, and as to its location between the termini, and especially in determining whether the prerequisite conditions exist which warrant the taking of private property for public use and awarding damages to owners of land so taken.

It is a maxim of the law that "A person ought not to be judge in his own cause, because he cannot act both as judge and party," and it applies in all cases where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort: *Dimes v. Proprietors of Grand Junction Canal*, 3 H. L. Cas. 759, 793; *Queen v. Justices of Hertfordshire*, 6 Q. B. 753; *State v. Castleberry*, 23 Ala. 85; *Meyer v. City of San Diego*, 121 Cal. 102, 66 Am. St. Rep.

22, 53 Pac. 434, 11 L. R. A. 762; *Tootle v. Berkley*, 60 Kan. 446, 56 Pac. 755; *Pearce v. Atwood*, 13 Mass. 324; *Cooley's Constitutional Limitations*, 592, 595. This rule has been established since the earliest periods of the common law: *Bonham's Case*, 8 Coke, 118. The reason for it expressed by *Bronson, J.*, in *People v. Suffolk Com. Pleas*, 18 Wend. 550, shows its universal application: "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge": *Lyon v. Hamor*, 73 Me. 56.

Selectman Peabbles was thus disqualified, and this rendered the judgment of the board void, and would have had this effect, even if a sufficient number without him concurred in the result: *State v. Delesdernier*, 11 Me. 473; *Ex parte Hinckley*, 8 Me. 146; *Friend v. County Commissioners*, 53 Me. 387; *Andover v. County Commissioners*, 86 Me. 185, 29 Atl. 982; *Case v. Hoffman*, 100 Wis. 357.

The petitioner could undoubtedly have attacked the proceedings collaterally (*Small v. Pennell*, 31 Me. 267); he elected, however, to have the question of the validity of the laying out of this town way definitely determined. The closing prayer of his petition to be technically exact should have been to reverse the action of the municipal officers and not to discontinue the way, but the purport of the allegations⁴⁸² and prayers of the petition clearly shows that the appellant intended to seek redress of his grievances under the provisions of Revised Statutes, chapter 23, section 21, and they are sufficient.

The commissioners did not dismiss the petition for want of jurisdiction, but assuming jurisdiction, though erroneously, they sought to affirm the location of the way; and the committee acted upon the same theory as is indicated by their report, "that the judgment of the county commissioners from which appeal was taken by said appellant in this cause be wholly affirmed and in no part reversed."

The question of jurisdiction of the county commissioners, and any other questions affecting the legality of their proceedings, may be raised when the report of the committee of appeal is offered for acceptance: *Phillips v. County Commissioners*, 83 Me. 541, 22 Atl. 385; *Hodgdon v. County Commissioners*, 68 Me. 226; *Goodwin v. County Commissioners*, 60 Me. 328; *Winslow v. County Commissioners*, 31 Me. 444.

The objection of the petitioner should have been sustained and the report of the committee should have been rejected: *Belfast v. County Commissioners*, 52 Me. 529; *Wells v. County Commissioners*, 79 Me. 522, 11 Atl. 417; *Donnell v. County Commissioners*, 87 Me. 223, 32 Atl. 884.

Exceptions sustained.

Appeal sustained.

Judgment of county commissioners reversed.

A Judge is Disqualified when he has in the litigation some certain definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered: *Meyer v. San Diego*, 121 Cal. 102, 66 Am. St. Rep. 22; *First Nat. Bank v. McGuire*, 12 S. Dak. 226, 76 Am. St. Rep. 598; *State v. Call*, 41 Fla. 442, 79 Am. St. Rep. 189.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

NOYES v. NOYES.

[194 Mass. 20, 79 N. E. 814.]

DIVORCE—Connivance in Adultery, What Amounts to.—If a husband arranges that his wife and another man may be permitted to occupy the house of a third person for an evening, without interference or interruption, and that they shall be secretly watched, his object being to afford her an opportunity to commit adultery and obtain divorce from her if she does, and she, knowing nothing of the arrangement, goes to such house and commits the act intended, the husband is guilty of connivance, and cannot obtain a divorce on account thereof. (pp. 519, 520.)

Libel for divorce alleged to have been committed by the defendant with a man named Dodge at the house of one Dow. The libel was dismissed. Libellant excepted, and in his bill of exceptions stated:

“The libelant introduced testimony tending to show that on said evening of November 5th, the libelee and the co-respondent went to Dow’s house shortly after dark, unlocked the door, entered the house downstairs and remained there until 9 o’clock that evening; that shortly before they entered the house three men in the employ of the libelant also went to this house, found the door locked and no one there, unlocked the door, went inside and upstairs, and remained there until shortly after 9 o’clock, when they came downstairs and found the libelee and the co-respondent in a situation which, if their testimony is to be believed, would warrant a finding that adultery had been committed.

“There was evidence that no person other than the libelee, the co-respondent and these men was in the house during the evening.”

E. B. Fuller, for the appellant.

H. F. Hurlburt, Jr., for the libelee.

²¹ HAMMOND, J. The trial judge found that the libelant arranged, as stated in his testimony which is recited in the bill of exceptions, with one Dow that an opportunity should be afforded the libelee by permitting her and the co-respondent to pass the evening of November 5th alone in Dow's house, without interference and interruption by other persons, although such permission had theretofore, on the morning of the preceding day, been refused the libelee by Mrs. Dow, and having so found, "ruled as matter of law that the facts so found were connivance on the part of the libelant." He thereupon ordered that the libel be dismissed, "and to the rulings aforesaid and said order the libelant duly excepted." In an amendment to the bill it is stated that the finding was made only upon the evidence recited in the bill.

It is contended by the libelant that the only question arising on the record is whether the testimony of the libelant, which is the only testimony reported, shows, as matter of law, connivance; but we do not so interpret the record. The only ruling made ²² was that certain facts found by the trial court constituted in law connivance, and the question whether the evidence warranted the finding does not seem to have been raised. The evidence upon which the finding was made was circumstantial to a certain extent; and according to the relative degree of credit to be given to the libelant's denials of inferences which might be drawn against him from the facts stated by him, the finding might be either way. The judge evidently placed more reliance upon the legitimate inferences from the facts stated by the witness than he did upon the denial of the inferences. The witness was before him, and as he went on the judge had an opportunity by observing him to test his sincerity in his denials.

Even if the question whether the finding is sustained by the evidence is before us, we are of opinion that it is so sustained. The evidence warranted the finding that the libelant desired that on the night in question his wife should commit adultery, or, at least, that she should be placed in such a compromising position as to lead to the inference of the committal of that act; that he desired to do this so that he might get a divorce and be freed from her and his real estate be free from any claim on her part; that Mrs. Dow, who was to be away,

had refused the libelee the use of the house for that evening; that the libelant knew it and feared that Dow might be at home; and that the libelant's purpose in seeing Dow was to induce him to stay away, not only that a crime, if committed, might be detected, but that it might be committed; and that in that way, by active exertion, he aided in procuring the house for an adulterous use by his wife, when otherwise she would not have had it. In other words, the evidence warranted the finding made by the judge that the libelant arranged with Dow that the house should be used by his wife without interference or interruption on the part of other persons, although such permission had been refused by Mrs. Dow. Under the circumstances of the case this must be held to be a finding that the libelant did this to facilitate the committal of adultery by his wife.

Was such an act, as matter of law, connivance on the part of the libelant? The law upon this subject was quite fully considered by this court in *Wilson v. Wilson*, 154 Mass. 194, 26 Am. St. Rep. 237, 28 N. E. 167, 12 L. R. A. 524. ²³ Morton, J., speaking for the court, uses the following language: "Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed: 2 Bishop on Marriage and Divorce, 5th ed., sec. 9; *Timmings v. Timmings*, 3 Hagg. Ecc. 76; *Stone v. Stone*, 1 Rob. Ecc. 99, 101; *Phillips v. Phillips*, 10 Jur. 829."

Applying the law to the findings of the court as interpreted by the issues on trial, it is clear that the ruling that, as matter of law, the facts show connivance was correct. By his arrangement with Dow the libelant assisted his wife on "her path to the adulterous bed." It is immaterial that she was

unaware of this assistance. As additional cases bearing upon the law of connivance, see *Morrison v. Morrison*, 136 Mass. 310; *Robbins v. Robbins*, 140 Mass. 528, 54 Am. Rep. 488, 5 N. E. 837.

Exceptions overruled.

WHAT CONSTITUTES CONNIVANCE SUFFICIENT TO BAR A SUIT FOR DIVORCE.

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II. What Acts Constitute Connivance When Adultery is Ground Alleged.

a. By the Husband, 521.

b. By the Wife, 525.

c. Abandonment as Constituting Connivance, 525.

d. Effect of Previous Connivance, 526.

III. Connivance When Desertion is Ground of Divorce, 526.

IV. Connivance When Cruelty is Ground of Divorce, 526.

I. Introduction.

As the officers before whom a marriage must be solemnized, and the formalities required to render it valid, are prescribed by the state, the state thereby becomes a party to all marriages. And being a party to a contract which it favors as promoting the best interest of society, so it regulates divorce procedure entirely in its own interest. Hence divorces are not granted to gratify the wishes of either party to the action, nor as a reward to the innocent party or a punishment to the offending party, but only when the prosperity of the state will be promoted. Actions for divorce are in the nature of equity proceedings and the party seeking relief must himself be free from fault. In accordance with this well-established principle of equity, connivance on the part of one seeking a divorce can always be successfully pleaded as a bar to the action. This principle is too well established to be disputed, and it is only necessary for us in this note to determine what, as matter of law, constitutes connivance, and give illustrations of how the general doctrine has been applied. Connivance is generally limited in its application to suits on the ground of adultery, but is equally available as a bar to actions for divorce brought on other grounds. Whenever positive connivance is shown, there is no diversity of opinion that it is a perfect defense, but some uncertainty is found among the decisions where the connivance pleaded could only be inferred from conduct of the complainant, which, though sufficient to provoke the act complained of, was not planned with the view of taking advantage of its commission, the difficulty in such cases being to determine whether the conduct amounts to connivance as matter of law, or is simply an effort on the part of one spouse to test the faithfulness of the other. We will endeavor to show by this note the various adjudications on this subject.

II. What Acts Constitute Connivance When Adultery is Ground Alleged.

a. **By the Husband.**—The authorities are practically unanimous in holding that if a husband procures his wife to be lured into the commission of adultery, he is deemed as consenting to it and cannot obtain a divorce therefor: *Dennis v. Dennis*, 68 Conn. 186, 57 Am. St. Rep. 95, and note, p. 101, 36 Atl. 34, 34 L. R. A. 449; *Burgeois v. Chauvin*, 39 La. Ann. 216, 1 South. 679; *Morrison v. Morrison*, 136 Mass. 310; *Wilson v. Wilson*, 154 Mass. 194, 26 Am. St. Rep. 237, 28 N. E. 167, 12 L. R. A. 524; *Noyes v. Noyes*, 194 Mass. 20, ante, p. 517, 79 N. E. 814; *Viertel v. Viertel*, 86 Mo. App. 494; *Hedden v. Hedden*, 21 N. J. Eq. 61; *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424.

It is by no means necessary that a husband should have lured his wife into the commission of adultery in order to charge him with connivance, for under the old English doctrine from which the modern doctrine of many of the states has not departed, the passive permitting of his wife's adultery by a husband constitutes connivance on his part, as much as if he had actively procured its commission. Thus in the leading English case of *Gipps v. Gipps*, 11 H. L. Cas. 1, 4 N. R. 303, 33 L. J. Mat. 161, 10 Jur., N. S., 641, 10 L. T. 735, 12 Week. Rep. 937, Lord Westbury said: "The word 'conniving' is not to be limited to the literal meaning of willfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by willfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur."

In *Dennis v. Dennis*, 68 Conn. 186, 57 Am. St. Rep. 95, 36 Atl. 34, 34 L. R. A. 449, the following definition is given: "Connivance is the corrupt consenting of a married party to that conduct of the other of which afterward complaint is made. It bars the right of divorce because no injury is received; for what a person has consented to, he cannot set up as an injury. Connivance is a thing of the intent resting in the mind. It is the consenting. But the connivance may be the passive permitting of the adultery or other misconduct as well as the active procuring of its commission. If the mind consents, that is connivance." Thus in *Morrison v. Morrison*, 136 Mass. 310, it is held that, "Where a husband, from the time he first became suspicious of his wife's infidelity, was willing in his own mind that she should commit adultery, provided that he could thereby obtain a divorce, and that he expected that she would commit adultery, and that he should obtain proof of it, and thus be enabled to secure a divorce, together with evidence that after his suspicions of her infidelity were aroused, he frequently retired, leaving her alone with her suspected paramour, having previously arranged to have them watched by a detective, allowed her to go alone with such suspected person into the streets of the city where

they lived, and also on pleasure excursions, and permitted him to use undue familiarity with her in his presence, without disapproval by him, is connivance such as to bar an action by him on ground of wife's adultery."

In *Cane v. Cane*, 39 N. J. Eq. 148, it is said: "If a husband sees his wife in danger, if he sees her in a position where she is likely to become subject to the power of the blandishments of a man whose character he knows to be bad and intentions evil, and he does nothing to warn her or to withhold her from his hands, but allows her to be led to her ruin and his dishonor, his conduct in law amounts to consent."

To the same effect is *Hedden v. Hedden*, 21 N. J. Eq. 61, and in a late case from this state, *Delaney v. Delaney*, 65 Atl. 217, it is announced: "It is not necessary to find words or statements of the petitioner indicating connivance or consent. If his conduct indicates an intent, or even a willingness, that the act of adultery may take place, or even culpable negligence in not preventing it, the maxim '*Volenti non fit injuria*' applies and the decree will be denied."

All of these decisions are based on the salutary principle that there exists a mutual duty on the part of both husband and wife to protect each other from the weaknesses which more or less exist in both sexes, for in *Moss v. Moss*, 24 N. C. 55, it is held that a husband cannot obtain a divorce from his wife on the ground of adultery committed by her after a separation if the husband's acts caused the separation. In speaking of the essential duties of married life the court said: "Among the most essential of those duties is conjugal society; both in being stipulated for in contracting the relation of man and wife, and as a wholesome restraint upon and as an effective protection against those passions and weaknesses to which both sexes are in some degree subject."

But in determining what acts on the part of a husband constitute "passive connivance" in contemplation of law, some very close distinctions have been drawn which should always be examined in cases where this question is involved. The rule apparently to be deduced from these decisions is, that if a husband, who believes his wife to be chaste, desires her to commit adultery, or throws no obstacles in the way of her committing the act when he sees she is in danger, or raises no objection thereto, he is guilty of connivance. But that a husband who has reasonable grounds of suspicion that his wife is unchaste, and permits her to commit adultery which he did not plan or invite, in order to obtain proof of her infidelity, he is not guilty of connivance, even though he hoped she would commit adultery in order that he might obtain a divorce.

In *Wilson v. Wilson*, 154 Mass. 194, 26 Am. St. Rep. 237, 28 N. E. 167, 12 L. R. A. 524, the question of what constitutes passive connivance was carefully considered. A husband, being suspicious of his wife's infidelity, had watched her without obtaining proof. Suspecting that she would go to Boston on a certain day he fol-

lowed and detected her going to a hotel with a strange man. Going to the hotel he waited there for an hour, listened ten or fifteen minutes at the door of the room in the hotel to which his wife and the man had gone, and bursting down the door found them in bed together. He hoped she would commit adultery so that he could get a divorce, and he gave her plenty of time so she might do it, and did not warn her. Under this state of facts the court said: "We think, as a matter of law, it cannot be said, on this state of facts, that the libelant was guilty of connivance. It is true that he could have prevented his wife from committing adultery, and did not; on the contrary, he wished she would, that he might have evidence on which he could get a divorce. But he did not make, or aid in any way in making, the opportunity. He did no overt act, unless keeping still was one, which it clearly was not. It was not a case where he supposed his wife was to commit adultery for the first time, and where it would have been his duty to give her the assistance which husband and wife are mutually expected to give to each other. It certainly cannot be held that a husband who suspects his wife of infidelity can take no means to ascertain the truth of his suspicions without being deemed guilty of connivance. 'There is a manifest distinction,' said the court in *Robbins v. Robbins*, 140 Mass. 528, 54 Am. Rep. 488, 5 N. E. 837, 'between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunity.'

"Merely suffering in a single case a wife, whom he already suspects of having been guilty of adultery, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed." The distinctions drawn in this case were referred to in the very recent case of *Noyes v. Noyes*, 194 Mass. 20, ante, p. 517, 79 N. E. 814, and it is here held that where a husband, in an action for divorce against his wife on the ground of adultery, had arranged with a third person that an opportunity should be furnished his wife to commit adultery, by permitting her and the co-respondent to pass an evening alone in the third person's house was guilty of connivance.

There does not seem to be perfect harmony among the English cases on how far a husband may go in passively permitting his wife to commit adultery without being guilty of connivance. In *Timmings v. Timmings*, 3 Hagg. Ecc. 81, which has often been referred to as a leading case on this question, it is said: "A husband is not barred by a mere permission of opportunity for adultery; nor is it every degree of inattention on his part which will deprive him of relief; but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of the wife take its full scope; but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution." But in commenting on the above language the lord chancellor in *Gipps v. Gipps*, 11 H. L. Cas. 1, 4 N. R. 303, 33 L. J. Mat. 161, 10 Jur., N. S., 641, 10 L. T. 735, 12 Week. Rep. 937, said: "So far as my judgment extends, that is not the law, and that it would be a disgrace to the law if it were so. If a husband knowing the tendency and the evil habit of the wife, misled by this expression, let 'the licentiousness of the wife take its full scope,' without reproof or interference, I hold that he would never obtain any remedy in a court of justice."

The doctrine of implied connivance seems to have been carried further in England than in this country, for in *Gower v. Gower*, L. R. 2 Pro. & Div. 428, 41 L. J. Mat. 49, 27 L. T. 43, 20 Week. Rep. 899, it is said: "If a husband employs a man to get evidence of adultery upon which to obtain a divorce, and the man so employed sets about to procure the defilement of the wife, and by the intervention of that man the wife is purposely induced to commit adultery, the petitioner has no right to a remedy in this court for such adultery; and I further think that the husband would have no right to a remedy even if it were proved that he had not given any distinct orders for that purpose": See *Allen v. Allen*, 30 L. J. Mat. 2; *Glennie v. Glennie*, 32 L. J. Mat. 17, 8 Jur., N. S., 1108, 11 Week. Rep. 28; *Boulbing v. Boulbing*, 3 Swab. & T. 329, 33 L. J. Mat. 33, 10 Jur., N. S. 182, 9 L. T. 779, 12 Week. Rep. 389; *Pechin v. Pechin*, 34 L. J. Mat. 22; *Sugg v. Sugg*, 31 L. J. Mat. 41. In a recent case in the appellate division of the supreme court of New York (decided February 8, 1907) the same point involved in the *Gower* case (L. R. 2 Pro. & Div. 428, 41 L. J. Mat. 49, 27 L. T. 43, 20 Week. Rep. 899), just cited, seems to have arisen, but in this case it was shown that the agent employed by the plaintiff to get evidence was not responsible for the commission of adultery by the defendant, though he visited the house of prostitution with the defendant when the act was committed. And it will be seen from the language of the court that it did not go as far as the English doctrine. In this case the court ruled that where the defendant, of his own volition, deliberately and intentionally committed adultery, the fact that he went to the house of prostitution with a detective employed by the plaintiff to obtain proof of his infidelity would not constitute connivance,

where there was no proof that plaintiff employed the detective to aid or connive at the commission of the offense, or that she ever had any knowledge that he did so, or that either she or her attorney was responsible for his acts: *Tuck v. Tuck*, 117 App. Div. 421, 102 N. Y. Supp. 688. It must be observed that in this case, however, connivance was charged against the wife and the rules above given do not seem to have been so strict in their application in regard to acts of a wife as to those of a husband, as we shall now see.

b. *By the Wife.*—The dependent condition of a wife and her lack of opportunity to observe her husband's conduct, is probably responsible for the fact that in determining what acts on her part constitute connivance, she seems to have been favored by the courts more than her husband. We have already seen that if a husband consents to his wife's adultery he is guilty of connivance, and further that it has been held in many cases that mere knowledge on his part of his wife's adulterous tendencies which he took no steps to prevent or warn her against would constitute connivance so as to prevent him from obtaining a divorce on the ground of her adultery. But in *Cochran v. Cochran*, 35 Iowa, 477, a wife sought divorce on the ground of her husband's adultery, of which she knew and gave opportunity for its commission. Yet the court said: "That plaintiff did know of defendant's criminal acts is well established, and that she, with unexampled patience and forbearance, lived with him while she knew he was committing them also appears, and that she by her own acts gave opportunity for intercourse between her husband and his paramour is shown by the evidence. But these things rather establish her want of true womanly spirit and proper delicacy and prudence, than her assent to defendant's crimes, and a conspiracy to drive him to their commission." The grounds alleged in this case were both adultery and desertion, and both were established, but the language above quoted clearly shows that the rule as to consent in establishing connivance is greatly relaxed in favor of the wife. But in an action by a wife against her husband on the ground of adultery to which she had assented proof by the husband that his wife had previously and subsequently committed adultery, to which he had not consented, was held such connivance by her of his adultery as to prevent her from using it as a defense to his cross-complaint and that he was entitled to a divorce: *Bleck v. Bleck*, 27 Hun, 296.

c. *Abandonment as Constituting Connivance.*—Where either husband or wife have abandoned the other, the one at fault or at whose instigation such abandonment was caused cannot obtain a divorce in North Carolina on the ground of the other's adultery committed afterward. This doctrine was applied to the husband in *Moss v. Moss*, 24 N. C. (2 Ired.) 55, when a divorce was denied a husband on the ground of adultery by his wife committed after a separation caused by his fault. And in *Foy v. Foy*, 35 N. C. (13 Ired.) 90, it is held that if a wife leave her husband and refuse to live with him "without sufficient cause," and he afterward lives in adultery, a decree of

divorce on the ground of such adultery will be denied her, because the consequence may be ascribed to her former violation of duty.

d. **Effect of Previous Connivance.**—Where a husband has connived at his wife's adultery with one man, he will be deemed, in the absence of evidence to the contrary, as assenting to it with others, and consequently will not be entitled to a divorce for a subsequent act of adultery by his wife with a different person: *Hedden v. Hedden*, 21 N. J. Eq. 61; *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424; *Timmings v. Timmings*, 3 Hagg. Ecc. 76; *Lovering v. Lovering*, 3 Hagg. Ecc. 85; *Stone v. Stone*, 1 Rob. 99. In the English cases above cited, it is held that previous connivance will not operate as a bar, unless the adultery had actually been committed. But in *Hedden v. Hedden*, 21 N. J. Eq. 61, which is a most interesting case, and fully reviews the English doctrine, it is contended that the doctrine stated in the English cases applies only when the connivance was merely passive, and that whenever positive connivance by the husband is shown, he will be deemed to have consented to all future acts of adultery by his wife with other men, even though the adultery to which he had consented was not committed. To the same effect is the later case of *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424.

III. Connivance When Desertion is Ground of Divorce.

When desertion is the ground alleged in an action for divorce, connivance can be successfully pleaded as a bar, if the plaintiff caused the defendant's desertion with the object of making it the ground of divorce. Thus in *Gillenwaters v. Gillenwaters*, 28 Mo. 60, a husband sued his wife for divorce on the ground of desertion. The wife had left him because he had sold all of his property and failed to provide her with a home. The decree was denied because, as was said by the court, his conduct was such as "seemed to have been made with a view to effect the very object he attained, and of which he now complains." And in *Romich v. Romich*, 16 Pa. Co. Ct. Rep. 195, 3 Pa. Dist. Rep. 607, it is held that where a husband designedly instigated his wife to separate from him, intending to make the separation the ground for divorce, he will be treated as consenting to the separation. Some cases have gone even further, and hold that even though a wife leave her husband without cause, that no divorce will be granted the husband on the ground of her desertion, if his conduct has been such as shows he did not desire her to return, and had made no efforts to effect a reconciliation: *Cornish v. Cornish*, 23 N. J. Eq. 208; *Taylor v. Taylor*, 28 N. J. Eq. 207; *Thorpe v. Thorpe*, 9 B. L. 57.

IV. Connivance When Cruelty is Ground of Divorce.

Where cruelty is the ground upon which a divorce is sought, the rule as to what will justify the defense of connivance seems to be analogous to the one just stated in cases where desertion is alleged; and no relief will be granted if the cruelty charged was induced by

the party seeking to take advantage of it. Thus in *Johnson v. Johnson*, 14 Cal. 459, a divorce was denied because "the conduct of the plaintiff was well calculated to provoke the cruelty of which she complains." And a similar doctrine is announced in *Van Glahn v. Van Glahn*, 46 Ill. 134; *Reed v. Reed*, 4 Nev. 395; *Skinner v. Skinner*, 5 Wis. 449.

ATTORNEY GENERAL v. STRATTON.

[194 Mass. 51, 79 N. E. 1073.]

MUNICIPAL CORPORATIONS, Authority of, to Remove Officers.—In the cities and towns of Massachusetts there is no power to remove public officers, such, for instance, as members of the board of health, except what is given by statute. Therefore, the power to remove is not vested in the voters in a town meeting assembled. (pp. 529, 532.)

F. L. Simpson and W. H. Niles, for the relators.

J. H. Sisk and R. L. Sisk, for the respondents.

⁵¹ KNOWLTON, C. J. This is an information in the nature of a quo warranto to require the respondents to show by what warrant and authority they exercise the office of members of the board of health of the town of Swampscott.

It appears that the inhabitants of the town, at the annual town meeting in March, 1906, which was called for many purposes, and among others to hear and act upon the reports of numerous town officers, including the report of the board of health, appointed a committee of five voters to investigate the doings of the board of health for the three municipal years then ending, with authority to call for persons, books and papers, and to employ counsel and a stenographer. At an adjourned meeting this committee made a report, with charges against the board of health, which was accepted and adopted. At this meeting another committee was appointed to hear evidence upon the charges against the board, and to report their findings of fact and recommendations at an adjourned town meeting. This committee were authorized to employ counsel and engage a stenographer, and were empowered to summon witnesses, and call for an inspection of public records and private documents and papers. The committee made a report at an adjourned meeting, finding the charges proved, and recommending the adoption of resolutions removing the

respondents from their respective offices as members of the board of health, for maladministration and misfeasance in office. The report was accepted and adopted, and resolutions were adopted in accordance ⁵² with its recommendations. The respondents did not recognize the authority of either of these committees, and did not appear before them, although each of the committees met the respondents at their office, and interrogated them in regard to their books, records and memoranda, which were there inspected.

The respondents also offered to show, at the hearing upon the information, that the committees were affected by bias and prejudice against them, such that their proceedings were not fairly conducted, and that the attempted removal of the respondents from their office was illegal by reason of other specified irregularities in connection with the meeting at which the vote of removal was passed. This offer of proof was rejected by the justice who heard the case. He ordered that the petition be dismissed, and reported the case to the full court. The justice made a memorandum of his findings and rulings as follows: "The members of the board of health are public agents invested with great public powers. Their term of office is prescribed by the legislature. Each member holds his office for three years from the day following the meeting at which he is elected and until another is chosen and qualified in his stead: Rev. Laws, c. 11, sec. 338. I rule as matter of law that the power to shorten this term even for misconduct, official or otherwise, is not vested in the voters of the town in town meeting assembled, and, having so ruled, order that this petition be dismissed."

The question whether this ruling was correct is the only question presented in terms by the report. Although the general language of the reservation may be broad enough to authorize a dismissal of the petition on the ground that the vote of removal was void, because there was no article in the warrant which gave notice to the voters that such a subject was to be acted upon at the meeting (see *Wood v. Quincy*, 11 Cush. 487; *Matthews v. Westborough*, 131 Mass. 521), we think it better not to dispose of the case on this ground, inasmuch as the term of office of neither of the respondents has yet expired. The three terms for which they were respectively elected will end in March, 1907, March, 1908, and March, 1909. The question expressly reserved has been fully argued, and, if not decided in this case, it may arise in subsequent

proceedings against these respondents for the causes now existing.

⁵³ It is contended by the informant that, at the common law, municipal corporations have an inherent power of removal of their officers for misconduct. This rule has been laid down in cases relating to certain municipal corporations in England: *Rex v. Richardson*, 1 Burr. 517; *Lord Bruce's Case*, Strange, 819; *Regina v. Ipswich Corp.*, 2 Ld. Raym. 1232; *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1, 7. In this country the subject is generally regulated by legislation, although there are cases in which the above rule has been stated as applying to officers of municipal corporations, in the absence of statutory provision touching the subject: *State v. Jersey City*, 1 Dutch. 536, 639; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774; *Ellison v. Raleigh*, 89 N. C. 125; *Mayor of Savannah v. Grayson*, 104 Ga. 105, 30 S. E. 693; *State v. New Orleans*, 107 La. 632, 32 South. 22. In other cases relating to corporations aggregate, not municipal, but having authority for their own government, the rule has been stated in general terms, although the decisions well might have been put on the ground of an original implied authority, given by the statute creating the corporations: See *Fawcett v. Charles*, 13 Wend. 473; *People v. Chicago Board of Trade*, 45 Ill. 112. Whatever the rule may be in reference to municipal corporations in other parts of the country, we are of opinion that, in the cities and towns of Massachusetts, there is no power to remove public officers except that which is given by the statutes. The difference between municipal corporations in England and towns in New England has been recognized in many cases. The former often have many prescriptive rights, as well as special powers expressly or impliedly given in their charters, while the latter have only the powers conferred by statutes. In *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145, Chief Justice Parker, referring to towns, said: "Their corporate powers depend upon legislative charter or grant; or upon prescription, where they may have exercised the powers anciently without any particular act of incorporation. But, in all cases, the powers of towns are defined by the statute of 1785, chapter 75." In *Hooper v. Emery*, 14 Me. 375, the court said: "'The inhabitants of every town in this state are declared to be a body politic and corporate' by the statute; but these corporations derive none of their powers from, nor

are any duties imposed upon them by, the common law." In the opinion ⁵⁴ by Mr. Justice Gray in *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 Sup. Ct. Rep. 865, 30 L. ed. 923, we find these words: "Towns in Connecticut, and in the other New England states, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the state is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government; they have those powers only which have been expressly conferred upon them by the statute, or which are necessary for conducting municipal affairs; and all the inhabitants of a town are members of the quasi corporation." Similar language was used by the same judge in *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 322, and in *Agawam v. Hampden*, 130 Mass. 528, when chief justice of this court. See statements to the same effect in *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302, and in *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361, 27 L. ed. 669. Chief Justice Bigelow in *Walcott v. Swampscott*, 1 Allen, 101, referring to public officers chosen by towns under the requirements of a statute, said: "Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; they are not amenable to towns for the manner in which they discharge the trust reposed in them by law." In the opinion in *Waldron v. Haverhill*, 143 Mass. 582, Mr. Justice Charles Allen says of surveyors of highways chosen by the town, "they are independent of the town, and cannot be directed, or controlled, or removed from office by the town."

Our statutes contain provisions for the removal of certain public officers. In cities members of the board of health may be removed by the mayor for cause: Rev. Laws, c. 75, sec. 9. Assessors of a town, if they fail to perform their duties, may be removed, virtually, by an appointment by the county commissioners of three persons to act as assessors, who supersede those regularly elected: Rev. Laws, c. 11, sec. 358. This is so, even where the selectmen are acting as assessors under the statute which requires them so to act if no other assessors are elected. Registrars of voters may be removed under the Revised Laws, chapter 11, sections 28, 29. The appointment of police officers may be revoked by the selectmen of the town in which they are appointed: Rev. Laws, c. 25, sec. 94; c. 108,

sec. 15. Election officers may be removed by the selectmen⁵⁵ of the town: Rev. Laws, c. 11, sec. 173. So may engineers of the fire department: Rev. Laws, c. 32, sec. 38. Licensing boards may be removed, although there is a right of review of the original proceedings by the superior court: Rev. Laws, c. 100, sec. 4. Provision is made for occasions when a treasurer or a collector of taxes is unable to perform his duties: Rev. Laws, c. 11, sec. 359. Against their misfeasance the town is protected by their bonds. Sheriffs, registers of probate, district attorneys and clerks of the several courts may be removed by the supreme judicial court: Rev. Laws, c. 156, sec. 4. Members of either branch of the legislature may be expelled for cause by a vote of such branch.

It is significant that none of the provisions for removal of an officer of a town gives authority to the town, or to the voters in their corporate capacity, to deprive him of his office. There are good reasons why such authority should not be vested in the inhabitants as a body. It is plain that public officers generally should not be subject to removal except for a good cause. If misconduct is alleged as a cause, there should be a trial to determine whether the accused is guilty. The inhabitants of a town assembled in a town meeting cannot properly conduct such a trial. If they attempt to do it by a committee, there is great risk that the members of the committee will not be well fitted for the performance of judicial duties. Moreover, there is no provision of law whereby such a committee can compel the attendance of witnesses and the giving of testimony. The committees appointed in this case were able to obtain only such testimony as was voluntarily given. It is not strange that, in providing for the removal of certain town officers, the legislature has always prescribed methods other than by a vote of the inhabitants of the town.

It has been held in a great many cases that public officers, even when elected by the voters of a town to perform statutory duties which involve the expenditure of money properly raised by local taxation, are not the agents of the town. They represent the public, and are subject to control by the legislature, or by such agencies as the legislature provides for the purpose. Their term of office is prescribed by the legislature, and they can be removed only in accordance with the legislative will.

Ample provision is made for the filling of vacancies in town⁵⁶ offices: Rev. Laws, c. 11, secs. 355-361. If a person

removes from a town, he thereby vacates any town office held by him: Rev. Laws, c. 11, sec. 362.

Thus it is seen that the election of public officers, their removal from office, and the filling of vacancies have been the subjects of elaborate legislation. There is no provision for the removal of members of the board of health in towns. In the absence of any such provision we are of opinion that they cannot be removed by a vote of the town, either with or without a hearing before the town or a committee thereof.

Information dismissed.

When No Tenure of Office is fixed by law, and no provision is made for the removal of the incumbent, the power of removal is a necessary incident to the power of appointment: Parish v. St. Paul, 84 Minn. 426, 87 Am. St. Rep. 374. See, too, Patton v. Board of Health, 127 Cal. 388, 78 Am. St. Rep. 66.

OLD CORNER BOOK STORE v. UPHAM.

[194 Mass. 101, 80 N. E. 228.]

BUSINESS, Effect of the Sale of the Goodwill of.—When a man voluntarily sells the goodwill of a business, he thereby precludes himself from setting up a competing business which will derogate from the goodwill so sold. (p. 535.)

BUSINESS, Goodwill of, Effect of Competing Business upon—Question of Fact.—In each case where the goodwill of a business is sold and the vendor sets up a competing business, it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does not derogate from the grant made by the sale. (p. 537.)

BUSINESS, Goodwill of, When Derogated from by a New Business Established by the Vendor.—If one connected with a business for many years, first as clerk and then as partner, has special charge of a department connected with the sale of books of a particular religious denomination, sells his interest in the business and in the goodwill thereof, and subsequently starts a new business primarily to sell the books of the same denomination, and solicits aid and patronage of persons prominent in that denomination, there can be no doubt that the effect of the new business will be to derogate from the goodwill so sold. (p. 536.)

APPEAL AND ERROR—Conclusiveness of the Decree of a Single Justice.—The decree of a single justice who has heard the witnesses is not to be set aside unless plainly wrong, but this rule is limited to those cases in which the decision is dependent on the credibility of witnesses, and does not apply when the uncontradicted evidence shows that the decree is wrong. (p. 537.)

BUSINESS, Goodwill of, Persons Selling will not be Permitted to Derogate from, Through a Corporation.—If a person selling his interest in the goodwill of a business forms a corporation for the purpose of setting up and conducting a rival business in derogation of

such goodwill, he will be enjoined from working for or holding stock in such corporation or in otherwise being connected with it, and it will be enjoined from employing him directly or indirectly in its business, or in recognizing him as a stockholder or otherwise connected therewith, except to let him sell his share of the stock or receive what is due him in respect thereof when the corporate business wound up. (pp. 537, 538.)

A. H. Russell, for the plaintiff.

G. R. Nutter, for the defendants.

¹⁰² LORING, J. This is an appeal from a final decree of the superior court dismissing the plaintiff's bill. It comes before us on all the evidence, without special findings of fact.

It appears from the evidence that the defendant Upham was employed as a clerk in the Old Corner Book Store from 1866 to 1872. In 1872 he became a partner and thereafter carried on the book trade at that store (as a partner or alone) until October 30, 1902, when he sold his interest therein to his then partner, George A. Moore. Moore paid Upham for his interest (it was a two-thirds interest) in the partnership thirty-five thousand dollars, and by the terms of the assignment Upham sold and assigned to Moore (among other things) all his interest in the stock in trade of the partnership, "and all other assets of said firm and of the business heretofore conducted by said Moore and myself under the name of Damrell and Upham, and including all my interest in the goodwill of said business." In the following month, that is to say, in November, 1902, Moore organized the plaintiff corporation and sold and assigned to it all his stock in trade "and all other assets, pertaining to the business now carried on by me, and recently carried on by one Upham and myself, under the name and style of Damrell and Upham, including the goodwill of said business."

The defendant Upham then went abroad. On his return he was for a time engaged as the assistant treasurer of a milk company, and later in real estate and insurance business. In the summer of 1905 he conceived the idea of establishing a book store in Boston, primarily for the sale of books used in the Episcopal church, and secondarily for the general trade of a book store.

It appears in the evidence that from the time that Upham became an employé of the Old Corner Book Store until he sold his interest to Moore in October, 1902, a period of some thirty-six years, a part of the business carried on there was

the selling of books used in or in connection with the Episcopal church. It further appears that Upham was employed in that department when he first came to the store; that from the ¹⁰³ time when he became a partner until he sold his interest to Moore in 1902 that department of the business was under his special direction and control, with this qualification: During the last three years he had to devote himself to the financial affairs of the partnership, and therefore left the church department more to one Wentworth, who, at the time the defendant corporation was organized, had been employed in that department of the Old Corner Book Store and its successor, the plaintiff corporation, for ten years, with a short interruption.

The defendant Upham testified that while he was connected with the Old Corner Book Store that store was "the most prominent church depository" in Boston. And by this we understand him to mean that it was the most prominent store in Boston for the sale of church books, or at any rate for the sale of Episcopal church books. He further testified that the business of the new corporation was intended to be and was a business which was to compete with that of the plaintiff corporation.

The plaintiff corporation has continued the business sold to its assignor by the defendant Upham, including the church department just described, and, as we have said, Wentworth, who, in December, 1905, entered the defendants' employ, then was conducting that department for the plaintiff.

The defendant Upham, on his own testimony, was and is very active in the Episcopal church. He has been the treasurer of the Episcopalian Club since its organization about 1888. This club consists of some two hundred or more Episcopilians. It also appeared in evidence that he was treasurer of the Margaret Coffin Prayer Book Society, which seems to be a society for the sale or distribution of Episcopal prayer books.

After conceiving the idea of setting up a rival book store, the defendant Upham's next move was to solicit, personally and through some one employed by him for the purpose, men prominent in the Episcopal church to subscribe to shares in a corporation to be organized to carry on the business which he proposed to set up. Some of these men were admitted by him to have been customers of the Old Corner Book Store, and all of them were men in the Episcopal church. He succeeded in getting thirty persons to subscribe to stock.

¹⁰⁴ The result of this solicitation on the part of the defendant Upham was the organization of the defendant corporation on November 29, 1905. The name of the corporation was that of the defendant Upham, to wit, "H. M. Upham Company." The business of the corporation is stated in the agreement of association to be "To conduct a depository for the Episcopal church and to carry on a general book business and any other matters connected therewith." The corporation opened a store at No. 15 A, Beacon street, on December 7, 1905. On December 23, 1905, this bill was filed. The suit went to a hearing on January 10 and 11, 1906, and the final decree dismissing the bill was entered on January 15, 1906.

It appeared that the plaintiff corporation had moved its store from the corner of Washington and School streets to Bromfield street, and that it was situated there in November and December, 1905. It further appeared that this was five minutes' walk from the defendant corporation's store at 15 A, Beacon street.

On the day before the opening of the store of the defendant corporation the defendant Upham sent some twelve hundred cards to persons in the residential part of Boston; he also sent cards to all the clergy of the diocese of Massachusetts.

So far as appeared, the only persons employed in the store of the defendant corporation were the defendant Upham and Wentworth, who already has been spoken of as having been employed under Upham in the church department of the Old Corner Book Store. In November, 1905, Wentworth was an employé of the plaintiff, in charge of its church department, and he left that employment to enter into that of the defendant corporation.

We have not found it necessary to go into some further details attending the organization and make-up of the defendant corporation, nor into the circumstances under which Wentworth left the service of the plaintiff to take service with the defendant. The facts which have been stated were not in dispute, and those facts, in our opinion, are decisive of the merits of the suit now before us.

It is settled in this commonwealth that when a man voluntarily sells the goodwill of his business, he thereby precludes himself from setting up a competing business which will derogate from the goodwill which he has sold: *Angier v. Webber*, ¹⁰⁵ 14 Allen, 211, 92 Am. Dec. 748; *Dwight v. Hamilton*, 113 Mass. 175; *Munsey v. Butterfield*, 133 Mass. 492; *Webster*

v. Webster, 180 Mass. 310, 62 N. E. 383; Hutchinson v. Nay, 187 Mass. 262, 105 Am. St. Rep. 390, 72 N. E. 974, 68 L. R. A. 186.

In each case where the goodwill of a business is sold and the vendor sets up a competing business it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does or does not derogate from the grant made by that sale. In *Bassett v. Percival*, 5 Allen, 345, and in *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713, it was held that the new business did not derogate from the grant, while the contrary conclusion was come to in the cases before the court in *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748; *Dwight v. Hamilton*, 113 Mass. 175; *Munsey v. Butterfield*, 133 Mass. 492.

In the case at bar but one conclusion can, in our opinion, be reached on that question of fact.

The goodwill sold included the goodwill of a department carried on for at least thirty-six years, and for the last thirty years under the immediate personal direction and control of the defendant Upham; and that department was a department for the sale of books used in and in connection with the Episcopal church, and was the most prominent department or store for the sale of such books in Boston during that period. This business, it should be remarked, had a limited class of customers, for the customers are of necessity limited to those belonging to or interested in the Episcopal church. The defendant under whose direction this department in the old business was conducted was and is prominent in and among Episcopalians. It was under these circumstances that this defendant sold the goodwill of the business which included that department.

There could be no question as to the effect which the new business started by the defendant Upham was going to have upon the goodwill of the business which the defendant Upham sold, and which had come to the plaintiff. We speak of the effect which the new business was going to have because the hearing took place only a month and three days after the new store was opened.

The new business is primarily to sell church books to Episcopal church people. It was started at the solicitation of the defendant Upham, who is prominent in Episcopal church circles. ¹⁰⁶ Its stockholders are all of them men of the Episco-

pal church, and its store is within five minutes' walk of the plaintiff's store.

The defendants have invoked the rule that the decree of a single justice who heard the witnesses is not to be set aside unless plainly wrong, citing *James v. Lewis*, 189 Mass. 134, 75 N. E. 217; *Dickinson v. Todd*, 172 Mass. 183, 51 N. E. 976; *Evans v. Strachan-Hanscom*, 171 Mass. 64, 50 N. E. 512. That is true. The reason of the rule is that the single justice who sees the witnesses has a better opportunity to decide on their credibility, and the rule is limited accordingly. For that reason the rule does not apply when all the evidence before the single justice is documentary: *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886. This rule does not confine the parties in this court to a consideration of points raised in the court below. The whole case is before this court, in case of an appeal on all the evidence, to be disposed of on that evidence as it should have been disposed of by the judge who heard it in the first instance, except so far as the fact that he has made a finding after seeing the witnesses affects the situation. It is competent for the parties to put forward in this court contentions justified by the evidence which were not raised below. And it is competent for this court in the exercise of its discretion to order all the necessary amendments to be made in the pleadings to meet the case made out on the evidence.

There is nothing, therefore, in the defendants' contention that the question which we have discussed here is not open in this case.

We are of opinion that, on the uncontradicted facts in the case at bar, if the business set up by the defendant corporation had been set up by Upham personally, it would have been in derogation of his grant, and that the plaintiff is entitled to an injunction perpetually restraining the defendant Upham from working for or holding stock in or otherwise being connected, directly or indirectly, with the defendant corporation; and to have an accounting as against the defendant Upham for the damages which it has suffered from his breach of contract. The plaintiff is also entitled to have the defendant corporation perpetually enjoined from employing, directly or indirectly, the defendant Upham in its business, or recognizing him as a stockholder therein or otherwise connected therewith except to allow him to sell his share ¹⁰⁷ of

stock or to receive what is due in respect thereof on the corporation being wound up.

The further rights of the plaintiff against the defendant corporation remain for consideration. Its counsel has taken this position in his brief: "The corporation, H. M. Upham Company, was a bona fide corporation, and not merely H. M. Upham in another form. It was composed of many stockholders besides Upham. It had a right to its name—at least so far as the present plaintiff is concerned. It had no contractual relationship of any kind with the plaintiff, and had not in fact received any transfer of any goodwill of Damrell and Upham. It is difficult to see on what theory it did not have the right to engage in the retail book business and to solicit the customers of the old firm."

We agree that as matter of fact the defendant corporation is not Upham in another form.

We also agree that the day after Upham sold his goodwill to Moore, the persons (other than Upham) who now constitute the defendant corporation could have organized that corporation and opened a store for the sale of Episcopal church books, and, if they had pleased, could have opened that store in the building next to the Old Corner Book Store.

But the difficulty here is that the defendant corporation is not an independent body, and that it is the creation of the defendant Upham, brought into being by him in violation of the implied contract entered into by him with Moore in selling his goodwill to him. The very name which it bears to-day and which it will bear hereafter is and must remain a mark in the trade of that fact.

What remedy the plaintiff is entitled to against the defendant corporation under the findings of fact which we have made has not been argued by counsel. It is possible that it never will arise. As the case must go back for an accounting in any event, we do not think it necessary to come to a decision on that point now.

Decree accordingly.

The Sale of a Business and the Goodwill thereof does not of itself, in some jurisdictions, preclude the seller from setting up a rival establishment in the same vicinity: *Bergamini v. Bastia*, 35 La. Ann. 60, 48 Am. Rep. 216, and note. But see *Hutchinson v. Nay*, 187 Mass. 262, 105 Am. St. Rep. 390; note to *Slater v. Slater*, 96 Am. St. Rep. 610.

SMITH v. VOSE & SONS PIANO COMPANY.

[194 Mass. 193, 80 N. E. 527.]

CONTRACTS IN WRITING—Presumption.—Unless fraud or mistake is shown, a contract in writing is conclusively presumed to contain the entire agreement in which all previous negotiations respecting the subject matter have been merged. (p. 540.)

CONTRACTS, Written, Oral Evidence to Ascertain the Meaning of.—If any special term of a written contract when applied to the transaction concerning which the parties dealt is ambiguous, oral evidence is relevant and admissible, not to construe a new agreement, but to ascertain what the parties understood by the one they have made. (p. 540.)

CONTRACT to Procure Water—Extrinsic Evidence to Show that Fresh Water was Meant.—Under a contract to procure water by the drilling of a well, extrinsic evidence of all prior negotiations of the parties is admissible to show that a supply for drinking water and other uses in a manufactory was what was desired, and that salt water was not within the contemplation of the parties to the contract, and that it is not complied with by procuring such water. (p. 542.)

Action upon contract for drilling an artesian well. Plaintiff submitted to defendant a proposal to drill for its factory in Boston, at a place to be designated by its superintendent, a well which should furnish twenty-five gallons of water per minute, and the defendant accepted the proposal. The drilling was carried on in the manner provided in the contract until the specified amount of water was obtained, but it proved to be extremely salty and wholly unsuitable for defendant's use. It offered to prove other conversations between its agents and the plaintiff before the execution of the contract, in which the agent was told that salt water was not available, and that the water procured must be fit for drinking by the defendant's workmen, and also fit for other specified purposes, and that the agent undertook to furnish water satisfactory for such purposes. This evidence was rejected, and the defendant excepted. Various other offers were made and rejected, all of the same purport. All were excluded on the ground that the word "water" must stand as it was in the contract, unless subsequently altered by some agreement. Verdict and judgment for the plaintiff, and the defendant alleged exceptions.

A. L. Stinson, for the plaintiffs.

T. Parker, for the defendant.

¹⁹⁹ BRALEY, J. Upon omitting other provisions relating to the price and depth that might be necessary to obtain the stated amount of supply, but not material to the principal question involved, the plaintiffs undertook by their contract "to procure water in the earth above the bedrock" on the defendant's premises by driving in the boiler-room of the factory a pipe two and one-half inches in diameter, but if a sufficient amount was not obtained, then to "drill a well not less than six inches in diameter in the bedrock . . . until twenty-five gallons of water per minute is obtained." They finally procured this volume, but the water was very salt, and generally unsuitable for use in the defendant's business, and, it being common knowledge that water in its natural state either may be fresh or salt in quality, the defendant contends that as the contract failed to designate the ordinary sense in which the parties must have used the term, oral evidence was admissible to explain and remove the uncertainty. Unless fraud or mistake are shown, where the parties have put their contract in writing, there is a conclusive legal presumption that it contains the entire agreement in which all previous verbal negotiations concerning the subject matter have been merged: *Violette v. Rice*, 173 Mass. 82, 53 N. E. 144; *DeFriest v. Bradley*, 192 Mass. 346, 78 N. E. 467. But if any of the essential terms of the contract when applied to the transaction concerning which the parties dealt becomes ambiguous, oral evidence is relevant and admissible, not to construct a new agreement, but to ascertain what they understood by the one already made: *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 96, 1 Am. Rep. 92; *Hebb v. Welsh*, 185 Mass. 335, 70 N. E. 440; *Buffington v. McNally*, 192 Mass. 198, 78 N. E. 309. These familiar principles are undisputed, but the difficulty arises in their application, especially where the agreements are drawn by the parties or their business agents, who fail to use clear and exact language to express their mutual understanding. It was the plaintiffs' interpretation that they had fully performed their undertaking if the amount of water was procured, even if it was wholly unsuitable either because of saltiness or impurity. The ²⁰⁰ defendant then offered evidence, that during the preliminary negotiations the agent of the plaintiffs was informed and knew that its object in driving the well was to procure a supply of water for drinking and other uses in its manufactory, for either of which salt water could not be used, and would be unserviceable. This offer

also included conversations between their respective agents in which the location of the factory, and the accessibility to salt water, which, if desired, could be obtained at a small expense, was spoken of, as well as a statement by the plaintiffs' agent that they would furnish water of a quality equally good, when compared with water obtained for another customer, the quality of which was known to the defendant's agent, who thereupon said that if this were done the defendant would be satisfied. The testimony was excluded, upon the ground that conversations previous to the making of the contract must be held to have been merged, and oral evidence in explanation of the use and meaning of the word "water," therefore, was inadmissible. But, while this rule is undoubtedly correct, and should be inflexibly applied where no ambiguity or uncertainty appears, when the parties, by the language they have employed, leave their meaning obscure and uncertain when applied to the subject matter, then the expressions and general tenor of speech used in the previous negotiations, even if coming as they usually must from one or the other of the parties themselves, are admissible to show the conditions existing at the time the transaction was under consideration: See for illustrations, *Bradford v. Manley*, 13 Mass. 139, 7 Am. Dec. 122; *Hogins v. Plympton*, 11 Pick. 97; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 96, 1 Am. Rep. 85; *Miller v. Stevens*, 100 Mass. 518, 97 Am. Dec. 123, 1 Am. Rep. 139; *Pike v. Fay*, 101 Mass. 134; *Sweet v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209; *New England Dressed Meat & Wool Co. v. Standard Worsted Co.*, 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112; *Boak Fish Co. v. Manchester Assur. Co.*, 84 Minn. 419, 87 N. W. 932. Their definition when thus ascertained furnishes the best interpretation of their contract, the construction of which still remains, as a question of law, for the court: *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 96, 1 Am. Rep. 85; *Bassett v. Rogers*, 162 Mass. 47, 37 N. E. 772; *Lynn Safe Deposit & Trust Co. v. Andrews*, 180 Mass. 527, 62 N. E. 1061; *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 72 N. E. 345; *Buffington v. McNally*, 192 Mass. 198, 78 N. E. 309; *American Malting Co. v. Souther Brewing Co.*, 194 Mass. 89, 80 N. E. 526; *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46; *Smith v. Faulkner*, 12 Gray, 251.

The evidence, therefore, was excluded wrongly, and as there must be a new trial at which the other questions raised by the exceptions may become immaterial, or be presented in another form, we do not consider them.

Exceptions sustained.

When a Contract is Reduced to Writing, prior negotiations are merged therein and parol evidence is ordinarily not admissible to modify or vary its terms: *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811; *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580; *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146. But when a written contract is obscure or ambiguous, so that the intention of the parties cannot be understood, extrinsic evidence may be received to enable the court to make a proper interpretation of the agreement: *L'Engle v. Scottish Union etc. Co.*, 48 Fla. 82, 111 Am. St. Rep. 70; *Traders' Ins. Co. v. Edwards Post G. A. R.*, 86 Miss. 135, 109 Am. St. Rep. 699; note to *Harris v. Murphy*, 56 Am. St. Rep. 659.

ABERTHAW CONSTRUCTION COMPANY v. CAMERON.

[194 Mass. 208, 80 N. E. 478.]

CORPORATIONS, Liability of, for Conspiracy.—A corporate body is liable for conspiracy under the same circumstances as a natural person. (p. 546.)

CONSPIRACY.—To a conspiracy it is necessary that there be a mutual intent whereby all the conspirators work together for a common end. (pp. 546, 547.)

CONSPIRATORS, Who are not.—The fact that a corporation, being informed that a person working upon a building being constructed for it is obnoxious to certain trades unions, and that, if not discharged by his employer, there will be a general strike, attempts to persuade such employer to avoid further difficulty by discharging such employe, does not make the corporation a co-conspirator with the trades unions in seeking the discharge of such employe. (p. 547.)

CONSPIRACY to Obtain the Discharge of Workman—Finding of, When Sustained.—A finding that the defendants conspired together to compel the plaintiff to employ only union carpenters, and that, in pursuance of such conspiracy, they caused a breach of an existing contract of employment between the plaintiff and one of the defendants without any just cause or legal provocation, is warranted by evidence tending to show that the plaintiff was in the employ of a person who had a contract with one of the defendants to do certain concrete work in a building under process of erection for it, and that defendants, for the purpose of compelling the employment only of persons belonging to such trades unions, united in securing the abandonment of such defendant. (p. 547.)

INJUNCTION Extending Beyond the Case Made by the Complaint.—In a Suit to Restrain Defendants from Carrying Out a Conspiracy to Compel the Discharge of nonunion workmen through the violation of a contract, the court cannot grant an injunction to prevent interference in the future, if the plaintiff, in the performance of

other contracts, chooses to employ nonunion workmen. There is no presumption that the defendants will engage in similar wrongful acts in the future, and if they do so, this must be pleaded and proved before it can be the ground for relief. (p. 548.)

Suit in equity, the bill in which was filed February 23, and amended on February 28 and March 3, 1906. The plaintiff was a Maine corporation, having a place of business in Boston. The defendants were the business agent, the president, the vice-president, the secretary, and the treasurer of the Carpenters' District Council of Boston and vicinity. The persons thus named as officials were also made defendants personally, and other persons were made defendants as officers of the Building Trades Council. A corporation known as the Christian Science Board of Directors and two other members were also defendants. The object of the suit was to enjoin the defendants, other than the Christian Science Board of Directors, from inducing that defendant to break its contract with the plaintiff, under which it had been employed to construct and complete, by March 12, 1906, a concrete floor in the First Church of Christ, Scientist, on Falmouth street, Boston, and also to enjoin the defendant corporation from breaking its contract, and all the defendants from interfering by threats, intimidation, or coercion with any of the persons employed by the plaintiff, and from combining and conspiring to compel plaintiff to employ only members of any labor union.

The master to whom the case was referred reported in favor of the plaintiff. Afterward the case was heard on the master's report, and the defendant's exceptions, and all such exceptions were overruled, except one, and the case was reported for full determination by the supreme court, as follows:

"This case came on for hearing upon the filing of the master's report and the exceptions of the defendants thereto. I overruled all the exceptions except the second exception of the defendant Christian Science Board of Directors.

"The plaintiff contended that the defendant Christian Science Board of Directors became a co-conspirator with the other defendants from the time when they first sought to induce the plaintiff to discharge the workman Stark. Against the plaintiff's objection, I ruled that the Christian Science Board of Directors became co-conspirators only on its overt act in breaking its contract with the plaintiff on Wednesday,

February 21, 1906, and therefore sustained the second exception so far as the same applies to the item of fifteen dollars and twelve cents, cost of reinstating work destroyed, and three dollars and thirteen cents, cost of advertising in the public press, said items of damage having accrued before said breach of contract. Thus modified I ordered the master's report to be confirmed.

"The plaintiff asked for a permanent injunction in the following form:

" 'That the following respondents named in said bill, to wit, the Carpenters' District Council of Boston and vicinity, and each and every member thereof, C. W. Cameron, W. D. McIntosh, S. F. McArthur, H. M. Taylor, J. E. Potts, J. F. Medland, John McLeod, and Patrick Slew, individually and as officers and agents of said Carpenters' District Council, and the Christian Science Board of Directors, and the servants, agents, confederates and attorneys of each of the foregoing persons, associations and corporations, and all others who may act in concert with them or by their direction, be, and they hereby are, perpetually restrained and enjoined from combining and conspiring to compel said complainant in the prosecution of its business to employ members of said Carpenters' District Council or of any other labor organization so called, and to refrain from employing any person or persons who may be nonunion men so called; and said respondents, their servants, agents, confederates, and attorneys are further enjoined and restrained, for the purpose of compelling the complainant to employ exclusively in the transaction of its work and business members of said Carpenters' District Council or of any other labor union, from breaking or combining or conspiring to break, or causing to be broken, any contract or contracts which the complainant may now or hereafter have, either with any of the defendants herein or with any other person or corporation whatsoever; and for said purpose from directly or indirectly calling or combining or conspiring to call or cause a strike of workmen or a cessation of work by workmen now employed or hereafter to be employed by the complainant in the transaction of its business, and for such purpose from interfering by threats, intimidation, or coercion, or any other obstructive action, with any of the persons now employed or whom said complainant may hereafter seek to employ in the transaction of its business, and for said purpose from combining and conspiring to interfere with the said complainant

in the practice and prosecution of its occupation and business, and to prevent and obstruct it from obtaining further contracts therefor and employment therein, or from securing the services of workmen to carry out such contracts.'

"The defendants other than the Christian Science Board of Directors objected to any injunction which should apply to any part of the plaintiff's business except the particular work being done by the plaintiff under contract with the defendant Christian Science Board of Directors, which work was completed on March 12, 1906. Against the plaintiff's objection, I ruled that the injunction should apply only to said work, and not to other work.

"No question is made that the bill as to the defendants William B. Johnson, Charles Brigham, Charles C. Coveney, John Doe and Richard Roe, and the Building Trades Council should be dismissed without costs.

"All questions of pleading are waived.

"At the request of the plaintiff I report the case to the full court, such decrees to be entered as, on the master's report, law and justice require."

G. W. Anderson and E. H. Ruby, for the plaintiff.

F. W. Mansfield, for the defendants, other than the Christian Science Board of Directors.

²¹² **BRALEY, J.** The plaintiff's bill prays for injunctive relief, and the assessment of damages against the defendants, who are alleged to have formed a conspiracy to compel it under penalty of a general strike of its employés to hire only union workmen in the erection of a large building then in process of construction under its contract with the Christian Science Board of Directors, one of the defendants. Upon the principal question, the master to whom the case was referred found in favor of the plaintiff, and his report was confirmed, except as to the time when this ²¹³ defendant became a party to the conspiracy. By the modification of the single justice it was held that it did not unlawfully participate until February 21, 1906, when the board voted to request the plaintiff to cease work as they had decided to finish the building in another way. The master not only finds that this action was taken and communicated to the plaintiff, who refused compliance, but that on February 15, 1906, after having been informed by the defendant Cameron that a general strike was proposed if the

plaintiff continued to employ one Stark, who did not belong to either of the unions, the members of the board had an interview with the plaintiff. In this interview they requested the plaintiff either to discharge Stark, or procure employment for him elsewhere, or permit them to do so, and this action is found to have been taken to avoid a general strike which they believed probable if he was permitted to remain. By the pleadings and in the report this defendant is described as a corporation known as the Christian Science Board of Directors, and there is no statement or finding that this body was representative rather than original, or that the authority of the board if treated as the corporation itself was limited by any by-law or vote. The conspiracy charged and proved was a combination to coerce the plaintiff to accede to the demands of Cameron and the organizations named as defendants, in which this defendant joined. Being a body corporate gave it no immunity from the consequences, for which it could be held liable as if it had been a natural person: *White v. Apsley Rubber Co.*, 194 Mass. 97, 80 N. E. 500, 8 L. R. A., N. S., 484, and cases cited; *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 825. But while in a conspiracy at common law an overt act need neither be alleged nor proved, as the offense consists in the unlawful combination, there must be a mutual understanding whereby all the conspirators work together for a common end: *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Commonwealth v. Eastman*, 1 Cush. 189, 48 Am. Dec. 196; *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497. The plans of the other defendants were well on foot when this defendant, who had been informed of their object, intervened, and sought by its representations to persuade the plaintiff to avoid all future difficulty, by discharging an employé who had not become obnoxious to the corporation, except by reason of its pecuniary interest that there should be no ²¹⁴ unreasonable delay in the completion of its church. The master did not report the evidence, and the usual rule applies. But beyond this special finding, he made no further finding as to the conduct of the members of the board before the vote was taken. It is plain that the interview with the accompanying proposals was advisory only, and not intended to re-enforce or aid in the coercive measures adopted by the unions and their representatives, or to form a part of the measures of active interference which the other defendants were taking to enforce their demand.

The ruling that the proposals made at this conference did not make them co-conspirators by participation, therefore, must be sustained.

In the general scheme of the conspiracy the breaking of the contract* which subsequently followed was an important element, and, when taken in connection with the action of the other bodies of which the board had knowledge, the concluding finding that the defendants against whom this bill is prosecuted "conspired together to compel the plaintiff to employ only union carpenters," and "that in pursuance of such conspiracy they caused a breach of the existing contract of employment between the plaintiff and the defendant board, without any just cause or lawful provocation," was well warranted: *Walker v. Cronin*, 107 Mass. 555; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] App. Cas. 239, 250, 253.

The remaining question relates to the form and scope of the decree. An interlocutory injunction having issued under the first prayer of the bill, the plaintiff fully performed its contract,²¹⁵ completing the work more than two months before the case appears to have been ripe for the entry of a final decree. The plaintiff is not content with a decree in which relief is confined to the unlawful acts of the defendants in connection with the contract described in its bill, but asks for a permanent injunction restraining the unions and their officers from any interference in the future if the plaintiff in the performance of other contracts chooses to employ non-union workmen. To this proposition, the answer is plain. By the terms of the report under which the case is before us, while it is stated that all questions of pleading are waived, it is also stated that such decrees are to be entered on the

*The vote of the defendant corporation was communicated to the plaintiff in a letter from the architect of the corporation, found by the master to have been its agent for the purpose. This letter contained the following sentence: "I am instructed by the Directors of the First Church of Christ, Scientist, to inform you that it is their wish that you retire immediately from the work at the First Church of Christ, Scientist. It has been decided by them to do the remainder of the work included in your contract in a different manner, commencing at 1 o'clock to-day."

About 12 o'clock on the same day the agent of the defendant corporation ordered the plaintiff to leave the job, and, upon its refusal to do so, this agent called the watchman employed by the directors to police the building, who forcibly, but without actual physical violence, ejected the foreman of the plaintiff from the job and escorted him to the street, and the men employed by the plaintiff followed.

master's report as law and justice require. The master's report rests upon the frame of the bill with which it must be considered, not only for the purpose of the modification, but as to the extent of the relief to which the plaintiff is entitled. This issue was not presented by the pleadings, and consequently it neither has been heard and determined by the master nor by the single justice. If the pleadings are disregarded, it would be equally extraordinary to enter such a decree upon the report of a master to whom this question was not referred, and upon which he has not passed. The conspiracy in which the defendants are found to have participated was an unjustifiable wrong causing temporary damage: *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 69 N. E. 1085, 64 L. R. A. 260. But while the unlawful conduct has been proved in the present case, this fact raises no presumption that in the future defendants will engage in similar wrongful acts: *Hatch v. Bayley*, 12 Cush. 27; *Phelps v. Cutler*, 4 Gray, 137; *Stewart v. Thomas*, 15 Gray, 171; *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Kline v. Baker*, 106 Mass. 61. And if such a combination exists, it must be pleaded and proved before appropriate relief can be granted: See *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *Reynolds v. Everett*, 144 N. Y. 189, 39 N. E. 72. The plaintiff is entitled to a decree with costs confirming the master's report as modified, awarding execution for the damages assessed, less the diminution thus caused, and the injunction heretofore issued may be made perpetual if it desires.

Ordered accordingly.

Private Corporations are Liable for Their Torts committed under such circumstances as would attach liability to private persons. That the conduct complained of necessarily involved malice, or was beyond the scope of corporate authority, constitutes no defense: *Sawyer v. Norfolk*, 142 N. C. 1, 115 Am. St. Rep. 716; *Southern Ry. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203. For cases where corporations have been held liable for conspiracy, see *West Virginia Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845; *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290.

Injunctions Against the Conspiracies and other unlawful practices of trades unions have been frequently issued in recent years: See *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145; *Purvis v. United Brotherhood*, 214 Pa. 348, 112 Am. St. Rep. 757; *Franklin Union v. People*, 220 Ill. 355, 110 Am. St. Rep. 248; note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488.

HAYES v. WILKINS.

[194 Mass. 223, 80 N. E. 449.]

MASTER AND SERVANT, Act of the Latter, When Imputed to the Former.—If the driver of a team, while engaged in the business of the master, leaves the team unhitched and unattended in a public street, to go into a poolroom on an errand of his own, to obtain some tobacco for himself, and the team runs away and injures a person in the exercise of due care, the negligence of the driver in leaving the team is the omission to continue in its proper custody when he had such custody for the master, and the latter is liable. (p. 550.)

Tort for personal injuries in being knocked down by a runaway horse, the property of the defendant. The defendant was a truckman, having four or five teams, One of these was in the custody of and driven by a man named Current, who, after finishing his work for the day, started for the stable, but stopped at a poolroom to obtain tobacco for his own use, and the horse ran away, inflicting the injury complained of. The trial judge ruled that the cause of the injury was the driver's leaving the team unattended and going into the poolroom on an errand of his own; that in so doing, he was not acting in the course of his employment, and hence that his master, the defendant, was not liable. A verdict was therefore ordered for the defendant, and the case reported for the determination of the supreme court.

W. A. Buie and J. R. Murphy, for the plaintiff.

W. H. Hitchcock and W. I. Badger, for the defendant.

226 KNOWLTON, C. J. The plaintiff was struck and injured by a horse and wagon belonging to the defendant. The horse was running away, and there was evidence from which the jury might have found that the defendant's driver was negligent in leaving the horse unhitched and unattended, knowing that it was unsafe so to leave him. It was undisputed that the plaintiff was in the exercise of due care, and the principal question is whether there was evidence that the driver was acting within the scope of his employment when he left the horse.

He was on the way to the defendant's stable, after having completed the regular work for the day by delivering some merchandise at a freight-house. While the route that he took was not the shortest, it was little longer than the other, and the jury might have found that he chose it because the other

was blocked by teams, and that, therefore, he was within the scope of his employment up to the time when he left the horse. He went into a poolroom to get some tobacco, and this movement, treated as an independent act, was not for the master's benefit, nor within the scope of his employment as a servant. But his custody of the horse up to the time that he left him was in the performance of defendant's business, and any negligence in maintaining that custody was negligence for the consequences ²²⁷ of which the defendant is liable. While he had the horse in custody for his master, and was charged with the duty of continuing this custody as a servant, he negligently omitted to continue it, and, as a consequence, the horse ran away. His purpose in going into the poolroom is immaterial. His negligence occurred while he was directly engaged in his master's business, by the mere omission of that which he should have done in the business. If the attempt were to charge the master for negligence in the performance of the act of going to buy tobacco, the case would be different. If the driver had carelessly injured property in the poolroom, the defendant would not be liable, because his going into the poolroom, considered as a positive act, was not within the scope of his employment. But the omission and failure to continue the proper custody of his horse when he had him in custody for the master was an omission to perform his duty as a servant while he was acting for his master. This omission, quite apart from the purpose which accompanied it, was a direct and proximate cause of the plaintiff's injury.

The case is different from *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038, in which the driver, for his own purposes, had driven the team away from the streets on which he should have driven it, for his master, and had ceased to act within the scope of his employment before the negligent omission that caused the accident.

On this part of the case we are of opinion that there was evidence for the jury. We discover no error in the other rulings at the trial.

Verdict set aside.

For Authorities upon the Question involved in the principal case, see McCarthy v. Timmins, 178 Mass. 378, 86 Am. St. Rep. 490; note to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 81; McGinnis v. Chicago etc. Ry. Co., 200 Mo. 347, 118 Am. St. Rep. 661; Star Brewery Co. v. Hauck, 222 Ill. 348, 113 Am. St. Rep. 420; Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 112 Am. St. Rep. 381.

HAYNES v. BLANCHARD.

[194 Mass. 244, 80 N. E. 504.]

LIMITATIONS OF ACTIONS upon Judgments.—There is no statute of limitations in Massachusetts fixing the time after which an action cannot be sustained upon a judgment. The statute providing that a judgment or decree shall be presumed to be satisfied and paid twenty years after its rendition creates a presumption, and not a limitation, and a judgment may, therefore, be recovered on a judgment rendered more than twenty years prior to the commencement of the action upon it, if the evidence rebuts the presumption of its payment. (p. 552.)

LIMITATION OF ACTIONS upon Judgments.—A statute imposing a limitation of twenty years upon actions upon contracts does not apply to an action on a judgment. (p. 552.)

Action of contract commenced November 21, 1905, by the executor of the will of Laura A. Haynes, on a judgment in her favor and against the defendant, rendered July 9, 1885. The defendant pleaded payment, a general denial, and also the statute of limitations. The evidence at the trial showed the existence of the judgment; that it had never been paid in whole or in part; that the defendant had resided within the state ever since its entry, and that this action was brought more than twenty years thereafter. The defendant asked the judge to rule that the twenty years' statute of limitations applied, and that the action, therefore, could not be maintained, but the judge refused to so rule, allowed the request by the plaintiff, and judgment was given in his favor for the amount sued for. The defendant alleged exceptions.

C. F. Jenney, for the defendant.

H. H. Bosworth, for the plaintiff.

²⁴⁶ KNOWLTON, C. J. This is an action upon a judgment, recovered more than twenty years before the date of the writ, and the only question is whether the action is barred by the statute of limitations.

The provision of the statute touching this question is found in Revised Laws, chapter 202, section 19, and is as follows: "A judgment or decree of a court of record of the United States or of this or any other state of the United States shall be presumed to be paid and satisfied at the expiration of twenty years after it was rendered." This is applicable only to those judgments which have been rendered more than twenty years. It is found in the chapter which contains the general statute

of limitations, and it is a special limitation of judgments in regard to which there is no proof that they remain unpaid. It implies that, when there is such proof, the judgment may be enforced.

This statute was before the court in *Denny v. Eddy*, 22 Pick. 633. The court said in the opinion: "The only statute bar to an action on a judgment of a court of record is that contained in the Revised Statutes, chapter 120, section 24, providing that every judgment 'shall be presumed to be satisfied and paid at the expiration of twenty years after the judgment was rendered.'" The case was considered in reference to a general plea of the statute of limitations, and this section is distinctly held "to be the only statute bar" to such an action. The general provisions of the statute were substantially the same then as now: Rev. Stats., c. 120, secs. 1, 7; Rev. Laws, c. 202, secs. 1, 2. In *Walker v. Robinson*, 136 Mass. 280, this statute was again before us, and it was assumed both by counsel and the court that, on proof of nonpayment, lapse of time was no bar to an action on such a judgment. In *Day v. Crosby*, 173 Mass. 433, 53 N. E. 880, there was the same assumption. We have been referred to no decision that modifies the doctrine of *Denny v. Eddy*, 22 Pick. 533, although there are two or three dicta, relied on by the defendant, which appear to have been uttered without a particular consideration of the question, and without thought of their application to this special provision of the statute: *Von Hemert v. Porter*, 11 Met. 210; *Bannegan v. Murphy*, 13 Met. 251.

²⁴⁷ The defendant relies upon the fourth clause of the Revised Laws, chapter 202, section 1, which includes within the limitation of twenty years "actions upon contracts which are not limited by the provisions of the following section or by any other provision of law." This provision was before the court when *Denny v. Eddy*, 22 Pick. 533, was decided. The answer to the contention is that this judgment is limited by another "provision of law," within the meaning of the statute. Section 19 is a special limitation of all such judgments, unless there is affirmative proof that they have not been paid. Section 18 also declares that, "If a special provision is otherwise made relative to the limitation of any action, the provisions of this chapter which are inconsistent therewith shall not apply." Giving section 19 its true meaning, section 1, if construed as the defendant construes it, would be inconsistent with it.

Moreover, the whole force of the defendant's argument rests upon his contention that an action upon a judgment is an action upon contract, within the meaning of the fourth clause. This clause relates only to actions of contract founded "upon contracts," while section 2 includes "actions of contract founded upon contracts or liabilities, express or implied," except, etc.

There are many cases that treat a liability upon a judgment as contractual in its nature, and some that call a judgment a contract; but there are others in which the word "contract" has been held not to include a judgment. The meaning of the word often depends upon the connection in which it is used: See *Bidleson v. Whytel*, 3 Burr. 1545; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. Rep. 211, 27 L. ed. 936; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. Rep. 554, 28 L. ed. 1038; *Morley v. Lake Shore & Michigan Southern Ry.*, 146 U. S. 162, 13 Sup. Ct. Rep. 54, 36 L. ed. 925; *Jordan v. Robinson*, 15 Me. 167; *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Smith v. Harrison*, 33 Ala. 706; *Rae v. Hulbert*, 17 Ill. 572.

Actions upon the judgments referred to in section 19 are specially excepted from the provisions of Revised Laws, chapter 202, section 2, and we are of opinion that such judgments are not included in the fourth clause of section 1.

Exceptions overruled.

A Judgment is, by some authorities, regarded as a contract within the meaning of the statute of limitations: *Spilde v. Johnson*, 132 Iowa, 484, 119 Am. St. Rep. 578. But by other authorities it is not: *Ilson v. Dahl*, 99 Minn. 433, 116 Am. St. Rep. 435; *Berkson v. Cox*, 73 Miss. 339, 55 Am. St. Rep. 539; *McCaskill v. McKinnon*, 121 N. C. 192, 63 Am. St. Rep. 659.

A. BLUM JR.'S SONS v. WHIPPLE.

[194 Mass. 253, 80 N. E. 501.]

PRINCIPAL AND AGENT—Inquiry as to the Extent of the Latter's Authority.—One seeking to acquire title to checks by the indorsement of an agent of the payee is bound to inquire and ascertain the extent of his authority. (p. 554.)

PRINCIPAL AND AGENT—Laches—Delay in Giving Notice of an Unauthorized Indorsement of Checks.—Where an agent having checks of his principal in his possession, without authority to indorse, transfer or collect them, proceeds to negotiate and indorse them, and to collect the proceeds, which he embezzles, there is no duty on the part of the principal to give prompt notice of the want of the agent's

authority, nor does the failure to do so for two years constitute a ratification of the agent's acts, or prevent the recovery by the principal of a person to whom the checks were indorsed and who has received the proceeds thereof. (p. 555.)

Action to recover moneys received by the defendants through the conversion of two checks made payable to plaintiffs and indorsed in their name by M. K. Newman, who was their traveling salesman, and which the defendant, under such indorsement, collected. The plaintiffs became aware of the indorsement and collection in May, 1901, and the embezzlement by their salesman of the money collected, and caused criminal proceedings to be instituted against him, but did not notify the defendants of his want of authority until October, 1903.

The defendants asked the trial court to rule that, as the salesman was an agent of the plaintiff to the extent of being rightfully in possession of the checks, the plaintiffs, by their failure to notify the defendants until 1903, of the agent's want of authority, ratified his acts and could not recover, but the court refused to so rule, and entered judgment in favor of the plaintiffs for the amount sued for, and the defendants alleged exceptions.

J. Gordon, for the defendants.

A. K. Cohen, for the plaintiff.

²⁵⁶ SHELTON, J. As Newman was employed by the plaintiff corporation merely as a traveling salesman, with no authority to indorse the plaintiff's name upon any checks or other instruments, and as he never was held out by the plaintiff as having any such authority, there is no doubt of the plaintiff's right of ²⁵⁷ recovery in this action unless it has lost this right by its long silence after the discovery of Newman's wrongful acts: *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Buckley v. Second Nat. Bank*, 6 Vroom, 400, 10 Am. Rep. 249; *Graham v. United States Savings Inst.*, 16 Mo. 186. He was only a special agent of the plaintiff, with limited authority; and the defendants, before taking the checks upon his indorsement, were bound to inquire and ascertain the nature and extent of his authority: *Lovett, Hart & Phipps Co. v. Sullivan*, 189 Mass. 535, 75 N. E. 738, and cases there cited.

But the defendants contend that the plaintiff, having allowed more than two years to elapse after learning of New-

man's wrongful acts, and before it gave any notice to the defendants or made any claim upon them, was guilty of laches, and now must be taken to have ratified the acts of its agent Newman. They quote the language of Colt, J., in *Harrod v. McDaniels*, 126 Mass. 413: "It is a rule in the law of agency, that when the unauthorized act of the agent is done in the execution of a power conferred, in a mode not sanctioned by its terms, and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. The duty to disaffirm at once, on knowledge of the act, is said to be more imperative in such cases, because the confidence of the principal in the fitness and fidelity of the person he has selected as an agent is shown by the relations already established between them." But in that case there was evidence of ratification by the affirmative acts of the defendant. Nor were Newman's acts, as in some other cases cited by the defendants, done in the execution of a power conferred by the plaintiff, though in a mode not sanctioned by its terms, or merely in excess of the strict limitations put upon his authority: *Foster v. Rockwell*, 104 Mass. 167; *Brown v. Henry*, 172 Mass. 559, 52 N. E. 1073. Nor did the plaintiff receive any benefit from Newman's acts, as in *Brigham v. Peters*, 1 Gray, 139, nor was there any legal duty incumbent upon the plaintiff to give prompt notice of the facts and of its claims to the defendants; its delay could be nothing more than one of the circumstances to be weighed against it: *Greenfield Bank v. Crafts*, 2 Allen, 269; *Canal Bank v. Bank of Albany*, 1 Hill, 287. It could not have²⁵⁸ been ruled as matter of law that the plaintiff had ratified Newman's acts in indorsing the checks to the defendants.

Nor was the plaintiff guilty of such negligence or laches as to take away its right of recovery. This question was considered under somewhat similar circumstances in the recent case of *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693. Here, as in that case, it did not appear that any loss was caused to the defendants or that their position was in any way changed by the failure of the plaintiff to notify them earlier than it did: *Mamlin v. Sears*, 82 N. Y. 327. Indeed, it affirmatively appears that the plaintiff, as soon as it learned of these transactions, instituted criminal proceedings against Newman, but that he has never since been located, except that it was rumored that he was in the Philippine Islands; and these facts are competent to show

that the defendants have not been injured by the plaintiff's failure to give them any earlier notice. And see the cases cited in *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693.

The rule adopted in that case as between a bank and one of its depositors applies a fortiori in the case at bar.

It follows that the instructions requested by the defendants were rightly refused.

Exceptions overruled.

All Persons Dealing with an Agent are bound to ascertain the scope of his authority; if they do not, they ordinarily deal with him at their peril: *More v. Skyles*, 33 Mont. 135, 114 Am. St. Rep. 801; *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064. As to the application of this rule to an agent's indorsement of negotiable paper, see *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Deering v. Kelso*, 74 Minn. 41, 73 Am. St. Rep. 324; *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81.

WALSH v. BROWN.

[194 Mass. 317, 80 N. E. 465.]

ATTACHMENT, Officer Acting Under Writ of, What may not do.—If an officer having a writ of attachment against a woman who owns a lunchroom managed by her husband goes to such room, and, in addition to attaching the chattels therein, orders the husband and the employes out of the room in the evening, it being run night and day, puts a lock and staple on the door, and leaves a keeper therein during the night, and by thus closing prevents the customers from coming in until 10 or 11 o'clock of the next forenoon, these acts of expulsion and of locking up are beyond his authority under his writ. (pp. 557, 558.)

A PUBLIC OFFICER Exceeding His Authority becomes a trespasser ab initio. (p. 558.)

TRESPASS, When not Waived.—The giving of a bond to dissolve an attachment does not estop the person giving it from maintaining an action against the attaching officer for acts done by him, and not justified by his writ, and on account of which he became a trespasser ab initio. (p. 558.)

Tort for unlawfully entering the plaintiff's lunchroom, seizing and taking possession of her place of business, and preventing her from conducting it for eighteen hours. The defendant was a constable, and having received a writ of attachment against the plaintiff, he took possession of her place of business, placed a keeper in charge, and maintained him in charge for more than eighteen hours, when the plaintiff

herein gave a bond to dissolve the attachment, and the keeper was thereupon withdrawn. The defendant ordered the plaintiff's husband and her employés out of the store in the evening, put a lock and staple on the door, and left a keeper in charge during the night. The judge directed a verdict for the defendant, and ordered that the questions of law might be presented to the supreme court. The plaintiff alleged exceptions.

E. V. Callender and E. M. Shanley, for the plaintiff.

J. L. Sheehan and J. S. Cannon, for the defendant.

³¹⁸ HAMMOND, J. The defendant, a constable in the city of Boston, received a writ sued out by one Mahoney against Susan E. Walsh, the plaintiff in this action. The writ instructed him to attach the goods and estate of the said Walsh, to the amount of one hundred and ten dollars. Armed with this document he proceeded to a lunchroom owned and kept by her, but under the immediate management of her husband, and, as stated in his return, attached "certain goods and chattels, . . . placed a keeper over said property, and took from cash register, twelve dollars and ninety-three cents." Neither in his ³¹⁹ return nor in the evidence at this trial is there any more specific description of the goods and chattels which were attached. If the officer had stopped there, perhaps he would have been justified by his writ taken in connection with the provisions of Revised Laws, chapter 167, section 43. But he did not stop there. There was evidence that the store was "run night and day." It appeared that the defendant "ordered the husband of the plaintiff and her employé out of the store in the evening, and put a lock and staple on the door, leaving the keeper therein during the night." From some time in the early evening of the day of the attachment until 10 or 11 o'clock the next forenoon, he kept the store locked up and prevented all access to it. There was evidence also that before the closing of the store he forcibly prevented customers from coming in. Against the exclusion of the customers, the closing of the store and the exclusion of the husband and servants of the plaintiff, the plaintiff, through her husband, protested, but finally yielded.

It is plain that in these various acts of exclusion and in the locking up of the store the defendant went beyond the authority of his writ, and of the statute above named; and no

citation of authorities is needed in support of the proposition that such a public officer exceeding his authority becomes a trespasser ab initio. The third and fourth requests should have been given. The trespass was not waived by the subsequent giving of a bond to dissolve the attachment. The bond is not before us, but we assume it to be the statute bond to pay the judgment, and that it is good whether or not there has been any substantial attachment. The defendant in the writ may have preferred in that way to avoid all further trouble about the possession of her store, but it cannot be held to estop her from a claim for damages as to the past trespasses. There being evidence of a trespass, the plaintiff had a right to go to a jury.

Since the exceptions must be sustained upon this ground, it is unnecessary now to consider the exception concerning the filing of the writ.

Exceptions sustained.

The Liability of Ministerial Officers to private individuals for the nonperformance and misperformance of official duties is the subject of a note to Worden v. Witt, 95 Am. St. Rep. 72. The acts for which sureties on official bonds are liable are discussed in the note to Feller v. Gates, 91 Am. St. Rep. 497. And damages for wrongful or malicious attachments are discussed in the note to Tisdale v. Mayor, 68 Am. St. Rep. 266.

MILLMORE v. BOSTON ELEVATED RAILWAY COMPANY.

[194 Mass. 323, 80 N. E. 445.]

COMMON CARRIERS are not Insurers of the Safety of Their Passengers.—They are held to reasonable care only, and that care means the highest care consistent with the proper transaction of their business. (p. 560.)

STREET RAILWAYS, Duty of, to Alighting Passengers.—A conductor does not perform his duty by simply waiting a reasonable time for a passenger to alight. He must exercise reasonable care to see that the passenger is off the car. He is not, however, absolutely bound to see that the passenger is off. The care resting on him is the highest care consistent with the proper transaction of the business, and if he has exercised that degree of care, he has not been negligent. (p. 561.)

STREET RAILWAYS, Duty of, to See Alighting Passenger.—A conductor of a street railway is not bound absolutely to see that an alighting passenger has safely alighted before starting the car, but such conductor is required to know, if in the exercise of due care, caution and diligence he could know, that any person is attempting to alight before permitting the car to start in such a manner as might be liable to injure him. (pp. 561, 562.)

Tort against a street railway company by a passenger suffering injury while attempting to alight. Verdict and judgment for the plaintiff, and the defendant alleged exceptions.

E. P. Saltonstall and S. H. E. Freund, for the defendant.

T. F. Vahey, for the plaintiff.

324 **HAMMOND, J.** The plaintiff, a woman fifty-six years old, testified that she took in Boston an open car of the defendant which was bound for Watertown; that she sat in the sixth seat from the rear of the car, on the extreme left hand, and had a bundle and handbag with her; that a number of men afterward boarded the car "at a point before the one where she intended to alight," and that some of the men remained standing; that she desired to get off at Royal street, in Watertown, and upon her signal to the conductor he stopped the car there; that she got down on the left-hand running-board, and then, for the first time, attempted to pick up the bundle which she had placed upon the floor of the car; and that while she was in that position the conductor started the car, by reason of which she was thrown to the ground and injured. She was corroborated by several witnesses as to what occurred after she boarded the car. One Blakeney testified that at the time of the accident he was engaged in a dispute with the conductor as to whether the witness had paid his fare. The evidence showed that the accident took place at a few minutes before 11 o'clock, P. M., on Saturday, July 18, 1903, and that the night was very dark. At the time of the trial, the conductor was dead, and it was agreed that the only statement made by him before his death was that **325** contained in his report made out at the time of the accident, to the effect that "he did not see the lady fall, but was told by another passenger that she had fallen."

It was contended by the defendant that the conductor had waited a reasonable length of time before starting his car, and that under all the circumstances, considering the number of passengers and the length of time that he had waited, it was a question for the jury whether before starting the car he had not done all that was required of him. Upon this point the judge, after stating the question to be whether the conductor exercised "the highest degree of care that could be exercised under the circumstances to see that she [the plaintiff] had an opportunity to get off and the car was not started until she

had had that reasonable opportunity to get off and to take her bundles off," proceeded thus: "But the highest degree of care would require the conductor to move if he was not in a position to see whether the passenger was off; and the highest degree of care would call upon him to move, and even to the extent of getting off his car if he could not do any other way, to see whether a passenger was off. The question whether the conductor did all he could to see—it is for you to consider. But he ought not to have started the car until the passenger had an opportunity to get off and a reasonable opportunity, and he should have looked out to see whether she was off. It is not enough that he waited a certain length of time." At the close of the charge the defendant specifically objected to that portion of it wherein it was stated in substance that the highest degree of care required the conductor to move even to the extent of getting off his car to see whether a passenger was off. We have no doubt that in many cases a jury might find that a conductor should move from his car to ascertain whether a passenger was fairly off or fairly on the car. But we understand that by the language of which the defendant complains the judge meant that as matter of law a conductor of a street-car does not come up to the requisite degree of care unless he actually sees whether the passenger is fairly off or fairly on the car, as the case may be.

Common carriers are not the insurers of the life or the safety of their passengers. They are held to reasonable care only; and, briefly stated, that care when applied to them means the highest ³²⁶ care consistent with the proper transaction of their business. As to the nature of this care, the following language by Knowlton, J., in *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207, 12 Am. St. Rep. 541, 19 N. E. 373, 2 L. R. A. 83, is instructive: "Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions 'utmost care and diligence,' 'most exact care,' and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this

interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars."

Applying this to the action of the conductor, it will be seen that on the one hand the rule is not that the conductor of a street-car, after waiting a reasonable time for a passenger to get on or off, as the case may be, may start without taking any pains to see whether the passenger is either on or off. The conductor has not performed his duty when he has simply waited a reasonable time. He must exercise reasonable care, as above defined, to see that the passenger is on or off the car. On the other hand, the rule is not that he must absolutely see whether the passenger is on or off. In this, as in every other detail, there is resting upon him the same degree of care, namely, the highest care consistent with the proper transaction of the business; and, if he has exercised that degree of care, he has not been negligent. In the case before us that was the degree of care imposed upon this conductor. The plaintiff has cited to us several text-books and cases in support of the proposition laid down by the trial judge in this case, but in many of them it is plain from the context that when the court says that the conductor must see that the passenger is on or off, the meaning is that he must use the ³²⁷ highest degree of care to see it. See, for instance, the language of Fuller, C. J., in *Washington & Georgetown R. R. v. Harmon's Admr.*, 147 U. S. 571, 13 Sup. Ct. Rep. 557, 37 L. ed. 284. The rule is properly stated in *North Chicago Street R. R. v. Cook*, 145 Ill. 551, 33 N. E. 958, a case cited by the plaintiff: "Carriers of passengers are held to the exercise of the utmost or highest degree of care, skill, and diligence for the safety of the passenger that is consistent with the mode of conveyance employed. The car or train was in control of the conductor, and he was required to know, if by the exercise of due care, caution and diligence in the discharge of his duties he could know, whether any person was attempting to get on or off his train or car, before permitting the same to start in such manner as would be liable or likely to injure a person so getting on or off the same." This rule seems to us to be correct on principle and supported by the weight of authority, and so far as there

are decisions elsewhere to the contrary, we cannot follow them. We therefore think that the language excepted to was an erroneous statement of the law.

There is some ground for saying that this error was corrected by the court in a subsequent part of the charge, and so no harm was done to the defendant. A careful view of the whole charge, however, satisfies us that the error was not corrected, and the fact that the presiding judge did not strike out or modify the erroneous part even after his attention was specially called to it by the defendant's exception at the close of the charge, indicates that the judge still adhered to it as a view of the law by which the jury should be guided, and that the jury may properly have so understood. There was a mistrial.

The conclusion to which we have come on this part of the case makes it unnecessary to consider the other exceptions.

Exceptions sustained.

The Duty of Street Railway Companies to alighting passengers is discussed in the recent note to Thompson v. Gardner etc. Ry. Co., 118 Am. St. Rep. 471.

MCCAFFERTY v. LEWANDO'S FRENCH DYEING AND CLEANING COMPANY.

[194 Mass. 412, 80 N. E. 460.]

MASTER AND SERVANT—Assumption of Risk.—A workman employed in a factory assumes all the obvious risks, whether as a matter of fact he knows of them or not, and it is for him to determine whether he will make an examination before going to work, or will work without such examination and take his chances. (p. 564.)

MASTER AND SERVANT.—A workman falling into a hole in a floor, which is clearly visible and must be seen by anyone looking on the floor, cannot recover of his master. (p. 564.)

MASTER AND SERVANT—Change in the Condition of the Place of Employment, When Immaterial.—If the plaintiff is suing for injuries suffered from falling into a hole in the floor of the factory where she works, evidence tending to prove that such hole had been kept covered at a prior date is immaterial and inadmissible, if it was not covered at the time plaintiff was injured and its condition was obvious. (p. 565.)

APPEAL AND ERROR—Nonprejudicial Exclusion of Evidence.—If the court refuses to permit the asking of a question, but afterward the fact sought to be proved is proved and must be and it is assumed to be the fact in dealing with the cause, the error becomes harmless. (p. 565.)

APPEAL AND ERROR—Laches.—So far as defects in ways, works, and machines are concerned, there is no difference between the liability at the common law and the liability under the employers' liability act, except in the amount recoverable. Hence, the exclusion from evidence of the notice given by the plaintiff to comply with such act is harmless. (p. 565.)

Action to recover for injuries sustained by the plaintiff while an employé of the defendant from falling into a hole in the floor of a room. At the trial a witness was called on behalf of the plaintiff and asked whether before May, 1903, the opening was covered in any way, but the court sustained an objection to it.

J. H. Vahey and P. Mansfield, for the plaintiff.

W. H. Hitchcock, for the defendant.

413 LORING, J. The plaintiff was employed by the defendant at 1 o'clock in the afternoon, on the eighteenth day of May, 1903, and between 5 and 6 o'clock the same day she met with the accident here complained of.

She was set to work with other girls mending curtains, in a room some forty feet by thirty or thirty-five feet. Toward 5 o'clock she felt thirsty, and having seen two other girls get a drink of water from a tank, or a pipe running into a tank, she went with two fellow-employés to get a drink herself and fell into a hole between the tank and the floor. The tank was nine feet in height, and five feet in diameter. It was (as we understand the bill of exceptions) the section of a cylinder set on end. The bottom of the tank was "set into a space three and one-half to four feet" below the floor in question. The top was, therefore, some five feet above the level of the floor. The hole in which this round tank was set was a square one, and there was a space of about eighteen inches between the corner of the square hole and the round side of the tank. The employés were in the habit of getting water to drink as it ran from the pipe into the tank, the water in the tank not being fit to drink. Mrs. Daley, who with Miss Conley was with the plaintiff (according to her testimony), first took a drink. Miss Conley asked the plaintiff if she wanted a drink; she said she did, and stepping to one side, to make it convenient for Miss Conley, she fell into the hole.

The plaintiff testified that she did not see the hole, but was looking up and not on the floor. Although the evidence was overwhelming that the place in question was well lighted,

there was some evidence that it was not. All the witnesses, however, testified that the hole would be seen by anyone looking on the floor. On this evidence the presiding judge directed a verdict for the defendant. There were some questions of evidence which we shall state later on.

We are of opinion that the judge was right.

When the owner of real or personal property wishes to sell it, ⁴¹⁴ he does not have to make it a good thing of its kind, but can sell it as it is for what it is worth.

Again, when an owner lets his property to another in place of selling it, he is under no obligation to put it in repair or make it better, but can let it as it is.

The same principle applies when an employer hires a person to work in his factory. He is under no obligation to make the factory a better one or change it in any other way. The employé takes it as it is. Or, as it usually is said, he assumes all obvious risks. Whether the employé in fact does or does not know of the risk is not the question, and is not material. He assumes all obvious risks, even though they be unusual ones (*McLeod v. New York etc. R. R.*, 191 Mass. 389, 114 Am. St. Rep. 628, 77 N. E. 715), and it is for him to determine whether he will make an examination before going to work or will go to work without making an examination and take his chances: *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 36 N. E. 789.

It is only in case the risk is not an obvious one that any duty is thrown on the employer, and the duty thrown on him in such a case is to give a warning.

On the uncontradicted testimony, the hole in question in the case at bar would have been seen by anyone who was looking on the floor. The case is very like *Hoard v. Blackstone Mfg. Co.*, 177 Mass. 69, 58 N. E. 180; *Nealand v. Lynn & Boston R. R.*, 173 Mass. 42, 53 N. E. 137; *Kleinst v. Kunhardt*, 160 Mass. 230, 35 N. E. 458.

The difference between the case at bar and the cases of *Falardeau v. Hoar*, 192 Mass. 263, 78 N. E. 456, and *Hogarth v. Pocasset Mfg. Co.*, 167 Mass. 225, 45 N. E. 629, relied on by the plaintiff, is plain. It is one thing to open a trapdoor and leave it unguarded, and another to maintain a hole all the time which is obvious to anyone who looks on the floor in which the hole is. In *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468, 27 N. E. 179, a ditch was dug subsequently so as to make it dangerous to use the track in question as it was

used when the plaintiff entered the employment of the defendant.

The questions of evidence remain.

It was immaterial whether the hole had been covered over previously or not. The question to be tried was whether it was in the same condition at the time of the accident that it was in ⁴¹⁵ when the plaintiff was employed at 1 o'clock on the same day, and whether the condition was an obvious one. The question asked Bailey was rightly excluded.

The plaintiff was not injured by the refusal of the judge to allow the plaintiff to ask the superintendent whether the employes were in the habit of drinking at the tank in question. That was proved afterward, and we have assumed it to be the fact in dealing with the plaintiff's case.

So far as defects in the ways, works and machinery are concerned, there is no difference between the liability under the employers' liability act (Rev. Laws, c. 106, sec. 71, cl. 1) and at common law, except in the amount which can be recovered: *Lynch v. Stevens & Sons Co.*, 187 Mass. 397, 73 N. E. 478. For this reason the plaintiff was not harmed by the exclusion of her notice, if it was a good one.

Exceptions overruled.

The Doctrine of Assumption of Risks in the law of master and servant is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289.

GORDON v. LEVINE.

[194 Mass. 418, 80 N. E. 505.]

BANKS—Checks, Improper Delay in Presenting for Indorsement, What is.—If the drawer, drawee, and payee of a check all reside in the same city, or town, the check is not presented in reasonable time unless presented before closing of business hours on the day after its issuing. If not presented within the time thus fixed, and there is a loss due to delay, such loss falls on the holder of the check. (p. 568.)

BANKING—Check, Time for Presenting, When It Passes from One Owner to Another.—The fact that after a check issues it passes from hand to hand, and several persons thereby become owners of it at different times, does not extend the time for its presentment for payment, when the drawer, drawee, and holder all reside in the same city or town. The doctrine of *Taylor v. Wilson*, 11 Met. 44, 45 Am. Dec. 180, disapproved. (pp. 568, 569.)

J. Bennett and H. Bergson, for the plaintiff.

E. P. Saltonstall and S. H. E. Freund, for the defendant.

⁴¹⁸ MORTON, J. This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated ⁴¹⁹ December 30, 1905, which was Saturday, though there was some question whether it was actually drawn and delivered on that day or the 31st. The plaintiff is described in the writ as of Chelsea and the defendant as of Boston. The bank on which the check was drawn was in Boston and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days, as he did not have sufficient funds to meet it, but that he presented it Monday morning, January 1st, and was told there were no funds, and that he went to see the defendant at his place of business but did not see him. The plaintiff also testified that in the afternoon of the same day he passed the check to one Saievitz in payment of a bill which he owed him, receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Roostein, who deposited it on January 4th in the Faneuil Hall National Bank in Boston for collection, and that that bank's messenger went with it on the afternoon of the following day, Friday, January 5th, to the bank on which it was drawn, the Provident Securities and Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant that the bank had failed, and that the defendant promised to make the check good. The defendant denied this, and also the plaintiff's statement that he had asked the plaintiff not to present the check for a couple of days, and introduced testimony tending to show that at the time when the check was drawn he had sufficient funds on deposit at the bank to meet it, and continued to have it down to the failure of the bank. It was admitted that the bank failed on Friday, January 5th, and the defendant introduced evidence tending to show that he had received no payment or dividend on account of his deposit. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain instructions that were requested, and to the admission of certain testimony.

The defendant, in substance, asked the judge to instruct the jury that a check must be presented for payment in a reason-

able time, and that, in order to have them presented within a reasonable time, the checks in suit should have been presented before the close of banking hours on Monday; that its transfer to successive ⁴²⁰ holders would not extend the time for presentment, and a presentment on January 5th would not be within a reasonable time, and if the bank failed in the meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that extent. The judge gave in part the instruction thus requested, and refused it in part. He instructed the jury that the check must have been presented for payment within a reasonable time, and that if it was presented on Monday, that would be within a reasonable time. But he refused to instruct the jury that the transfer to successive holders would not extend the time, or that a presentment on Friday was not within a reasonable time. On the contrary, he instructed them that "the court had occasion to consider that in one case in this commonwealth (referring, we assume, to *Taylor v. Wilson*, 11 Met. 44, 45 Am. Dec. 180), and it is there stated that a check may also be passed from hand to hand, and a reasonable time is allowed to each party receiving the same to present it for payment." And after calling their attention to the provision of the statute (Rev. Laws, c. 73, sec. 209) that in considering what a reasonable time is, "regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case," left it to them to determine whether the check was presented on Monday or, if they were not satisfied that it was, then to determine whether, if it passed from hand to hand and each one had a reasonable time to present it, the presentment on Friday was within a reasonable time. For aught that appears, the jury may not have been satisfied that the check was presented on Monday, and may have found for the plaintiff on the ground that the presentment on Friday was within a reasonable time. The question is, therefore, distinctly raised whether a presentment on Friday could have been found to be within a reasonable time.

The general rule is as was stated by the judge and as is provided in the negotiable instruments act (Rev. Laws, c. 73, sec. 203), that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented, and the drawer sustains a loss by reason of the failure

of the drawee, he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument ⁴²¹ which, though defined in the negotiable instruments act (Rev. Laws, c. 73, sec. 202) as "a bill of exchange drawn on a bank payable on demand," is intended for immediate use (*Mussey v. Eagle Bank*, 9 Met. 306), and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss, if any, resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The negotiable instruments act provides generally (Rev. Laws, c. 73, sec. 209), as the judge said, that "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case." This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is, that where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterward the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss, it falls not on him but on the holder: *Watt v. Gans*, 114 Ala. 264, 62 Am. St. Rep. 99, 21 South. 1011; *Simpson v. Pacific Ins. Co.*, 44 Cal. 139; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238, 89 Am. Dec. 436; *Northwestern Coal Co. v. Bowman*, 69 Iowa, 150, 28 N. W. 496; *Cawein v. Browinski*, 6 Bush, 457, 99 Am. Dec. 684; *St. John v. Homans*, 8 Mo. 382; *Grange v. Reigh*, 93 Wis. 552, 67 N. W. 1130; *Gregg v. Beane*, 69 Vt. 22, 37 Atl. 248; *Woodruff v. Plant*, 41 Conn. 344; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; *Parker v. Reddick*, 65 Miss. 242, 7 Am. St. Rep. 646, 3 South. 575; *Mohawk Bank v. Broderick*, 10 Wend.

304, 13 Wend. 133, 27 Am. Dec. 192; Carroll v. Sweet, 128 N. Y. 19, 37 N. E. 763, 13 L. R. A. 43; Rickford v. Ridge, 2 Camp. 537; Williams v. Smith, 2 Barn. & Ald. 496; 2 Daniel on Negotiable Instruments, 5th ed., sec. 1595; Byles on Bills, Sharswood's ed., ⁴²² 80; Chitty on Bills, 12th Am. ed., 387; Story on Promissory Notes, sec. 494; Bigelow on Bills and Notes, 78; Eaton & Gilbert on Commercial Paper, 632.

The case of Taylor v. Wilson, 11 Met. 44, 45 Am. Dec. 180, relied on by the plaintiff, was a case where a check was drawn by one doing business in Charlestown and living in Roxbury on a bank in Charlestown in favor of a resident of Newport. The check was dated September 30, 1842, which was Friday, and was received by the payee Saturday evening, October 1st. On Tuesday, October 4th, having been previously cashed for the payee by a local bank, it was given by the cashier of that bank to a messenger to be carried to the Merchants' Bank at Providence in the usual course of remitting its funds and securities, and was received by that bank on Wednesday and sent by its cashier to the Suffolk Bank at Boston. That bank received it on the next day, October 6th, and presented it on the same day to the bank on which it was drawn and payment refused—the bank having closed its doors on Monday morning, October 3d, and being insolvent. The case was submitted to the court on agreed facts, with power to draw inferences, and the court found in favor of the payee and against the drawer. The court held in effect that under the circumstances there had been no laches, and that the check had been presented within a reasonable time. There is a sentence in the opinion to the effect that a check may pass from hand to hand and that a reasonable time be allowed to each party receiving it to present it for payment, and the case had been cited to that point with approval in Veazie Bank v. Winn, 40 Me. 60. But we do not think that the court meant to lay down the rule that, under any and all circumstances, each party receiving a check from a previous holder was entitled to a reasonable time to present it for payment, or that the case required that it should lay down such a rule. On the contrary, the court expressly said that a party receiving a check was not guilty of laches if he did not present it on the same day on which it was drawn, but was allowed a reasonable time for that purpose, and that the next day was held to be such reasonable time. The decision should be limited to the case before the court, which was that

of a check drawn on a bank in one place and sent to a payee in another place at considerable distance and forwarded for presentment in ⁴²⁸ usual course of business, and, so understood and applied, was correct. It follows from what has been said that the exceptions must be sustained. The conclusion to which we have come on the principal question renders it unnecessary to consider the questions of evidence, though we may observe that we see no error in regard to them.

Exceptions sustained.

For Authorities in support of the principal case, see Watt v. Gans, 114 Ala. 264, 62 Am. St. Rep. 99; Morris v. Eufaula Nat. Bank, 122 Ala. 580, 82 Am. St. Rep. 95; First Nat. Bank v. Miller, 37 Neb. 500, 40 Am. St. Rep. 499; note to Holmes v. Briggs, 17 Am. St. Rep. 807.

GIRAGOSIAN v. CHUTJIAN.

[194 Mass. 504, 80 N. E. 647.]

TRADE NAMES, Right to Exclusive Use of, When not Acquired.—If, when the defendant adopted a trade name, the plaintiff had not acquired any right in his trade name, and it had not become identified with the plaintiff among dealers and the general public, and the defendant adopted his name in good faith, without any intention to wrong plaintiff or acquire his business, then neither acquired any better right to the use of his trade name than the other to the use of his. (pp. 571, 572.)

CHANCERY PRACTICE—Right to Dispense with the Assessment of Damages.—If the trial judge finds that the plaintiff has not sustained enough damages from the defendant's misconduct to warrant a reference to the master, such reference may be refused. The smallness of the claim is a sufficient ground for refusing to exercise jurisdiction in equity. (p. 572.)

Suit in equity to restrain the defendant from using the names "Oriental Rug and Carpet Renovating Company" and "Oriental Carpet and Rug Renovating Company." A decree was entered enjoining the defendant from using the name "Oriental Carpet and Rug Renovating Works" or any other colorable imitation of the plaintiff's business name, "Oriental Process Rug Renovating Company," unless there was prefixed the name of the defendant or other words sufficient to distinguish it from plaintiff's business, but not enjoining the use of the name "Oriental Rug and Carpet Renovating Works." The plaintiff appealed.

E. D. Chadwick, for the plaintiff.

A. S. Apsey, for the defendant.

⁵⁰⁵ KNOWLTON, C. J. The plaintiff contends that the defendant has interfered with his rights to the use of his trade name, "Oriental Process Rug Renovating Company," as a designation of the business carried on by him. The single justice who heard the case found that the plaintiff has used this name since September, 1900, and that the defendant began to carry on a business similar to that of the plaintiff at about the same time, under the name, "Oriental Rug and Carpet Renovating Works." "When the defendant adopted this name the plaintiff had not acquired any rights in his own name; it had not become identified with the plaintiff, either among dealers or with the general public, and the defendant adopted his name in good faith, without any intention of wronging the plaintiff or of acquiring the plaintiff's business or of palming off his own business as that of the plaintiff. The defendant also advertised his business considerably—generally under the name 'Chutjian Brothers, Oriental Rug and Carpet Renovating Works.' ⁵⁰⁶ Neither one of the parties uses any process of cleaning or repairing rugs which is peculiar to himself; each is familiar with and uses the processes common in Oriental countries, so far as there are any such peculiar processes. Each does as good work as the other."

Upon these findings, neither has acquired any better right to the use of his trade name than has the other to the use of his trade name. The name used by the defendant is nothing more than a simple description of his establishment, in reference to the kind of business carried on there. It is a name which anyone engaged in that business properly may use, if he does nothing which tends to deprive another of the benefit of his good reputation among his customers. If a use of it would indicate to the public that his establishment was that of another person who had become favorably known in the trade, and would thus take away from that person business which otherwise would go to him because of his good reputation, he might be required to accompany the name with something to show that his was a separate business: *Fox Co. v. Glynn*, 191 Mass. 344, 114 Am. St. Rep. 619, 78 N. E. 89, 9 L. R. A., N. S., 1096; *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A., N. S., 964; *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 73 Am. St. Rep. 263, 53 N. E. 141, 43 L. R. A. 826. But the facts in the present case show no reason for enjoining the defendant: *Fox Co. v. Glynn*, 191

Mass. 344, 114 Am. St. Rep. 619, 78 N. E. 89, 9 L. R. A., N. S., 1096.

The fact that the defendant, in 1904, used the name "Oriental Carpet and Rug Renovating Works" so that it would appear alphabetically in the telephone directory before that of the plaintiff, and perhaps strike the eye first if one was looking for the name of a renovator of rugs, and give him some of the plaintiff's customers, was made the ground of an injunction against the use of that name by the defendant. So far as appears, this part of the decree is satisfactory to both parties.

Upon the hearing of the whole case, the justice found that the plaintiff had not sustained enough damages from the defendant's wrongful conduct to warrant a reference of the case to a master. His finding is that damage was not more than a very few dollars. He therefore decreed an injunction against the use of the name, "Oriental Carpet and Rug Renovating Works," or any other colorable imitation of the plaintiff's name, but did not enjoin the use of the original name, "Oriental Rug and ⁵⁰⁷ Carpet Renovating Works," and decreed costs in favor of the plaintiff.

The plaintiff contends that the case should have been referred to a master to assess damages. If the damages were substantial this order would be made, unless some other mode of determining their amount was agreed upon. But a court of equity is not bound by any rule to send the parties to a master in such cases, when it is manifest that the cost to the plaintiff of a hearing would be much more than the damages which he seeks to recover. An order of reference, under such conditions, would be inequitable. The smallness of a claim has repeatedly been stated as a ground for refusing to take jurisdiction in equity: *Cummings v. Barrett*, 10 Cush. 186; *Smith v. Williams*, 116 Mass. 510; *Chapman v. Banker & Tradesman Publishing Co.*, 128 Mass. 478.

Decree affirmed.

Words Which may Constitute a Valid Trademark are considered in the note to *Kyle v. Perfection Mattress Co.*, 85 Am. St. Rep. 83. As to the right to an injunction to protect a trademark or trade name, see the recent cases of *George G. Fox Co. v. Glynn*, 191 Mass. 344, 114 Am. St. Rep. 619; *Nesne v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 439; *Falk v. American etc. Trading Co.*, 180 N. Y. 445, 105 Am. St. Rep. 778; *Koebel v. Chicago Landlords' etc. Bureau*, 210 Ill. 176, 102 Am. St. Rep. 154.

COOLIDGE v. KNIGHT.

[194 Mass. 546, 80 N. E. 620.]

GIFT, When not Perfected by Placing Account in Savings Bank in the Name of the Depositor for Another as Trustee.—If a person having deposits in several savings banks causes each of his accounts to be transferred to himself as trustee of a person designated, and makes an assignment to himself as such trustee, keeping such books in his possession during his lifetime, and drawing out the dividends for his own use, and making statements of the persons to whom such books were to go, they being the persons named as beneficiaries, this does not constitute a perfected gift in favor of any of them, and on his death the accounts represented by the books constitute part of his estate. (p. 576.)

Petition that Anna M. Coolidge, as administratrix of the estate of Emma L. Magee, deceased, executrix of the will of Thomas Livermore, deceased, be ordered to retain the assets of the estate of said Emma L. Magee to satisfy the claim of the petitioner as administrator de bonis non with the will annexed of the estate of Thomas Livermore, deceased.

The only question to be determined was whether certain savings bank books or their proceeds were assets of said Thomas Livermore or of the persons designated as beneficiaries. Each of the savings bank books purported to represent an account standing in the name of Thomas Livermore in trust for another and designated person. Each of these accounts was opened in the name of Thomas Livermore alone, but he subsequently caused it to be transferred to himself as trustee, designating the person for whom he was to hold as beneficiary. Thus, that with the Warren Savings Institution was as follows: "No. 20408. Warren Institution for Savings standing in the name of Thomas Livermore in trust for Mary E. Bond." The others were in like form, except the name of the beneficiary. Livermore had some accounts which he transferred to Alice M. Farnham, delivered to her the bank-books representing his accounts, and never again having them in his possession or drawing anything therefrom. But as to the accounts here in question, he left a will of which Emma L. Magee was appointed executrix, and, after making bequests of two sums, purported to bequeath all the balance of his property to his sister, Martha Magee. The trial judge ruled that the pass-books and the accounts represented thereby remained the property of Thomas Livermore until his death and constituted part of his estate, and ordered the administra-

trix, Anna M. Coolidge, to account with the administrator de bonis non therefor, and such administratrix thereupon appealed.

W. A. Abbott, for Anna M. Coolidge.

B. N. Johnson, for Henry F. Knight.

550 HAMMOND, J. Under the stipulation of the parties, the sole question left for our consideration is whether Thomas Livermore, to whom the seven savings bank accounts in controversy originally belonged, made during his lifetime a perfected gift of them, or any of them, to the respective beneficiaries. The case was heard, upon evidence largely oral, by a single justice of this court.

All the bank-books were kept by Livermore while he lived, and after his decease they were found in his trunk among his other effects. He treated the accounts as belonging to him. As to his intention the justice found that even "where the alleged beneficiary was notified, there was no intention on the part of Thomas Livermore to hold the several books in trust for himself for life and subject thereto in trust for the several beneficiaries. On the contrary, I find as a fact that it was his intention to keep the full control of the several books in question during his life, and to give the books to the several beneficiaries on his death. In other words, that the case does not come within the class of cases of which *Gerrish v. New Bedford Institution for Savings*, 128 Mass. 159, 35 Am. Rep. 365, would be one if the evidence there held to be admissible was believed, but to the class of cases of which *Nutt v. Morse*, 142 Mass. 1, 6 N. E. 763, is an example." This finding must stand unless it appears to be clearly wrong. But it is not necessary to invoke in this case that principle of practice. We have carefully examined the evidence and are satisfied that the finding was clearly right.

The interest on these various accounts was added every six months to the principal by the respective banks, and it appeared that for years after the alleged gifts and up to the time of his death, Livermore in every account drew out, on the day on which the interest was thus added, or within a very few days thereafter, a sum equal to the amount of the interest. He went to the banks and drew out this interest in person, except the last year before his death, in which year he from time to time gave an order to Mrs. Farnham, with

whom he boarded, and she went to the bank and drew the money for him. As a rule he receipted for the money in his own individual name, and with one or two ⁵⁵¹ exceptions signed the orders in the same way. With the exception of the account in the Boston Five Cents Savings Bank it is not shown that he ever receipted in any other way. In one or two instances Mrs. Farnham added the word "trustee" or its abbreviation "Tr." to his name upon an order, but that was at the suggestion of the bank after her arrival there, and it does not appear that he ever knew it; and in one or two cases, at least in one instance, the word "Tr." appears after his name, but in a different ink and a handwriting differing from that of the body of the signature. In a word, he kept the books, and in all ways seems to have treated the accounts as if they belonged to him.

It is argued, however, in behalf of the accountant, that although he made a perfect gift of the principal, still it was with the reservation of the income during his life. But one of the troubles with that view of the transactions is that in the case of several of the accounts the written assignment was of the interest as well as the principal, and in none is there expressed any such reservation. The assignment of the account in the Warren Institution for Savings, for instance, is of the deposit-book "together with all moneys due thereon, both principal and interest." The order to the Newton Savings Bank is to pay Mrs. Adams "all moneys that have been or may be deposited, together with the interest that may become due on" the account. While it is true that Mrs. Bond-Foote testified that at the time Livermore exhibited the books in the presence of herself, her mother and her sister Emma, he said that he should take the interest as long as he lived, but when he was gone the books should respectively belong to them, still, in view of the whole circumstances disclosed, we must regard the whole language uttered by him on that occasion as indicating not an intention on his part to make a then present gift of the principal so as to pass it irrevocably out of his hands, but as indicating what he supposed would happen after his title to the principal had ceased by his death. And in calling a book "Maria's book," we understand that he meant not that the book then actually belonged to her, but simply that upon his death he intended that it should go to her. In all this we find no then present gift of any part of the account represented by the books.

552 Livermore apparently was not unacquainted with the manner in which a gift of a book account could be properly made. When he had concluded to give an account to Mrs. Farnham he proceeded in a proper way and made an effectual gift. It is unprofitable to rehearse the evidence further.

In view of the facts that the books were kept in his possession, that he treated the accounts as his own and under his control until his death, that he knew how to make a perfected gift when his object was to pass the title from him in his lifetime (as shown in his gift to Mrs. Farnham), and of the other material circumstances, we are of opinion that the finding of the single justice was correct, and that it was not Livermore's intention to pass the title either to the principal or the interest of any of these accounts during his lifetime. There was therefore no perfected gift. The title remained in him at the time of his death: *Nutt v. Morse*, 142 Mass. 1; *Bailey v. New Bedford Institution for Savings*, 192 Mass. 564, and cases there cited.

Decree affirmed.

Where Moneys are on Deposit, to pass the property by a gift, there must be a delivery to and an acceptance by the donee or something equivalent thereto: *Bailey v. New Bedford Inst. for Savings*, 192 Mass. 564, 116 Am. St. Rep. 270, and see the cases cited in the cross-reference note thereto.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY v. REED.

[194 Mass. 590, 80 N. E. 621.]

CORPORATIONS—Directors—Remedy Against, When must be in Equity, and not in Law.—To enforce a liability arising from a statute providing that the directors of a street railway company shall be jointly and severally liable to the extent of its capital stock for all its debts and contracts until the whole amount of its capital stock shall be paid in, and a certificate stating the amount so fixed and paid in shall have been signed and sworn to by its president, treasurer, clerk, and a majority of its directors, and filed in the office of the secretary of the commonwealth, the remedy is in equity and not at law, because the liability is not to be enforced solely for the benefit of the creditor who may first seek to avail himself of it, but must be made available for the benefit of all creditors. (p. 578.)

CORPORATIONS—Suit Against Directors, Corporation, When not a Necessary Party to.—Under a statute making the directors of a corporation liable for its debts until the whole amount of its capital

stock has been paid in, the corporation is not a necessary party to a suit against the directors. (p. 579.)

CORPORATION, Directors, Liability of, is not Terminated by Their False Certificate.—Under a statute making directors of a corporation liable for its debts until its capital stock has been paid in, and a certificate stating the amount is signed and sworn to by the president, treasurer, clerk, and a majority of the board of directors, the liability of the directors does not terminate on their filing a false certificate of the required facts, though such certificate was made in good faith. (p. 580.)

Suit in equity by the Westinghouse Electric and Manufacturing Company, a corporation of Pennsylvania, for the benefit of itself and any of the creditors of the Lowell and Boston Street Railway, who might desire to join with it against the defendants as directors of the latter street railway company. The bill alleged a cause of action in favor of the street railway company arising from the plaintiff's having furnished it certain electric equipments; that in March, 1901, certain persons were appointed receivers of the street railway company; that it had no assets to distribute among its creditors, and that the receivers had been discharged; that the street railway company had owned and operated a street railway between the town of Billerica and the city of Woburn; that the defendants were the directors of the street railway when the plaintiff's indebtedness was incurred; that the capital stock of the railway company was ninety thousand dollars; that the whole amount thereof had never been paid in, and that no valid certificate had been filed by the directors to the effect that the capital stock had been paid, as required by statute. The bill prayed for process to attach the real estate of the defendants and for a decree requiring the defendants jointly and severally to satisfy the plaintiff's debt.

A demurrer was interposed to the bill on various grounds, among which were, that the plaintiff had not stated a cause of action entitling it to relief against any of the defendants; that the plaintiff had a complete and adequate remedy at law; that it did not appear in the bill that the Lowell and Boston Street Railway had ever been duly adjudicated a bankrupt, or that judgment had been recovered against it, and that it had neglected for thirty days, after demand made on execution, to pay the amount due or to exhibit to the officer real or personal property belonging to it sufficient to satisfy any execution issued on such judgment; that the bill did not set forth in detail the allegations necessary to enable the plaintiff to maintain it; that it is not alleged that no capital

stock in the railway company has ever been issued; and because the validity or invalidity, truth or falsity, of the certificate filed by the directors cannot be ascertained in this proceeding.

The trial court, after hearing the case made by the bill, and the demurrer, reported the same to the supreme court for its determination. If the demurrer was sustained, the bill to be dismissed; if overruled, the defendants were to answer.

F. H. Nash, for the plaintiff.

A. H. Russell, for the defendants.

⁵⁹³ SHELTON, J. It was provided by Revised Laws, chapter 112, section 19, in force when this bill was brought, that "the directors of a street railway company shall be jointly and severally liable, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock as originally fixed by its agreement of association, or if a chartered company, by its directors, shall have been paid in, and a certificate stating the amount thereof so fixed and paid in shall have been signed and sworn to by its president, treasurer, clerk, and a majority of its directors, and filed in the office of the secretary of the commonwealth." These provisions are now contained in Statutes of 1906, chapter 463, part 3, section 29. The bill is brought under that statute to enforce the liability of the directors of the Lowell and Boston Street Railway Company, for debts alleged to have been incurred by that company.

It seems manifest to us that the remedy to enforce this liability must be in equity and not at law. The liability of the defendants is not for all the debts and contracts of the company, but only for those debts and contracts to the extent of its capital stock. The liability, being to this limited extent for all the debts and contracts of the company, is not to be enforced for the benefit of the creditor who may first seek to avail himself thereof, which might result in excluding other creditors by exhausting the fund, but must be made available for the benefit of all the creditors: *Harris v. First Parish in Dorchester*, 23 ⁵⁹⁴ Pick. 112; *Crease v. Babcock*, 11 Met. 525; *Bell v. Spaulding*, 3 Allen, 485. For the reasons stated in those opinions, it is only in equity that the rights of all parties can be protected and an adequate remedy given: See, to the same effect, *Knowlton v. Ackley*, 8 Cush. 93; *Kinsley v.*

Rice, 10 Gray, 325; Merchants' Bank v. Stevenson, 10 Gray, 232; Merchants' Bank v. Stevenson, 5 Allen, 398; Commonwealth v. Cochituate Bank, 3 Allen, 42; Pope v. Leonard, 115 Mass. 286.

The corporation is not a necessary party to the bill. This statute creates a different liability from that imposed by Revised Laws, chapter 110, section 58 et seq. By section 62 of that statute the corporation is made a necessary party to a bill brought to enforce that liability. It is only for this reason that the corporation must be joined as a defendant: Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563. As was pointed out in that case, the right to proceed against the directors never belonged to the corporation and was no part of its assets. So in Clark v. Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887; Hancock Nat. Bank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532; New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656. The provisions of Statutes of 1903, chapter 437, section 36, do not apply to this case for the same reasons, and for the further reason that by section 1 of that act street railway companies are excluded from its provisions. Nor need the creditors exhaust their remedy against the corporation by taking out execution or otherwise, because the statute under which this bill is brought requires no such action.

The statute provides that the liability of the directors shall continue until the whole amount of the capital stock shall have been paid in and a certificate thereof shall have been signed and sworn to by the president, treasurer, clerk and a majority of the directors, and filed in the office of the secretary of the commonwealth: Rev. Laws, c. 112, sec. 19; Stats. 1906, c. 463, pt. 3, sec. 29. The bill avers that the whole amount of the capital stock "was never actually paid in in cash," and "that no valid certificate has been filed by the directors of said street railway company to the effect that said capital stock has been paid in as required" by the statute. The defendant contends that this is not an averment that no certificate has been filed, and that the validity ⁵⁹⁵ of the certificate is not to be inquired into in this proceeding, but that the statutory liability of the defendants ends as soon as a certificate shall have been filed, whether its statements are true or untrue: Stedman v. Eveleth, 6 Met. 114. The liability considered in that case rested upon the stockholders until the

capital stock should have been paid in and the officers of the corporation should have filed a certificate thereof; and it was held that the liability of the stockholders for subsequent debts of the corporation ceased upon the filing of the certificate. But the reasoning of the court in that case is inapplicable to the facts in the case at bar. Here the liability is upon the directors; and it is upon them, acting by a majority of that body, as well as upon other officers, that the duty of signing, swearing to and filing the required certificate rests. It would be strange if by their mere false statement under oath, whether made willfully or carelessly, they could terminate the liability imposed upon them, especially as it ordinarily would be in their own power to prevent the incurring of the debts and the making of the contracts which create that liability. Nor is it material whether the directors did or did not act in good faith in making the certificate. It concerned a matter as to which they had full means of knowledge. We cannot restrict their liability further than is done by the statute: *Anthony & Scovill Co. v. Metropolitan Art Co.*, 190 Mass. 35, 76 N. E. 289.

The formal objection that the bill avers that the capital stock has not been paid in "in cash," and that no valid certificate has been filed "by the directors," whereas the requirement of the statute is that it be filed by the president, treasurer, clerk and a majority of the directors, has not been argued, and need not be considered. Nor has it been argued that the bill should have averred that any certificate of capital stock had been issued, or that the proper defendants are not those who were the directors when the debt due to the plaintiff was incurred: See *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing & Bleaching Co.*, 15 Gray, 216.

Demurrer overruled.

Statutes Imposing Liability on Directors of corporations for indebtedness in excess of their capital stock are construed strictly as in derogation of the common law: Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 49 Am. St. Rep. 943.

CASES

IN THE

SUPREME COURT

OF

MINNESOTA.

STATE v. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

[98 Minn. 380, 108 N. W. 261.]

RAILROADS—Statutes Requiring Construction of Crossings.—In the exercise of the police power, a state may compel a railroad company to construct and maintain, at its own expense, suitable crossings at street and highway intersections, whether the highway is laid out before or after the construction of the railway, and whether the crossing is at grade, or below or above the tracks. (pp. 585, 592.)

RAILROADS—Construction of Charter.—Charters of public corporations are construed strictly against the corporations and liberally in favor of the public. (p. 593.)

STATUTES—Construction.—The Operation of Statutes is often extended, by construction, to matters of subsequent creation, and applied to conditions that accrue after their passage, as well as to those that existed before. (p. 593.)

STATUTES—Construction.—Courts may Carry a Statute beyond the natural import of its words when essential to answer the purpose of the legislature. (p. 594.)

STATUTES—Construction.—The Intention of a Remedial Statute will always prevail over the literal sense of its terms. Therefore, when the expression is special or particular, but the reason is general, the expression is deemed general. (p. 594.)

RAILROADS—Construction of Statute Providing for Crossings.—A provision in the charter of a railway company that the said company shall have the right and authority to construct their said railroad and branches upon and along, across, under or over, any public or private highway, road, street, plank road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank road, or railroad, in such condition and state of repair as not to impair or interfere with its free and proper use," applies to streets and highways laid out subsequently to the construction of the railroad. (p. 595.)

COMMON LAW—Nature and Origin.—The common law is not a codification of exact or inflexible rules for human conduct, for the re-

dress of injuries, or protection against wrongs, nor yet a mere figment of judicial genius; but, on the contrary, is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. (p. 597.)

RAILROADS—Duty to Construct Crossings.—The right of the state to lay out and open new streets is a condition attached by implication of law to the charter and franchise of a railway company, and the obligation of the company to maintain crossings in good condition at street intersections is a continuing one, follows the franchise, and applies to new streets or highways as they come into existence. (p. 599.)

RAILROADS—Safe Crossings—Police Power.—A bridge over railroad tracks at their intersection of a public street is, when necessary to make the crossing safe for use, a "safety device" which the state may, in the exercise of its police power, require the railway company to construct and maintain at its own expense. (p. 599.)

RAILROADS—Safe Crossings.—The Right of the State to require a railroad company to construct bridges at crossings where the public safety requires them is a part of the police power, which can neither be contracted away nor lost by inaction on the part of the public authorities. (p. 600.)

Frank Healy, for the appellant.

Rome G. Brown and Charles S. Albert, for the respondents.

385 **BROWN, J.** Proceedings in mandamus to compel defendants to erect and maintain a bridge over their right of way and railroad tracks as the same extend across University avenue, in the city of Minneapolis.

The facts, briefly stated, are as follows: The Minnesota and Pacific Railroad Company was incorporated by chapter 1, page 3 of the Laws of Minnesota Territory, Extraterritorial Session of 1857; and defendants, St. Paul, Minneapolis and Manitoba Railway Company and the Great Northern Railway Company, are successors in interest, entitled to all its rights and subject to all its obligations and liabilities, in so far as involved in this proceeding. The line of railroad was constructed through the city of Minneapolis many years ago upon a right of way acquired by purchase, of which defendants are now the owners. Long after the construction of the railroad, in the year 1892, the council of the city of Minneapolis, pursuant to the provisions of its charter conferring authority to that end, duly laid out and opened the street in question over and across the railroad right of way, and it has since that time been used as one of the public thoroughfares of the city. At the time the street was opened, the city, at its own cost and expense, erected a bridge over the railroad tracks, and thereafter maintained the same until the

year 1903, when it was ^{see} partly burned and practically destroyed; since which time there has been no passage over the tracks at this point. Subsequently to the destruction of the bridge the city council, by resolution duly adopted, ordered and directed defendants to construct a good and suitable bridge over their tracks at the intersection of this new street, at their own cost and expense. Plans and specifications were prepared by the city engineer under the direction of the council. Defendants refused to comply with the order, and thereafter these proceedings were commenced to compel a compliance therewith.

The matter came on for hearing before the court below, and was submitted for its determination upon a stipulation of facts, from which it appears, among other things, that the erection of the bridge is necessary to render the street crossing safe for public travel. This must be taken, for present purposes, as conclusive upon the question of the propriety and necessity of the proposed improvement. Of course, if this stipulation was entered into by counsel for defendants on the theory that this was not a grade crossing, and that the necessity for the bridge arises solely from the fact that the street was laid over the tracks, he is not bound by it, and the question of necessity will be open on a new trial. The court below held that, inasmuch as the street was laid out and opened subsequently to the construction of the railroad, the burden of erecting and maintaining the bridge rested upon the city, and not upon the railroad company. Judgment was entered, dismissing the proceedings, from which relator appealed.

The case is an important one, not only to the railway companies of the state, but to the numerous municipalities thereof as well. In a word, the turning point of the controversy is, shall the railway companies, or interested municipalities, bear the burden and expense of constructing crossings at streets and highways intersected by railroads, and maintaining them in a safe and suitable condition for public use, where the street or highway is laid out after the construction of the railroad? The precise question was not involved in any previous case in this court, except in a measure in *State v. District Court for Hennepin County*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121, which will be referred to hereafter; and whatever may be found in former opinions in analogous cases on the subject must be treated as mere obiter remarks. Some

conflicting views are apparent, but we are not required, ³⁸⁷ in disposing of the present case, to reconcile them. The court is confronted with the principal question for the first time. We have been assisted by exhaustive arguments by able counsel, have considered the subject thoroughly, and the result of our deliberations is, in our opinion, fully in accord with the legislative policy of this state respecting the matter in issue, and in harmony with the law and policy of other states. Several questions are presented by the record which will be considered in their logical order.

1. It is contended on the part of defendants that the proceedings laying out and establishing the street in question did not vest in the city the right to open the same on a grade with the railroad track; that a proper view of such proceedings, taken as a whole, will permit of no conclusion other than that the street was laid out up to the right of way, and then over the same by means of a bridge, which was erected by and at the expense of the city. A strict construction of the proceedings might sustain this contention; but we are of opinion that, fairly construed, a street was laid out across the right of way, and the city authorities thereby became vested with power to open the same at grade, or by an overhead crossing, as propriety, necessity and public safety required. It is unnecessary to go further into this phase of the case, and we pass to other more vital and important questions.

2. We come, then, to the question whether the state, in the exercise of its police power, may require railroad companies to construct, at their own cost and expense, suitable crossings at street and highway intersections, in cases where the street or highway was laid out subsequent to the construction of the railroad; and further, if that power be vested in the state, whether the legislature has, by any statutory enactment, imposed the obligation upon the respondents, or whether it rests upon them at common law. It is insisted by defendants that there is no such obligation at common law; that the state has no power to cast the burden upon the railroads; and that if any statute exists which may be so construed, it is in violation of both state and federal constitutions, in that it denies to such companies the equal protection of the law, and operates to take from them their private property for public use, without compensation first paid or secured.

3. The question as to the power of the state, as respects streets and highways existing at the time of the construction of a railroad and over ³⁸⁸ which it passes, to require the latter to construct and maintain suitable crossings, by bridges, viaducts or otherwise, at its own expense, has been before the courts in numerous cases, and the uniform rule, so far as our examination of the authorities has extended, is that the state possesses that power. The obligation of the company in such cases arises from the rule of the common law that, where a new highway is laid out across one already in existence and use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary for the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way: *Northern etc. Ry. Co. v. City of Baltimore*, 46 Md. 425, 445; *Dyer County v. Chesapeake etc. Ry. Co.*, 87 Tenn. 712, 11 S. W. 943. The obligation exists in such cases independent of statute, and, as observed, the authorities enforce it in all cases where the streets were laid out and in existence before the advent of the railroad, and it extends to grade crossings, bridges and viaducts, or whatever may be essential and necessary to make the crossing safe. If the duty to construct and maintain the bridge in question rests upon the railroad company, either by force of the provisions of its charter or at common law, it is clear that the city may enforce it. Its specially delegated supervision and control over streets and highways, with authority to lay out and open new ones, vest in it authority to enforce all appropriate regulations sanctioned by the police power of the state. The obligation was enforced by the city of Minneapolis in the case of *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. 153, without special statutory authority, the obligation existing, as it is contended it does in the case at bar, by force of the provisions of the charter of the railroad company.

4. The authorities are not fully agreed upon the question whether the state may, in the exercise of the police power, compel a railroad company, without compensation, to construct and maintain suitable crossings at streets extended over the right of way subsequent to the construction of the railroad. Our examination of the books, however, leads to the conclusion that the great weight of authority sustains the affirmative of that proposition. The right of the state

so to act is maintained in the states of Maine, Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the supreme court of the United States. ³⁸⁹ It involves an exercise of the police power, and the inquiry is whether such a requirement is a proper exercise of that power. It is unnecessary to enter into an extended discussion to show the extent to which the legislature may go in the exercise of this governmental prerogative. The property, rights and liberty of the citizen are to be enjoyed in subordination to the general public welfare, and all reasonable regulations for the preservation and promotion thereof are uniformly sustained by the courts. "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient": *Commonwealth v. Alger*, 7 Cush. 53; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *New Orleans Gas Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, 25 Sup. Ct. Rep. 471, 49 L. ed. 831. The reasonable limits of the exercise of the power are not readily defined, but, generally speaking, it extends to all matters where the general public welfare, morals and health of the community are involved: *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308.

A reference to a few of the adjudged cases will show the general trend of judicial opinion upon the subject before us. In *Boston & M. R. Co. v. County Commrs.*, 79 Me. 386, 10 Atl. 113, the court had before it a statute imposing upon the railroad companies of that state the duty of constructing crossings at subsequently laid-out highways, and its validity was affirmed. The court there said: "The power of the legislature to impose uncompensated duties and even burdens upon individuals and corporations for the general safety is fundamental. It is the police power. Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty and consequent power override all statute or contract exemptions; the state cannot free any person or corporation from

subjection to this power. All personal as well as property rights must be held subject to the police power of the state."

In the case of *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109, the court had before it a case where the city instituted condemnation ³⁹⁰ proceedings for the purpose of opening and extending a street across a railroad already in existence, and the question presented was whether the company owning the railroad was entitled, as a part of its compensation for opening the street across its tracks, to the cost of constructing and maintaining the crossing. It appeared that the railroad was constructed prior to the passage of a statute which required all railroad companies thereafter to construct and maintain such crossings and all approaches thereto. It was insisted that the statute was invalid, and had no application to the defendant because its road was constructed prior to the opening of the street and prior to the enactment of the statute. In that case the court said: "Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. . . . If railroads, so far as they are public highways, are, like other highways, subject to legislative supervision, then railroad companies in their relations to highways and streets which intersect their rights of way are subject to the control of the police power of the state; that power of which this court has said that 'it may be assumed that it is a power coextensive with self-protection, and is not inaptly termed the law of overruling necessity': *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71. The requirement embodied in section 8 (2 Starr & Curtis' Ann. Stats. 1885, p. 1937, c. 114), that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the

making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. . . . The items of expense for which appellant claims compensation are such only as are involved in its compliance with a police regulation of the ³⁹¹ statute. It is well settled that 'neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare': Chicago etc. R. R. Co. v. Joliet etc. R. R. Co., 105 Ill. 388, 44 Am. Rep. 799. It has been held by this court in a number of cases that railroad corporations may be required to fence their tracks, to put in cattle-guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirements: . . . Galena etc. R. R. Co. v. Dill, 22 Ill. 264; Ohio etc. R. R. Co. v. McClelland, 25 Ill. 140; Peoria etc. Ry. Co. v. Peoria etc. Ry. Co., 105 Ill. 110. . . . Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest. . . . The language of section 8 is broad enough to include streets to be thereafter opened or extended as well as to existing streets. . . . There is no reason for supposing that the legislature intended to refer exclusively to a railroad crossing, created by running a new railroad across an existing street. The language includes also a railroad crossing created by running a new street across an existing railroad."

The supreme court of the United States, in 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. ed. 979, in reviewing the case of Chicago etc. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, after quoting the above excerpt from the prior Illinois decision, said: "We concur in these views. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state": See, also, Detroit etc. Ry. v. Osborn, 189 U. S. 383, 23 Sup. Ct. Rep. 540, 47 L. ed. 860; New York

etc. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. Rep. 437, 38 L. ed. 269.

In *Chicago v. City of Milwaukee*, 97 Wis. 418, 72 N. W. 1118, the supreme court of Wisconsin reviewed the subject at length and reached the conclusion ³⁹² that the subject of crossings at streets laid out after the construction of the railroad was a proper subject for legislative control, within the police power, and the obligation to construct them might be imposed upon the railroad company without compensation. The opinion in that case points out that the decisions of the supreme court of the state of Massachusetts, which apparently laid down a different doctrine, were founded upon a statute of that state, by which the expense of such crossings was imposed upon the municipality. In the course of the discussion the court said: "The correct policy, in our judgment, is that held by the courts of New York, Maine, Illinois and Iowa, that the probable results of a failure of duty, respecting the safety of railway crossings, are so serious that the public interests require, as between municipalities and railway corporations, that such duty be lodged in some one place, undivided, absolute, and with certainty, and that such place be the one where, in the estimation of legislative authority, it can be most readily, economically, certainly and efficiently performed. Whichever place is designated, the municipalities owning the highways, or the railway corporations, the expense directly or indirectly falls on the public. These considerations are abundantly sufficient, judicially considered, to legitimately locate the whole subject of maintaining safe crossings within the domain of the police regulations, so far as the legislative branch of the government may see fit to exercise its authority. It needs no extension of well-settled principles to reach this conclusion. But if it did, the increase of railroad operations, the growth of population and social and business activities, with consequent increasing dangers to persons and property, might reasonably warrant the extension. This tendency of modern development is in the direction of greater, rather than more restricted, use of police power, and necessarily so in order to meet the new dangers, and increase of old dangers, constantly occurring as natural incidents of advancing civilization. We think the weight of modern authority is in accord with the views just expressed, and to the effect that everything that goes to make up a crossing,

safe for public use, is as essentially within police regulations as any part of it."

It was held immaterial, as respects the right of the state to require those things to be done, whether the highway be laid out before or after the construction of the railroad. Their statutes were, however, strictly ³⁹³ construed, and held not broad enough to include subsequently laid-out streets, though an "obvious legislative policy" so imposing the obligation upon the railroads was recognized. In *People v. Boston & A. R. Co.*, 70 N. Y. 569, the railroad company, long after it had constructed its road, was required by statute to construct a bridge over its track at an intersecting highway, and the act was sustained as a proper exercise of the police power. The court in that case said, in substance, that while the legislature could not confiscate property under a pretense of an exercise of the police power, yet it might impose upon railroad corporations such reasonable restrictions, regulations and burdens as the public good required; could regulate the speed of trains, the way in which they should cross highways, and make all regulations proper to protect the lives of persons carried by them or passing upon the highways across the track: See, also, *Albany N. R. Co. v. Brownell*, 24 N. Y. 345; *Boston & A. R. Co. v. Greenbush*, 5 Lans. 461.

It was held by the supreme court of Tennessee, in *City of Harriman v. Southern R. Co.*, 111 Tenn. 538, 82 S. W. 213, that an act of the legislature of that state empowering cities to require railroad companies to construct bridges at places where their tracks crossed the public streets, being referable to the police power, applied to railroads whose tracks were laid before the streets were opened or the city was incorporated. In that case the railroad was constructed and in operation many years before the city of Harriman, which sought therein to compel the company to construct a bridge, was founded. It was incorporated by the legislature long after the appearance and location of the railroad, and numerous streets were laid out over the railroad right of way. In *Illinois v. Swalm*, 83 Miss. 631, 36 South. 147, the court held that a railway company might be required to place a bridge over its road and to grade approaches thereto for a highway crossing it, though the railroad was in operation for many years before the highway was laid out. It appeared in that case that the proposed new highway crossed the tracks of the railroad company at a point where there was a cut fifteen feet

deep and fifty feet wide, in which the double tracks of the road were located. The court applied the rule of the cases already referred to, following a prior decision of that court: *Illinois C. R. Co. v. Copiah*, 81 Miss. 685, 33 South. 502.

³⁹⁴ The same doctrine is affirmed in *Gulf etc. Ry. Co. v. Milam Co.*, 90 Tex. 355, 38 S. W. 747. The court in that case sustained an act of the legislature imposing the duty upon railroad companies of constructing crossings over public highways, and held that it applied to cases where the highways were laid out by the county subsequent to the building of the railroad, as well as to previously existing highways, and that the expense of grading such crossings, putting in cattle-guards, drain pipes, sign boards, and crossing planks formed no part of the damages which the company was entitled to recover on account of the condemnation of its right of way for highway purposes. Such is the law in Connecticut (*Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849), in Nebraska (*State v. Chicago*, 29 Neb. 412, 45 N. W. 469; *Chicago etc. Ry. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481), in Ohio (*Lake Shore & M. S. Ry. Co. v. Sharpe*, 38 Ohio St. 150), in Vermont (*Thorpe v. Rutland & B. R. Co.*, 27 Vt. 141, 62 Am. Dec. 625), and in Indiana (*Evansville etc. R. Co. v. State*, 149 Ind. 276, 49 N. E. 2; *Lake Erie & W. R. Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743; *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 36, 71 N. E. 151). See, also, *Chicago, B. & Q. R. Co. v. People*, 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L. ed. 596.

5. A contrary doctrine may be said to be the law in the states of Kansas, Louisiana and Michigan, but the great weight of authority, as shown by the foregoing citations, sustains the general proposition that the police power will uphold legislation of this kind. That the state has such authority, as respects all devices necessary for the safety and protection of the public, has been held by this court: *State v. District Court for Hennepin Co.*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121; *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. 153; *State v. Minnesota T. Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656. In the case first cited the court held that, where the highway was laid out over and across the railroad tracks, the company was not entitled to compensation for providing and maintaining cattle-guards and sign boards at the new crossing, but was entitled to compensation for planking the roadway where it crosses the railroad tracks and

for the maintenance of the same. The decision in that case is in harmony with the rule laid down in Kansas and Massachusetts, but is at variance with all other courts whose decisions we have cited. The theory of this court in that case was that planking the tracks was a part of the work of constructing the highway, and in no sense a safety ^{and} device or necessary for the protection of the traveling public, and did not come within a proper exercise of the police power. That case, however, sustains the general proposition that safety devices may be required at new streets; and sustains the contention of relator, if the bridge in question comes within the meaning of a safety device. But the decision rested upon the general statutes requiring cattle-guards and gates to be constructed, and is not here directly in point. What was said in *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3, with reference to the construction of the statute there before the court, as respects streets laid out after the location of the railroad, was not intended as a decision of the question. That question was not involved in the case, and the remark was made for the purpose of indicating that the decision was intended to be limited to existing streets only.

6. Counsel for defendants attempted to distinguish many of the cases cited as supporting the contention of the relator, on the ground that they involved grade crossings only. The cases cited from Tennessee, Indiana and Mississippi involved the construction of bridges over the tracks of the railroad company, but, as urged by counsel, the other cases concerned only grade crossings. But there can be no difference on principle, in so far as an exercise of the police power is concerned, between a grade crossing and a bridge over the tracks. The difference between the two is one of degree, relating solely to the matter of expense. But the expense incident to a compliance with police regulations is not an element of consideration, except, perhaps, where arbitrary and unreasonable, or resulting in a practical confiscation of property. Cases where one railroad crosses another have no application, because both stand on an equality respecting rights and obligations, while in cases like that at bar the rights of the public are superior.

7. If, then, it is within the authority of the state, in the exercise of its police power, to require railroad companies to construct and maintain crossings, either at grade, or above or below the tracks, at streets laid out after the construction

of the road, it becomes necessary to inquire whether the legislature of this state has so declared or ordered by any statute, or whether the obligation rests upon the railroad company at common law.

³⁹⁶ The charter of the Minnesota and Pacific Railroad Company, predecessor of defendants, provides as follows: "The said company shall have the right and authority to construct their said railroad and branches upon and along, across, under or over any public or private highway, road, street, plank road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank road or railroad in such condition and state of repair as not to impair or interfere with its free and proper use": Laws Extra. Sess. 1857, p. 6, c. 1, sec. 7.

A statute very similar to this was held applicable to new streets by the Indiana supreme court (*Louisville v. Smith*, 91 Ind. 119), and the rule announced by that court may be said to have been applied in effect, by other courts, as shown by the cases cited: *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109.

While the statute on its face might be construed as intended to apply to existing highways only, a fair and reasonable construction thereof, in view of the legislative policy of the state on this subject, and the propriety and necessity for some specific regulation, will bring within its scope and purpose streets and highways subsequently laid out and opened. It is elementary that charters of public corporations, in which the rights of the public are involved, are to be construed with strictness against the corporation, and liberally in favor of the public: *St. Louis R. D. Imp. Co. v. C. N. Nelson Lumber Co.*, 51 Minn. 10, 52 N. W. 976; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471. Or, as said by the New York court of appeals, in *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433, 98 Am. Dec. 54, an act of the legislature, induced by public considerations, the purpose of which is to protect the traveling public, should receive a liberal construction to effectuate the purpose of its framers. "A rigid and literal reading would in many cases defeat the very object of the statute and exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.'" The operation of statutes is often extended, by construction, to matters of subsequent creation and applied to conditions that accrue after

their passage, as well as to those that existed before: *Wilberforce*, St. L. 166; *Kline v. Minnesota Iron Co.*, 93 Minn. 63, 100 N. W. 681; *Schus v. Powers-Simpson Co.*, 85 ³⁹⁷ Minn. 447, 89 N. W. 68, 69 L. R. A. 887. In those cases we construed the fellow-servant statute, which, on its face, applied to commercial railroads, to apply to "logging" railroads, though they were unknown when the statute was enacted; and the construction there given was sustained by the supreme court of the United States in *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. Rep. 159, 50 L. ed. 322.

The language of statutes, when under liberal construction, is flexible, and general words admit of more than one interpretation. The court may carry the statute beyond the natural import of its words when essential to answer the purpose of the legislature: *Black's Interpretation of Laws*, 307, 315; 2 *Sutherland's Statutory Construction*, 2d ed., 582 et seq.; *Avery v. Town of Groton*, 36 Conn. 304; *Smith v. Stevens*, 82 Ill. 554; *Vigo's Case*, 21 Wall. 648, 22 L. ed. 690. It is an "old and unshaken rule in the construction of statutes, to wit, that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression should be deemed general": *Brown v. Pendergast*, 89 Mass. 427. A large construction is to be given to statutes having for their end the promotion of important and beneficial public objects: *Town of Wolcott v. Pond*, 19 Conn. 597. In *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138, the supreme court of the United States applied this rule to an act of Congress granting lands to certain settlers, and held that the words "single man" included unmarried women. A statute of Alabama provided that whenever an officer, required by law to give an official bond, acts under a bond "which is not in the penalty payable and conditioned as prescribed by law," such bond is not void, but stands in the place of the official bond, subject, on its conditions being broken, to all the remedies which the person aggrieved might have had upon the bond, had it been executed in conformity with the law. The court held that the statute, being a remedial one, should be construed to apply to a bond properly conditioned, but defectively executed: *Sprowl v. Lawrence*, 33 Ala. 674. Numerous illustrations of the application of this rule to various statutes will be found referred to in 2 *Sutherland's Statutory Construction*, 2d ed., sec. 593 et seq. See,

also, *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, 938.

The purpose of incorporating this particular provision in the charter of the railroad company was in the interests of the public, and to require ~~the~~ the railroad company to keep in good repair all crossings at the intersection of highways; and, though it may be said to be declaratory of the common law, the general rules of statutory construction apply to its interpretation. At the time the legislature granted the charter of the railroad company in 1857, the city of Minneapolis was a small village, and the territory to the north and west through which the proposed line of railroad was to extend was a vast wilderness, occupied by roving bands of Indians. It was in the mind of the legislature at that time that the city of Minneapolis would increase in population and ultimately become a large city; that the state through which the road was to be constructed would develop and improve; that settlers would make their homes upon the public lands; and that villages and cities would spring up along the line of the railroad, thus rendering new streets and highways an absolute necessity for public use. Respondent's charter was granted with the reserved right on the part of the state to construct new highways and streets over its line of railroad, wherever made necessary by the future development of the state. It is not, therefore, in view of this condition, which was in the mind of the legislature and the railroad company, unreasonable to believe that they contemplated, when providing for the care of highway and street crossings, not only those then existing, but such as might thereafter, in the course of the growth and development of the state, become necessary to be laid across the railroad's right of way. The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the legislature should deem it prudent to provide for existing highways only; and we do no violence to the rules of statutory construction in holding that the provisions of defendant's charter were intended to include all streets and highways intersected by railroads, whether laid out before or after the building of the railroad. The expression of the statute is special, perhaps; but the reason therefor is general. The expression must, therefore, be deemed general: *Brown v. Pendergast*, 89 *Mass.* 427.

A railroad company accepts and receives its franchise subject to the implied right of the state to lay out and open new streets and highways over its tracks, and must be deemed, as a matter of law, to have had in contemplation at the time its charter was granted, and is bound to assume, all burdens incident to new, as well as existing, crossings.

³⁹⁹ This feature of the case was before this court in *State v. District Court for Hennepin County*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121. That case involved the general statutes requiring cattle-guards and sign boards to be erected at crossings, which, on their face, like the provisions of respondent's charter, have at least apparent reference to highways crossed by railroad lines. It was there insisted that the requirement had no application to new streets, and that the railroad company was entitled to compensation for their construction, to be allowed as damages for opening the new street over the right of way. The court held that the statute applied to new streets, but that the company was entitled to compensation for planking the crossing. In the course of the opinion the court said, in substance, that, although the street involved in that case was not in existence when the railroad was constructed, and hence the requirement of the statute referred to did not impose the duty of putting in cattle-guards and sign boards at the particular place at that time, yet as soon as the street was laid out and opened, the existing statute became applicable and required those things to be done; that the circumstances, with reference to which the statute as a police regulation applied, came into existence by the location of the new street, and the requirements of the statute became operative. "When the railroad company accepted its charter, it received its franchises subject to the authority and power of the state to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous enginery, and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or, as is the case, arises from the laying out of a new highway, to which the previously existing law becomes applicable, can make no difference." The court further said that, when the franchise was granted to the railroad company to construct and operate its railroad, it was not contemplated either by it or by the state that no more public highways should be laid out which

would increase the number of places where the ordinary police regulations would have to be complied with by the railroad company to its inconvenience and expense; on the contrary, that it must have been understood and contemplated, especially in a new state, rapidly advancing in population and in the development of its resources, where new towns were springing ⁴⁰⁰ up and new avenues for travel and traffic were becoming necessary, that new streets and roads would and must be laid out, and that many of these would necessarily cross existing railroad lines; and "we cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement"; citing *Lake Shore etc. R. Co. v. Cincinnati*, 30 Ohio St. 604; *Chicago etc. R. Co. v. Joliet etc. R. Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Hannibal v. Hannibal etc. R. Co.*, 49 Mo. 480; *City of Bridgeport v. New York etc. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63.

The reasoning of the court in that case applies to the case at bar. In conclusion, on this branch of the case, we say, as was said by the Indiana supreme court in *Louisville etc. R. Co. v. Smith*, 91 Ind. 119, that the provisions of the railroad charter should not receive the literal and restricted construction contended for by respondent. Neither the interest of the railroad company nor of the public require it.

8. Again, we are clear that the obligation is imposed upon the railroads at common law. The common-law doctrine that where a street or highway is laid over one already in existence, the expense of making the crossing safe rests upon the company or corporation using the new way, had its origin when railroads were unknown, at a time when the use of all highways, generally speaking, was of the same general nature, the traffic or use of either not being inherently dangerous to the free use and enjoyment of the other. Not so where a railroad crosses a public street, or a street a railroad. In such a case the operation of trains over the latter, particularly in our large cities, is highly dangerous and a menace to the public using the intersecting street. The railroad company is alone responsible for this condition, and, though it has an unquestioned right to operate its trains in such manner as the practical conduct of its business may require, the dangers

resulting therefrom are of its own creation, and on every principle of right and wrong it should bear the burden of protecting the public so far as practicable from accident or injury.

The common law is not a codification of exact or inflexible rules for human conduct, for the redress of injuries, or protection against wrongs, nor yet a mere figment of judicial genius; but, on the contrary, ⁴⁰¹ is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society: Holmes' Common Law, 1-5, 36 et seq. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs. The principles governing the rights and liabilities of individuals are often inapplicable to railroad companies, or other corporations, clothed as they are by the state with special rights, powers and privileges, not enjoyed by individuals. The nature and character of the business of railroad companies, the numerous hazards and dangers connected with the conduct of their affairs, render the law for the individual inappropriate and inefficient, and the courts, in testing the various pertinent principles in connection with their peculiar features, have, by methods of differentiation and analogy, evolved new and appropriate rules for the determination of their rights and liabilities: 5 Harvard Law Review, 189.

It is insisted that the rule of the common law above referred to applies to and governs the position of relator in the case at bar, imposing the obligation of constructing the bridge in question upon the city, because the street was laid over the existing railroad. The rule in its abstract form can have no application to facts and conditions such as here shown, and cannot be held to impose upon the municipality the burden of constructing safety devices to protect pedestrians from dangers caused solely by the railroad company. In view of the fact that the railroad company takes its franchise subject to the reserved right of the state to lay new streets over and across its track, and in contemplation that it may do so

(*Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109; *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. ed. 979; *State v. District Court for Hennepin County*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121), and the further fact that the company is solely responsible for the necessity of safety devices at street crossings, the same being occasioned by the operation of its trains over and across the street, and the further ⁴⁰² elementary principle that he who creates and maintains upon his premises a condition dangerous and inimical to others is under legal obligation to so guard and protect it that injury to third persons may not result therefrom, the rule of the common law as to existing, must be held to apply equally to new streets. The right of the state to lay out and open new streets is a condition attached by implication of law to the charter and franchise of the railway company, and the obligation to maintain the street intersections in good repair is a continuing one, follows the franchise, and applies to new streets or highways as soon as they come into existence.

9. It follows from what has been said that the obligation to construct and maintain the bridge in question rests upon defendant, unless it is a part and portion of the crossing, for which, within *State v. District Court for Hennepin County*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121, it is entitled to compensation, and in no sense a safety device. The court, in the case just referred to, held that the railroad company might be required to construct safety devices at new streets, the planking for the crossing being held in that case not to come within the scope of that expression. So, if the proposed bridge constitutes a safety device, within the meaning of that term, relator's contention must be sustained, and the order of the court below reversed. That it comes within the meaning of that expression we have no serious doubt. It appears from the record that a number of railroad tracks cross this particular street, which is in a populous part of the city and constantly used by the citizens; that trains are frequently operated over and across the same, rendering the crossing dangerous and unsafe for public use. The purpose of planking between the rails is to make the street passable over the track. But the purpose of a bridge over the tracks is for safety, and for safety alone. There can be no distinction between it and gates or sign boards. They answer the same purpose. "Everything that goes to make up a crossing safe for public

use is as essentially within police regulations as any part of it": *Chicago v. City of Milwaukee*, 97 Wis. 418, 72 N. W. 1118.

10. In the year 1892, the city council of the city of Minneapolis enacted a certain ordinance requiring the respondents to construct certain bridges and approaches thereto at the intersection of certain streets with the railroad tracks. By section 8 of that ordinance the city council, on behalf of the city, expressly agreed that, in consideration ⁴⁰⁸ of the performance of the conditions of the ordinance by the respondents, the city would thereafter construct and maintain all crossings or approaches made necessary by the opening of new streets. It is contended by respondents that this ordinance constituted a valid contract with the city, and, having been complied with on their part, it is beyond the power of the city to now require them to construct the bridge in question; that to require it to do so would impair the obligations of the contract, in violation of both state and federal constitutions. In this we do not concur. The power of the state to require the defendants to construct the bridge in question, or any other bridge, at streets crossing the right of way, is an exercise of the police power, which can be neither contracted away nor lost by inaction on the part of the public authorities. The contract was beyond the authority of the city council and ultra vires and void: *State v. Minnesota T. Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; 5 Current Law, 637, note 71; *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773; 36 Cent. Dig., cols. 1760, 1761, sec. 1315. See, also, *Chicago, B. & Q. R. Co. v. Omaha*, 170 U. S. 57, 18 Sup. Ct. Rep. 513, 42 L. ed. 948, where the subject is fully considered. Though the contract before the court in the case last cited was held valid so long as acted on by the parties, the court said that it might be repudiated at any time by the municipality. In the case at bar, the contract was repudiated by the city when its council adopted the resolution requiring defendants to construct the bridge. The resolution was sufficient for that purpose: *City of Alma v. Guaranty Sav. Bank*, 19 U. S. App. 622, 60 Fed. 203, 8 C. C. A. 564; *Atchinson Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. Rep. 706, 37 L. ed. 573; *Quincy v. Chicago etc. Ry. Co.*, 92 Ill. 21.

It is probable that this whole matter was set at rest by the last legislature, for the future at least, by the enactment of

chapter 280, page 413, of the Laws of 1905. But that statute is not here involved, for this proceeding was commenced prior to its passage.

Judgment appealed from is reversed and a new trial granted.

The Principal Case was followed by the supreme court of Minnesota in the subsequent case of *State v. Northern Pac. Ry. Co.*, 98 Minn. 429, 108 N. W. 269, which latter case was affirmed by the supreme court of the United States in *Northern Pac. Ry. Co. v. State*, 00 U. S. 000, 28 Sup. Ct. Rep. 341, wherein Justice Day delivered the following opinion:

"This case comes here from the supreme court of Minnesota, to review a judgment of that court affirming a judgment in mandamus of the St. Louis county court in that state, which required the Northern Pacific Railway Company, plaintiff in error, to repair a certain viaduct in the city of Duluth, carrying Lake avenue over the railway company's tracks: 98 Minn. 429, 108 N. W. 269. The Northern Pacific Railway Company is the successor in title of the St. Paul & Duluth Railroad Company, which derived its title from the Lake Superior and Mississippi Railroad Company. The Lake Superior and Mississippi Railroad Company, whose rights and obligations have devolved upon the Northern Pacific Railway Company, had the following provisions in its charter:

" 'Sec. 6. The said company may construct the said railroad across any public or private road, highway, stream of water, or watercourse if the same be necessary: Provided, That the same shall not interfere with navigation; but said company shall return the same to their present state, or in a sufficient manner so as not to impair the usefulness of such road, highway, stream of water, or watercourse, to the owner or to the public.'

" 'Sec. 17. This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation.'

"The Lake Superior and Mississippi Railroad laid its first track across what is now Lake avenue in 1869. Lake avenue was graded and improved for public traffic in the winter and spring of 1871, and since that time it has been in continuous use as a public street. In the year 1891 the amount of business on Lake avenue and the number of tracks therein had become so great that the constant passage of cars and engines endangered the safety of the public. The city of Duluth thereupon prepared plans and specifications for the construction of the viaduct upon Lake avenue, and made a demand upon the railroad company to construct the same. The railroad company, after considerable negotiation, in which it denied its obligation to build the viaduct, entered into a contract with the city of Duluth, which is set up in its answer in this case as a full defense to the right of the city of Duluth to require the repair of the viaduct at the railroad

company's expense. The contract was dated September 2, 1891, and provided that the city should build the bridge or viaduct upon Lake avenue to carry that street over the railroad tracks which had theretofore crossed the said avenue at grade. The railroad was to contribute to the expense of the construction in the amount of fifty thousand dollars, and the city undertook, for the period of fifteen years, to maintain the part of the bridge over the railroad's right of way, and to perpetually maintain the approaches. The city built the bridge at the expense of twenty-three thousand dollars, in addition to fifty thousand dollars which was paid by the railroad company.

"In 1903, the viaduct and its approaches having become dangerous for public use, the city of Duluth acted within the power conferred on it by law to require railroad companies to construct bridges and viaducts at their own expense at public railroad crossings, and, having investigated the subject, approved the plans prepared by the city engineer, and on the 13th of July, 1903, passed the following resolution:

" 'Resolved, That the repairs set forth in said specifications are necessary and proper, and are demanded by the public safety and convenience.

" 'Resolved, further, That said repairs are reasonable and practicable for the repairs of said viaduct and its approaches; and that said repairs as set forth in said specifications are hereby adopted and approved.

" 'Resolved, further, That this council does hereby demand that the Northern Pacific Railway Company immediately proceed to repair said viaduct and approaches in accordance with said specifications.

" 'Resolved, further, That a copy of this resolution be forthwith served upon the Northern Pacific Railway Company in the same manner as service may be made of summons in a civil action by the city clerk.

" 'Resolved, further, That, in the event of the failure or refusal of said company to comply with such demand, that the city attorney be and he is hereby instructed to institute such action or actions as to him may seem proper to compel the said railway company to make such repairs, or such portion thereof as the court may determine it is legally liable to make.'

"It was in pursuance of this resolution that this action in mandamus was begun and the writ issued, requiring the railroad company to make the repairs in accordance with the plans adopted and approved by the city council.

"We are met at the threshold with the question of the jurisdiction of this court. It is the contention of the plaintiff in error that, in requiring the railroad company to repair the viaduct at its own expense, the obligation of the contract of September 2, 1891, has been impaired by legislation of the municipal corporation, in violation of the contract clause of the constitution of the United States. In cases arising under this clause of the federal constitution this court determines for itself whether there is a contract valid and binding between the

parties, and whether its obligation has been impaired by the legislative action of the state: *Stearns v. Minnesota*, 179 U. S. 223, 233, 21 Sup. Ct. Rep. 73, 45 L. ed. 162, 170. If the plaintiff in error set up the claim of contract upon substantial grounds and with allegations showing an impairment of its obligation by state or municipal legislation, a case was presented which might be brought to this court in event such legislation was upheld: *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. Rep. 513, 42 L. ed. 948.

"It is no longer open to question that municipal legislation passed under supposed legislative authority from the state is within the prohibition of the federal constitution and void if it impairs the obligation of contracts: *Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311, 27 Sup. Ct. Rep. 83, 51 L. ed. 198, and cases there cited. But it is contended that the action of the city in this case amounts to no more than a denial of the validity and binding force of the contract in question and brings the case within *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 21 Sup. Ct. Rep. 575, 45 L. ed. 788, followed in *Dawson v. Columbia Ave. Sav. Fund etc. T. Co.*, 197 U. S. 178, 25 Sup. Ct. Rep. 420, 49 L. ed. 713. In the *St. Paul* case the city refused to pay certain sums claimed to be due on contract of the company, and ordered the gas posts to be removed from the streets. Such a denial of liability on the part of a municipal corporation was contained in an ordinance to that effect; it was held this was not legislation impairing the obligation of the contract, and it was said in that case that the ordinance 'created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp-posts which were ordered to be removed. . . . When the substantial scope of this provision of the ordinance is thus clearly understood it is seen that the contention here advanced of the impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that, wherever it is asserted, on the one hand, that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises, in violation of the constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error.'

"And such was the effect of the ordinance in the subsequent case of *Dawson v. Columbia Ave. Sav. Fund etc. Co.*, 197 U. S. 178, 25 Sup. Ct. Rep. 420, 49 L. ed. 713.

"We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto,

necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court: *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 22 Sup. Ct. Rep. 691, 46 L. ed. 936. And this jurisdiction has been frequently exercised in cases of municipal ordinances having this effect upon prior contract rights: *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 22 Sup. Ct. Rep. 585, 46 L. ed. 808; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 24 Sup. Ct. Rep. 756, 48 L. ed. 1102. As was said in *Dawson v. Columbia Ave. Sav. Fund etc. Co.*, 197 U. S. 178, 25 Sup. Ct. Rep. 420, 49 L. ed. 713, it is not always easy to determine on which side of the line a given case may fall. But, recurring to the resolution in this case, we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the merits. For the judgment of mandamus against the railroad company could not have been rendered in this case without the prior legislation by the city ascertaining the necessity for repairs upon the viaduct, the character and extent of the same, and imposing upon the railroad company the duty to enter upon the street and construct the improvement.

"This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deemed to be necessary. It required legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen years, and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this legislation does, is to require the railroad to incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming, for jurisdictional purposes, that the company had a valid claim of contract, it was impaired by the legislation of the city in question; we therefore think there is jurisdiction in the case.

"Passing to the merits, it is the contention of the railroad company that when this contract was made the supreme court of Minnesota had decided that, as to highways which were constructed after the railroad was built, there was no obligation upon the company to construct overhead bridges or crossings, and whatever the rule might be as to requiring a railroad company to construct such overhead bridges in the interest of public safety as to streets in existence when the railroad was built, it could not be required so to do when the highway

was constructed after the railway had acquired its right of way and laid its tracks.

"It is difficult to perceive how a judicial determination that the railroad company could not be charged with the expense of such structures as this viaduct as to streets laid out after the railroad was built could have induced the agreement to pay fifty thousand dollars toward the improvement in question in a street first occupied by the railroad company. And the recitals of the contract of September, 1891, are to the effect that the payment of the fifty thousand dollars was in lieu of assessments for benefits in excess of damages for the taking of property of the railroad company to be caused by said public improvement, which might be imposed upon the property of the railroad company.

"But was there such settled judicial construction? In the case of *State v. St. Paul, M. & M. R. Co.*, 98 Minn. 380, ante, p. 581, 108 N. W. 261, a case decided by that court upon the same day it handed down its decision in the case at bar, the subject was elaborately examined and a conclusion reached that the charter of a railroad, similar to the one granted the Lake Superior & Mississippi Railroad Company, above set forth, imposed an obligation upon the railroad company as to highways, roads, and streets, over which the railroad was constructed, to keep the same in good condition and repair, whether laid out after the building of the railroad or before, and that such requirement in the interest of public safety embraced an overhead bridge necessary for the public safety, and that a requirement that it should be built at the expense of the railroad company was an exercise of the police power of the state, and did not amount to taking property without due process of law. In that case the cases relied upon by the learned counsel for the plaintiff in error in this case as establishing a contrary doctrine, prior to the making of the contract, were reviewed. They are: *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3, and *State v. District Court*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121. It was there pointed out, and we think correctly, that while the learned court, in *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3, limited its ruling to cases where railroads had been constructed in streets already laid out, and expressly disclaimed that the doctrine there announced would necessarily apply where a new street had been laid out over the railroad after its construction, the question now made was not involved in the case, and the decision then made was limited to existing streets only. In the second case above cited (42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121), while it was held that planking the tracks at crossings was a part of the construction of the highway, and not a safety device for the protection of the thoroughfare, and therefore not within the proper exercise of the police power, so that the cost thereof could be required from the company, the court did say, in the most emphatic manner, that safety devices might be required at new streets, and that cattle-guards and gates were such

safety devices, the construction of which would be required at the expense of the company. And the court said:

“ ‘When the railroad company accepted its charter it received its franchises subject to the authority and power of the state to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous enginery, and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or, as is the case, arises from the laying out of a new highway, to which the previously existing law becomes applicable, can make no difference.

“ ‘The fallacy involved in the claim of the relator, and, as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property, which confessedly are protected under the constitution from being devested or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public. The claim of the relator involves an assumption that when the railroad constructed its line of road, conforming to the requirements of the law as to all then existing highway crossings, it had a constitutional right, by virtue of its priority, to always afterward operate its road unembarrassed by being required to observe like precautions with respect to highways that might be thereafter laid out across the railroad, except upon the condition that it should receive compensation, not merely for whatever of its acquired property might be taken for the other use, but also for the expense and burden of conforming its own conduct to the newly existing conditions—of conforming to a general police regulation of the state, not before applicable. There was no such exclusive or superior right acquired by priority of charter, or of the construction of this railroad highway. It cannot be supposed that, when its franchises were granted to this relator to construct and operate this railroad, it was contemplated, either by it or by the state, that no more public highways should be laid out which should increase the number of places where the ordinary police regulations would have to be complied with by the railroad company, to its inconvenience and expense. On the contrary, it must have been understood and contemplated, especially in a new state rapidly advancing in population and in the development of its resources, where new towns were springing up, and new avenues for travel and traffic were becoming necessary, that new streets and roads would be and must be laid out, and that many of these would necessarily cross existing railroad lines. We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement: *Lake Shore & M. S. R. Co. v. Cincin-*

nati, S. & C. R. Co., 30 Ohio St. 604; Chicago & A. R. Co. v. Joliet L. & A. R. Co., 105 Ill. 388, 400, 44 Am. St. Rep. 799; Hannibal v. Hannibal & St. J. R. Co., 49 Mo. 480; Bridgeport v. New York & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63.'

"As the supreme court of Minnesota points out in the opinion in 98 Minn. 380, ante, p. 581, 108 N. W. 261, above referred to, the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right: See cases cited in 98 Minn. 380, ante, p. 581, 108 N. W. 261.

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. Rep. 437, 38 L. ed. 269, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

"It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury: Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Barbier v. Connelly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252, 29 L. ed. 516; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468, 36 L. ed. 247, 4 Inters. Com. Rep. 45.'

"The principle was recognized and enforced in Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. ed. 979, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the state, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189

U. S. 383, 23 Sup. Ct. Rep. 540, 47 L. ed. 860, it was held that the state of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 25 Sup. Ct. Rep. 471, 49 L. ed. 831, where it was held that, although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the state was not a taking of property without due process of law.

"The same principles were recognized and the previous cases cited in *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L. ed. 596, and again in *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. Rep. 367, 51 L. ed. 523. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the federal constitution.

"In this case the supreme court of Minnesota has held that the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy, and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy; nor can it be destroyed by compromise; and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety: *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. Rep. 513, 42 L. ed. 948.

"We find no error in the judgment of the supreme court of Minnesota, holding the contract to be void, and beyond the power of the city to make, and it will, therefore, be affirmed."

MURTAUGH v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[102 Minn. 52, 112 N. W. 860.]

ADVERSE POSSESSION—**School Lands.**—Title to lands granted to the state of Minnesota for the use of its schools by the United States cannot be acquired by adverse possession, as against the state. (p. 612.)

J. M. Millett, for the appellant.

F. W. Root, for the respondent.

⁵³ **START, C. J.** This is an action of ejectment brought October 12, 1906, in the district court of the county of Dakota, to recover from the defendant the possession of a strip of land one hundred feet wide running through lot 6, section 36, township 115, range 17, in the county of Dakota, which the plaintiff claims to own in fee. The defendant claimed title to the land by adverse possession and at the close of the evidence the ⁵³ trial court directed a verdict for it. The plaintiff appealed from an order denying his motion for a new trial.

The facts are undisputed. Lot 6, which includes the land in question, was a part of the grant of lands to the state of Minnesota for the use of its schools. The state never conveyed or parted with its title in fee thereto, until May 31, 1904, when it executed and delivered its patent therefor to the plaintiff. The patent conveyed the entire lot in fee to the plaintiff, if the defendant had not then gained title to the strip, which is the subject matter of this action, by adverse possession. The defendant entered into possession of the strip of land under color of title twenty-five years prior to the commencement of this action, and ever since has been in the exclusive possession thereof, using it as a part of its right of way.

The sole question which the facts stated raise is whether, in view of the character of the title of the state to its school lands, title thereto can be acquired by adverse possession. This is necessarily so; for, if the state had not lost its title to the strip of land by the defendant's adverse possession, the plaintiff is the owner thereof. The defendant concedes the correctness of the general rule that statutes of limitations do not operate against the state or general government, unless

there be an express provision or necessary implication to that effect, and that title to public land cannot be acquired by adverse possession: *Maas v. Burdetzke*, 93 Minn. 295, 106 Am. St. Rep. 436, 101 N. W. 182.

It is, however, the contention of the defendant that the statute of this state (Rev. Laws 1905, sec. 4072) expressly or by necessary implication provides that title to the school lands of the state may be acquired by adverse possession. The original of section 4072 was section 12, chapter 66, of the General Statutes of 1866 (Gen. Stats. 1894, sec. 5142), which provided that "the limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens." This court, in the case of *City of St. Paul v. Chicago etc. Ry. Co.*, 45 Minn. 387, 48 N. W. 17, held that the provisions of this section of the statute of limitations applied to actions brought by the state, whether brought in its sovereign capacity to enforce rights as to property held by it in trust for the public, or in its proprietary capacity. ⁵⁴ The question under consideration in that case related to the claim of the city of St. Paul to recover a public levee. In practice this rule, which seems to be against the weight of judicial authority (see *Northern Pacific Ry. Co. v. Ely*, 25 Wash. 384, 87 Am. St. Rep. 766, 65 Pac. 555, 54 L. R. A. 526), was cautiously applied, and it was held that the statute did not begin to run as to public streets, ways, levees and grounds until they were required for actual public use: *Parker v. City of St. Paul*, 47 Minn. 317, 50 N. Y. 247; *St. Paul & D. R. Co. v. Village of Hinckley*, 53 Minn. 398, 55 N. W. 560; *Bice v. Town of Walcott*, 64 Minn. 459, 67 N. W. 360. The legislature, however, by chapter 65, page 65, of the Laws of 1899, abrogated the rule: See *City of Hastings v. Gillitt*, 85 Minn. 331, 88 N. W. 987. The statute now reads as follows: "Such limitation shall apply to actions by or in behalf of the state and the several political divisions thereof: Provided, that no occupant of a public way, levee, square or other ground dedicated or appropriated to public use shall acquire, by reason of his occupancy, any title thereto": Rev. Laws 1905, sec. 4072.

The statute, making statutes of limitations applicable to the state, to which reference has been made, must be construed with reference to the school land grant and the provisions of

the state constitution accepting the grant and providing for the sale of the land. Section 18 of an act of Congress entitled "An act to establish the territorial government of Minnesota," passed March 3, 1849 (9 Stats. 408, c. 121), known as the "Organic Act of Minnesota," reserved sections 16 and 36 of every township for the purpose of being applied to schools of the territory and future state. This was supplemented by section 5 of the act of Congress passed February 26, 1857 (11 Stats. 167, c. 60), authorizing the people of Minnesota to form a state government. This section granted to the state sections 16 and 36 of the public lands in every township within the state for the use of schools, provided the grant should be accepted by the constitutional convention, and, if it were, then its terms should become obligatory on the United States and the state of Minnesota. The convention, and the people of the state by their approval and ratification of the constitution, accepted the grant of sections 16 and 36 for the use of the schools of the state, and safeguarded the trust by providing that the proceeds of such trust lands should remain a perpetual school fund, and that no ⁵⁵ portion of the lands should ever be sold otherwise than at public sale: Minn. Const., art. 2, sec. 3, art. 8, sec. 2. Our school land grant, then, was not made to the state, in its proprietary capacity, but in trust, for the explicit purpose of having the lands applied to the use of the schools of the state. This was the substantial consideration for the grant which induced the United States to make it. The state accepted the trust, and by its constitution solemnly covenanted with the United States to apply the granted lands to the sole use of its schools according to the purpose of the grant, and prohibited the sale of any portion of the granted land except at public sale." Such being the nature of the title of the state to its school lands, it is unthinkable that the legislature intended, by section 12, chapter 66, of the General Statutes of 1866, and later acts amending it, to provide a way whereby the trust as to any of the school lands might be defeated, and title thereto acquired by adverse possession, contrary to the mandate of the constitution that title thereto could only be obtained by a public sale thereof.

The decision in the case of Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267, 23 Sup. Ct. Rep. 671, 47 L. ed. 1044, is an interesting and authoritative one. In that case the railway company brought ejectment to recover from the defend-

ant a portion of its right of way, to which the defendant claimed title by adverse possession under the statute of limitations of this state: *Northern Pac. Ry. Co. v. Townsend*, 84 Minn. 152, 87 Am. St. Rep. 342, 86 N. W. 1007. The supreme court of the United States held that, although the plaintiff's right of way, granted to it by the United States, was amenable to the police power of the state, yet an individual could not acquire title to any portion thereof by adverse possession under the statute of limitations of the state. In its opinion the court, after stating that the grant of the right of way was for a specific purpose, said: "This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done directly."

We are, then, of the opinion that, if the statute under consideration must be construed as authorizing the acquisition of title to the school lands of the state by adverse possession, it violates in this respect, not ⁵⁶ only the terms of the grant, but also the constitution of the state. We are, however, of the opinion that the statute fairly may be given a construction which is consistent with the terms of the school land grant and the provisions of the state constitution applicable thereto. If the statute be read in connection with the general and well-understood rule of law that title to public land cannot be acquired by adverse possession, the history of our school land grant, the nature of the title of the state to its school lands, and the mandates of our constitution with reference to them, it is clear upon the face of the statute that the legislature did not intend to provide for the acquisition of the title to school lands by adverse possession. We accordingly hold that title to lands granted to the state of Minnesota for the use of its schools by the United States cannot be acquired by adverse possession, as against the state.

Order reversed and a new trial granted.

For Authorities in Support of the Principal Case, see the notes to Northern Pac. Ry. Co. v. Ely, 87 Am. St. Rep. 775; Schneider v. Hutchinson, 76 Am. St. Rep. 479.

BADER v. NEW AMSTERDAM CASUALTY COMPANY.

[102 Minn. 186, 112 N. W. 1065.]

ACCIDENT INSURANCE—Construction Favorable to Insured. A construction as favorable to the insured as reasonably may be must be given to a policy of insurance, but only a natural and logical construction, not a strained or sophistical one. (p. 615.)

COMMON LAW.—The Spirit of the Common Law is the instinct of common sense. (p. 615.)

ACCIDENT INSURANCE—Ordinary Sense of Words.—The language of the parties to a policy of insurance must be given its natural and ordinary meaning; the words are to be taken in their popular sense, in the absence of anything showing a contrary intention. (p. 615.)

WORDS AND PHRASES.—The Word "Shoot" is synonymous with "kill," and is frequently, perhaps usually, employed in that sense. (p. 616.)

ACCIDENT INSURANCE—Shooting by Burglar.—Where a man is shot by a burglar and dies a few hours afterward from the wound, his beneficiary is entitled to one-half, but not the whole amount, of ordinary accident indemnity, under a provision in the policy on his life which does not exclude indemnity for loss by accident caused by sunstroke, freezing, poison, somnambulism, racing, shooting, wrestling, etc., but which in such cases limits the liability of the insurer to one-half the amount of ordinary indemnity specified for such loss. (p. 618.)

Welch, Hayne & Hubachek, for the appellant.

Buffington & Buffington, for the respondent.

187 JAGGARD, J. On February 2, 1904, defendant and respondent casualty company, in consideration of a premium paid to it by Charles O. Bader, executed to him a policy of accident insurance for the term of one year. The beneficiary named therein was the plaintiff and appellant, the wife of the assured. The policy was subsequently renewed for another year. On December 23, 1905, Bader was shot by robbers at his place of business, was immediately taken to a hospital, and died within an hour from the effects of the wound. Due notice of loss and proofs of death were furnished. On refusal by the company to pay, this action was brought. Plaintiff sought to recover the full amount of insurance for loss of life by accident, two thousand five hundred dollars with interest. The answer of the company denied liability, and asked that the action be dismissed. On trial, the court ordered judgment in favor of the plaintiff for one-half the principal sum, twelve hundred and seventy-five dollars, with interest, in accordance with a contract provision hereinafter set forth

in full. This appeal was taken from an order denying plaintiff's motion for a new trial and to modify the conclusions of law to correspond with the findings of fact.

The only question presented by this appeal is the construction of the following paragraph in the policy, viz.:

"SPECIAL INDEMNITIES.

"This policy does not exclude indemnity for loss by accident as herein provided, caused or contributed to, wholly or partly, directly, or indirectly, by sunstroke, freezing, anesthetics, gas, lockjaw, septicemia, narcotics, poison, somnambulism, racing, shooting, intoxicants, asphyxiation, riot, polo playing, wrestling, strikes, steeplechasing, football playing, hydrophobia, riding to hounds, or by bite of animal; but in any such event the liability of the company shall be one-half of the amount of the ordinary accident indemnity specified for such loss."

A proper construction of the contract involves its examination as a whole. Thereby the defendant company agreed to pay certain indemnities under the following general coordinate and conspicuous ¹⁸⁸ titles: "Ordinary Accident Indemnities"; "Surgical Indemnities"; "Illness and Disease Indemnities"; "Double Indemnities"; "Optional Indemnities"; "Special Indemnities." Indorsed on the policy also appear various provisions under the titles "Increased Indemnities" and "List of Operations, Amounts Payable in Addition to Weekly Indemnity." Under "Ordinary Accident Indemnities" appears: "(1) For loss of life by accident the full principal sum, \$2,500.00." An accident is subsequently defined thus: "'Loss of life by accident,' as used in this policy, shall be deemed to mean death from bodily injuries not intentionally inflicted by the assured, which independently of all other causes are effected solely and exclusively by external, violent, and accidental means, and which shall result in the death of the assured within ninety days of the event causing the injury." This clause, "Special Indemnities," is self-descriptive. The indemnity thereby referred to is "for loss by accident." That loss is caused, not "while," but "by," shooting, among other things. The natural construction of the clause is: "This policy does not exclude indemnity for loss by accident as herein provided, caused or contributed to, wholly or partly, directly or indirectly, by . . . shooting; . . . but in any such event the

liability of the company shall be one-half of the amount of the ordinary accident indemnity specified for such loss."

This apparent and normal construction of the controlling paragraph counsel for plaintiff insists is not the proper one on principle or on authority. The first of the two rules of construction which he invokes is the familiar and undisputed one that the terms of insurance policies should be interpreted in favor of the assured, particularly in cases of forfeiture of his interest. "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all the language used to limit the liability of the company strictly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and with those in mind attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to ¹⁸⁹ resolve any doubt or ambiguity in favor of the insured and against the insurer": per Taft, J., in *Manufacturers' Acc. Ind. Co. v. Dorgan*, 58 Fed. 945, 956, 7 C. C. A. 581, 22 L. R. A. 620. The decisions of this court are strictly in harmony with this elementary principle. Their unmistakable tendency is to make insurance mean insurance. This does not signify, however, that the terms of an insurance contract should be distorted from their natural meaning, or that the agreed liability of the insurer should be forced into one which only a new contract should have imposed, or that a court should indulge in the subtleties of the schoolmen to extend the plain rights of the insured. A construction as favorable as reasonably may be must be given, but only a natural and logical one, and not a strained or sophistical one. "The spirit of the common law is the instinct of practical sense": Philips, J., in *Maryland Casualty Co. v. Finch*, 147 Fed. 388, 77 C. C. A. 566. A court must interpret such an insurance contract as it finds it, and has no power to add to it, or take from it. Language used by parties must be given its natural and ordinary meaning. Their words are to be taken in their popular sense, in the absence of anything showing a contrary intention: *White v. Standard Life & Acc. Ins. Co.*, 95 Minn. 77, 103 N. W. 735, 884; *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472, 74 N. E. 421; *Dunning v. Massachusetts M. A. Assn.*, 99 Me. 390, 59 Atl. 535. A valuable collection of authorities on this subject will be found in 6 *Current Law*, 83, 84. The second rule of construc-

tion invoked by plaintiff, "*Noscitur a sociis*," is sanctioned by reason and adjudication.

Applying these rules to the case at bar, we agree with plaintiff that the paragraph here in issue should not be construed as defining risks which are ordinarily referred to in insurance law as excepted risks. The title of the paragraph appropriately describes its provisions. They prescribe contract obligations in case of "special" as distinguished from "ordinary," "double," "increased," or other indemnities. The result is a limitation upon the amount paid in the special cases enumerated in the paragraph.

The question next arises whether the word "shooting," grouped with other words in the context, should be construed as a physical sport, or at least as a shooting in which the assured had in some way participated or to which he had consented. The paragraph in ¹⁹⁰ question refers to some sports, among which shooting could be included: Racing, polo-playing, wrestling, steeplechasing, riding to the hounds. With respect to all of these, the basis of the insurance was some conscious participation of the assured. They were, therefore, under the earlier forms of accident insurance, doubtful cases, or "cases on the border line." Loss by gas, narcotics, poison, or anesthetics might be held to include both accidental and voluntary acts. It is to be noted, however, that these terms occur here without any of the qualifications customary under the earlier forms of accident insurance policies. Sunstroke, freezing, and septicemia more clearly negative participation or consent on the part of the assured. We are wholly at a loss to see how it would be possible for somnambulism to involve conscious participation of the assured. The argument based on "*noscitur a sociis*," therefore, operates against the plaintiff. Loss by "shooting" is here conclusively a loss by accident. Plaintiff's contention would make that phrase, reading literally "loss caused by shooting," read: "Loss occurring while engaged in shooting as a sport." It would create two classes of indemnity for loss by shooting: A one-half indemnity for loss caused by shooting as a sport or the like, and a full indemnity for loss caused by shooting in other cases, for example, of murder. "Shooting a person" naturally means that a person "was hit by the substance with which the gun or pistol was loaded": *Jarrell v. State*, 58 Ind. 293; *Voght v. State*, 145 Ind. 12, 43 N. E. 1049. It is an apt and current term for the description of such an offense as was here in-

volved. The word "shoot" is synonymous with "kill," and is frequently, perhaps usually, employed in that sense: *Lyon, C. J.*, in *Winn v. State*, 82 Wis. 571, 52 N. W. 775. And see *State v. Vaughn*, 26 Mo. 29; *State v. Hammerli*, 60 Kan. 860, 58 Pac. 559. The use of the term here included that sense.

Plaintiff's conclusion is not impossible, but paralogical. In effect it would make a new contract for the parties. To adopt it would merit Judge Sanborn's condemnation that the court would appear "to be cunning and astute to evade, rather than quick to perceive and diligent to apply, the meaning of the words it [the policy] contains in their plain, ordinary and popular sense": *McGlothter v. Provident Mut. Acc. Co.*, 89 Fed. 685, 32 C. C. A. 318.

¹⁰¹ The authorities most nearly in point are in direct conflict. The opposite views and decisions will be found ably and exhaustively discussed in *McGlothter v. Provident Mut. Acc. Co.*, 89 Fed. 685, 32 C. C. A. 318, in which Judge Sanborn wrote the opinion of the court, and Judge Thayer, the dissenting opinion, and in *Fidelity & Casualty Co. v. Lowenstein*, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450, in which Judge Thayer wrote the majority, and Judge Sanborn the dissenting, opinion. The opinions of Judge Thayer sustain the plaintiff's contention and have been criticised as metaphysical. The opinions of Judge Sanborn sustain the defendant's contention and have been criticised as mathematical. The abstract merits of these judicial utterances we need not here discuss. Neither case controls the one at bar. Nor is it determined by other cases, not therein considered, which tend to support plaintiff's claim: *Travelers' Ins. Co. v. Ayers*, 217 Ill. 390, 75 N. E. 506, 2 L. R. A., N. S., 168; *Omberg v. United States M. A. Assn.*, 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; *Dezell v. Fidelity C. Co.*, 176 Mo. 253, 75 S. W. 1102; *Button v. American M. A. Co.*, 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861.

To a peculiar degree the controversies in all of these cases have waged around certain verbal phrases. The precise wording employed in the policy at bar has not been the subject of adjudication. It is, of course, wholly immaterial whether in one case the question concerned the word "poison" and that in the present case it concerns the word "shooting." The essential differences arise in part from the qualifications attached to particular words in most of plaintiff's cases which are not presented here, in part from the other words in im-

mediate juxtaposition thereto, and largely from the title "Special Indemnities," which, as construed in connection with other co-ordinate titles in the same policy, is peculiar to the instance in dispute. Moreover, in most of plaintiff's cases the policies exclude indemnity for any of the specified items; and the courts held that, as to such matters as the insured did not voluntarily and consciously participate in, the loss was due to accident, and therefore not beyond the company's responsibility. Here, in any view, loss by shooting, however, is treated as an accident, and paid.

In *Preferred Accident Ins. Co. v. Robinson*, 45 Fla. 525, 33 South. 1005, 61 L. R. A. 145, Taylor, C. J., referring to plaintiff's New York and other authorities, said: "Even if [these cases] were sound law, ¹⁹² the policy in litigation here seems to have been framed with a view to avoid the strained reasoning of the courts in those cases, predicated upon the use of certain words and forms of expression in the policies therein considered. The policy in this case differs materially from the contracts construed in those cases." This is true of the case at bar. By construing this contract as a whole, the conclusion is accordingly reached that it provides in plain language that, in case of loss by accident due to shooting, the liability of the company shall be one-half of the amount of the ordinary accident indemnity specified for such loss, and that therefore the ruling of the trial court was correct.

Order affirmed.

Accident Insurance Policies are construed liberally with a view to the protection of the insured. A policy susceptible of two interpretations will be given the one most favorable to him: *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 107 Am. St. Rep. 548; *Jones v. Casualty Co.*, 140 N. C. 262, 111 Am. St. Rep. 843; *Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 112 Am. St. Rep. 232. For applications of this rule to recent cases, see *Continental Casualty Co. v. Johnson*, 74 Kan. 129, 118 Am. St. Rep. 308; *Hunt v. United States Accident Assn.*, 146 Mich. 521, 117 Am. St. Rep. 655; *Cary v. Preferred Accident Ins. Co.*, 127 Wis. 67, 115 Am. St. Rep. 997.

The Language of an Accident Insurance Policy is given its ordinary and popular signification, rather than its technical meaning: *Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 112 Am. St. Rep. 232; *Vorse v. Jersey Plate Glass Ins. Co.*, 119 Iowa, 555, 97 Am. St. Rep. 330.

RED WING SEWER PIPE COMPANY v. DONNELLY.

[102 Minn. 192, 113 N. W. 1.]

MUNICIPAL CONTRACT—Bond to Secure Payment.—The order in which a contract for the construction of a sewer and the bond to secure payment to materialmen and laborers are executed is not material. After the bid has been accepted and approved, the bond may be executed before the contract, or the contract before the bond. (p. 619.)

MUNICIPAL CONTRACT—Recitals in Bond.—Where a bond, given to secure payments to materialmen and laborers under a contract to construct a sewer, recites that the contract was executed as of one date, the sureties are estopped to assert that it was in fact signed by the president of the board of public works at another and subsequent date. (p. 620.)

MUNICIPAL CONTRACT—Action by Materialmen.—One who sells materials for the construction of a sewer is not required, in an action for their value on the bond of the contractor, to show that they actually entered into the construction of the sewer. (p. 621.)

R. A. Walsh, for the appellant.

Oppenheim & Hunt, for the respondent.

193 JAGGARD, J. This action was brought to recover the value of two carloads of sewer pipe sold to one Preston, on a bond on which the defendant Schroeder was a surety. The first carload was ordered by Preston for the Conway street sewer on June 24, 1903, the other on July 2d, and both cars were delivered to Preston on July 3, 1903. Preston had contracted with the city of St. Paul to construct a sewer on Conway street. That contract was dated June 30, 1903. Defendant showed that the contract was executed on behalf of the city on July 10, 1903. The bond was executed on June 30th. The court ordered judgment for plaintiff. Defendant appealed from an order denying the motion to set aside the findings and decision of the court and for a new trial.

The principal controversy in this case arises from the fact that, while the contract and the bond bear the same date, defendant showed that the contract was not signed by the president of the board of public works until some two weeks after the date of the contract.

Appellant argues with much earnestness that "sureties are favorites in the law. They have a right to stand upon their legal defenses." There can be no question as to the soundness of this general principle. More specifically the defendant urges that the plaintiff had failed in the necessary proof

of the due execution of the contract to support the bond. In this connection he refers us to *Costello v. Doherty*, 55 Minn. 77, 56 N. W. 459, in which, inter alia, it was said: "It must appear in some way that [the statutory bond] was taken as authorized by statute to secure performance of a valid contract of the city." In that case, however, it was distinctly set forth that, "under the charter, the order in which the bond and contract are executed is not material. ¹⁹⁴ After the bid is accepted and approved, the bond may be executed before the contract, or the contract before the bond." In the case at bar the bond recited the contract as having been duly executed. That recital estopped the defendant from availing himself of the technical objection as to the date of the contract. In *Costello v. Doherty*, 55 Minn. 77, 56 N. W. 459, the effect of such a recital as an estoppel was not explicitly considered. The principle in this connection is admirably stated by Collins, J., in *Jefferson v. McCarthy*, 44 Minn. 26, 46 N. W. 140: "It is well settled that an allegation or recital in a bond, which is certain in its terms and relevant to the matter in hand, is conclusive between the parties to a controversy growing out of the instrument itself or the transaction in which it was executed."

This rule has frequently been enforced in cases analogous to the one at bar by this court. And see *County of Meeker v. Butler*, 25 Minn. 363; *Greengard v. Fretz*, 64 Minn. 10, 65 N. W. 949; *Board of Commrs. of Hennepin County v. State Bank*, 64 Minn. 180, 66 N. W. 143; *Board of Commrs. of St. Louis County v. American Loan & Trust Co.*, 75 Minn. 489, 78 N. W. 113; *Hayden v. Cook*, 34 Neb. 670, 52 N. W. 165. In general terms it is of almost universal acceptance: 16 Cyc. 699, 702; 5 Current Law, 1285; 24 Am. & Eng. Ency. of Law, 2d ed., 57; 27 Am. & Eng. Ency. of Law, 2d ed., 447, 467; 40 Cent. Dig., "Principal and Surety," secs. 91, 91½; 1 Brandt on Suretyship and Guaranty, sec. 52; 2 Brandt on Suretyship and Guaranty, sec. 816; Pingrey on Suretyship and Guaranty, sec. 59. More specifically in *Brown & Haywood Co. v. Ligon* (C. C.), 92 Fed. 851, a bond to secure performance of a contract recited the contract as existing, although in fact it appeared to have been executed four days after the bond. It was held, per Adams, J., in effect that the recitals of the bond controlled the date of the contract.

The rule is generally based upon principles of estoppel proper. It is also rested upon the maxim "*Volenti non fit in-*

juria": See Martin, J., in Bradford v. Skillman, 6 Mart., N. S., 123.

The evidence in this case sufficiently showed that the goods were sold by the plaintiff to the contractor, were of the kind appropriate for use in the performance of the contract, and were ordered by and delivered to the contractor for the purpose of being used in the execution of the contract. The analogy of the cases under mechanic's lien laws is apt: See John Paul Lumber Co. v. Hormel, 61 Minn. 195 303, 63 N. W. 718; Burns v. Sewell, 48 Minn. 425, 51 N. W. 224; Combination Steel & Iron Co. v. St. Paul City Ry. Co., 52 Minn. 203, 53 N. W. 1144; Howes v. Reliance Wireworks Co., 46 Minn. 44, 48 N. W. 448. It was not necessary that the plaintiff should have shown that the pipe actually entered into the construction of the sewer.

Order affirmed.

The Liability of a Surety is measured by his agreement, and is not to be extended by construction; his contract, however, is to be interpreted by the rules applicable to the construction of other contracts: Blades v. Dewey, 136 N. C. 176, 103 Am. St. Rep. 924; Fink v. Farmers' Bank, 178 Pa. 154, 56 Am. St. Rep. 746.

A Surety on an Official Bond is Estopped from denying any fact recited therein, when, by such denial, he seeks to avoid liability in an action between the parties to the bond: State v. McDonald, 4 Idaho, 468, 95 Am. St. Rep. 137.

A Recital in a Bond given by one contracting to construct a sewer that the contract is valid and subsisting precludes the sureties from asserting that it is ultra vires: Bell v. Kirkland, 102 Minn. 213, post, p. 621.

BELL v. KIRKLAND.

[102 Minn. 213, 113 N. W. 271.]

MUNICIPAL CONTRACT—Doctrine of Ultra Vires.—The tendency of courts to refuse recognition to the doctrine of ultra vires is less pronounced in the case of municipal than in the case of private corporations; but in both cases, when the doctrine is invoked, it should not be allowed to prevail where it will defeat the ends of justice or work a legal wrong. (p. 625.)

MUNICIPAL CONTRACT.—The Term "Ultra Vires" is used in two senses. The first describes a contract wholly outside the power of the corporation to make under any circumstances; the second, a contract within the power of the corporation to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power in some particular or through some undisclosed circumstance. Contracts in the first class are ultra vires

in the primary and proper sense of the term, and ordinarily are void in toto; but contracts in the second class are *ultra vires* in a secondary sense merely, and the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. (p. 626.)

MUNICIPAL CONTRACT—Doctrine of Ultra Vires.—The fact that a city has not procured a right of way for a portion of a contemplated sewer line does not render invalid its entire contract for the construction of the sewer. (p. 627.)

MUNICIPAL CONTRACT—Doctrine of Ultra Vires.—The facts that only a small proportion of a contract is *ultra vires* in any sense, and that it has been substantially performed by the parties, are strong, if not conclusive, considerations for refusing to hold it void. (p. 629.)

MUNICIPAL CONTRACT—Ultra Vires.—A Recital in a Bond given by one contracting to construct a sewer that the contract is valid and subsisting precludes the sureties from asserting it to be *ultra vires*. (p. 632.)

Lightner & Young, B. H. Schriber and Markham & Calmenson, for the appellants.

O'Brien & Albrecht, for the respondent.

215 JAGGARD, J. Plaintiff and respondent brought an action against defendants and appellants to recover the unpaid balance for materials furnished to one Kirkland to be used in the construction of the "Somerville sewer." Kirkland contracted to construct the sewer, and, as principal, signed an instrument in which the appellants joined as sureties, which purported to be a bond to the city of St. Paul conditioned for the performance of the contract, and for the payment for the labor and materials furnished in its execution. The total amount of the account was six thousand two hundred and eighty-six dollars and thirty cents. The balance unpaid was two thousand nine hundred and sixty-seven dollars and fifty-five cents. The amount of the bond was fifty-nine thousand two hundred dollars. The present is a test case. The court found for the plaintiff. It found as facts, *inter alia*, that the course of the sewer carried it under property hereinbefore more fully set forth as to which the city had acquired no right by condemnation or grant. This appeal was taken from an order denying defendants' motion for a new trial.

Defendants' essential argument is that, if the contract was *ultra vires* and void, so also was the bond, and that the agreement was shown to have been *ultra vires* and void.

In the first place, the agreement required the construction of a sewer through property not owned by the city. The

sewer provided for in the contract was a main sewer of about four thousand two hundred feet in length. It is cut into two almost equal parts by a railroad right of way and adjoining private property for two hundred and five feet. It is proposed to construct it to the Mississippi river as an outlet. In connection with the latter proposition, it is argued that a sewer is of no value unless continuous, or unless it has an outlet. It cannot reach the river because the last eighty-five feet is owned by the United States government. The result was two disjointed pieces of sewer without an outlet. The significant fact is that the *ultra vires* part of the contract leaves the sewer valueless. A contract to construct a useless sewer in private property is beyond the power of the city. The invalidity appears upon the face of the contract.

²¹⁶ In the second place, defendants' argument proceeds, the contract was not entered into in accordance with the mandatory provisions of the city charter. We have examined the record adduced in support of this contention. It may fairly be regarded as showing a failure to let the contract as required by the city charter. It is unnecessary to consider the details of this want of compliance. It was, in fact, made by the board of public works, the proper body. A valid preliminary order, a specification of the portion of its cost to be paid out of general funds and other essentials, may properly be conceded to have been wanting.

1. A proper preliminary consideration of the legal questions thus presented involves a brief reference to the attitude of the courts to the doctrine of *ultra vires*. That doctrine has been attacked with an earnestness amounting sometimes to asperity. "The doctrine of *ultra vires* is of very modern date and entirely the creation of the courts. There is no such thing as *ultra vires* in the case of a common-law corporation (Case of Sutton's Hospital, 10 Coke, 30 C), and it is not enacted in any statute. It affords, perhaps, the most remarkable instance in the history of English jurisprudence of the making of law by the judges; and, having once been created, it is now probably saddled onto the backs of the courts, like Sinbad's 'Old Man of the Sea,' not to be shaken off": 6 Cent. L. J. 3. "The reasoning (on the subject) involves a strange confusion of ideas": 2 Morawetz on Private Corporations, sec. 649. Judge Seymour D. Thompson regards the modern doctrine of *ultra vires* as a revolt against the ancient doctrine based on species of moral reformation. His con-

clusion is "that the doctrine of ultra vires has no proper place in the law of private corporations, except in respect of contracts which are bad in themselves, the making of which is prohibited by considerations of public morality, of justice, or of a sound public policy, and which, therefore, stand upon such a footing that neither party can be regarded as innocent or blameless in entering into them": 28 Am. Law Rev. 398. And see 5 Thompson on Corporations, sec. 5969.

In 9 Harvard Law Review, 255, Mr. George Wharton Pepper combats—and we think successfully—the existence of any clear distinction between the principles of the earlier and of the present decisions or of inextricable confusion on the subject in the American reports. He ²¹⁷ recognizes, however, that, "in modern times there has been a steady movement in the direction of enforcing unauthorized and prohibited contracts as between the parties." The tendency to what Mr. Cooke (28 Am. Law Rev. 227) calls "the extinction of the doctrine" is certainly very marked: 11 Harv. Law. Rev. 387; 13 Am. Law Rev. 661; 14 Harv. Law Rev. 332. After an exhaustive discussion of relevant authorities in *Re Assignment Mut. G. F. Ins. Co. v. Barker*, 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868, Mr. Freeman concludes: "After a study of the cases upon the subject . . . the impression is forced upon us that the doctrine of ultra vires, as applied to the contracts of private corporations, has almost lost its meaning. The undermining of the foundation upon which it has rested from its inception has proceeded simultaneously from different directions until the doctrine itself seems almost ready to fall of its own weight. The original rule that an ultra vires contract was illegal and void, could give rise to no rights, nor be validated by any performance or application of the law of estoppel, has practically been erased from the law, for those courts which do not contradict it directly do so indirectly by their manner of applying it. An appeal to the public interest that private corporations should be restricted in the making of contracts to the scope of their granted powers is growing more and more ineffectual where the rights of persons innocently entering into ultra vires contracts with such corporations intervene."

With respect to contracts by municipal corporations, one current opinion is that: The "contracts of corporations, whether public or private, stand on the same footing with contracts of natural persons, and depend on the same circum-

stances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals": *Argenti v. City of San Francisco*, 16 Cal. 256. We incline, however, to accept the views of Judge Dillon on the subject, thus summarized by counsel for the defendants: "The great principle of law is settled beyond controversy that the agents, officers, or even the city council of municipal corporations cannot bind the corporation by any contract which is beyond the scope of its power. . . . The history of the workings of municipal bodies has demonstrated the salutary nature of this proposition, and it is the part of true wisdom to keep the corporate wings clipped down to the lawful ^{and} standard. It results from this doctrine that contracts not authorized by the charter or by other legislative act—that is, not within the scope of the powers of the corporation under any circumstances—are void": *Dillon on Municipal Corporations*, 4th ed., sec. 457 (381). And see *Mayor v. Ray*, 19 Wall. 468, 22 L. ed. 164; *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333. There is, however, an unmistakable and proper tendency to apply to both classes of corporations the principle that "the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong": *Ohio & N. R. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

2. It is to be kept in mind that the term "ultra vires" is used in many different senses: 8 Words and Phrases, 7145, 7146. Two different uses of the term were pointed out in *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310, three in *Bissell v. Michigan etc. R. Co.*, 22 N. Y. 258, and four in *Green's Brice's Ultra Vires*, 33-35. For present purposes, it suffices to refer especially to two different meanings.

The first of these describes a contract which is not within the scope of the powers of a corporation to make under any circumstances, or for any purposes; for example, "Where a corporation authorized only to build a railroad engages in banking": *Mitchell, J., in Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310. Where "the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbour": *Kindersley, V. C., in Earl of Shrewsbury v. North Staffordshire*, 35 L. J. Ch. 156,

172. So, in the cases to which defendant refers us, it was held to be wholly outside of a city's power to "surrender control over streets" (*State v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656); to pay money to aid in building a shoe factory within its limits (*City of Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737); to aid in the construction of a dam for the purpose of improving a private water power (*Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366); to construct a building for the use of another municipality or other third person (*Borough of Henderson v. County of Sibley*, 28 Minn. 515, 11 N. W. 91; *Village of Glencoe v. County of McLeod*, 40 Minn. 44, 41 N. W. 239); or without authority to buy real estate (*Bazille* ²¹⁹ *v. Board of Commrs. of Ramsey County*, 71 Minn. 198, 73 N. W. 845). For further illustrations, see *Ingersoll on Public Corporations*, 292, 293. The second of these meanings refers to contracts of a class which the corporation had a right to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power "in some particular or through some undisclosed circumstance" affecting the individual contract in issue.

The former class is *ultra vires* in the primary, and really only proper, use of the term, while in the second it is merely secondary: *Mitchell, J., in Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310. That is to say, an *ultra vires* municipal contract, in its true sense, is a contract relating to matters wholly outside the charter powers of a corporation: 2 *Dillon on Municipal Corporations*, secs. 935, 936. In *Miners D. Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300, *Sawyer, C. J.*, justly remarked: "These distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void in toto, and the corporation may avail itself of the plea. But, when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case": And see *City of Valparaiso v. Valparaiso City W. Co.*, 30 Ind. App. 316, 65 N. E. 1063; *Rogers v. City of Omaha (Neb.)*, 107 N. W. 214; 5 *Thompson on Corporations*, sections 5975, 5976, 5977; 2 *Dillon on Municipal Corporations*, sec. 936; 2 *Current Law*, 977.

3. The inquiry naturally arises as to the sense in which the present contract is *ultra vires*. In the first place, it is *ultra*

vires in the secondary and restricted sense only. The city had the undoubted charter power to contract for the construction of a sewer. So to do was strictly within the object of the creation of the corporation. That was a familiar and necessary part of its function in government. The contract was not of the class of contracts which are void for want of legal capacity on the part of the city to make them. On the contrary, it was such a one as the city could properly have made, although it may be admitted that this particular contract it ought not to have made. It is not at all such a contract as is prohibited by statute or public morals, any more than by its subject matter. If the officers executing it had been regularly authorized, and if consent of the ²²⁰ owners of all premises through which it was to run had been obtained, it would unquestionably have been a valid contract.

In the second place, the present contract is ultra vires, if at all, as to a small part only. It is convenient to postpone the consideration of irregularities in the letting of the contract, and to here refer only to the failure of the city to condemn. So far as that failure is addressed to private property, which the city could have condemned, the controversy is disposed of by the ruling in *Keough v. City of St. Paul*, 66 Minn. 114, 68 N. W. 843. It was there held that the contract for grading a street is not ultra vires, because the council has omitted to establish gradient lines, nor because condemnation proceedings have not been consummated. In the last analysis, however, defendants rely on the fact that the outlet of the sewer, to the extent of eighty-five feet, was owned by the government, and that the contract was beyond the power of the city, because it involved the commission of a trespass. In this connection we are cited to *Sang v. Duluth City*, 58 Minn. 81, 59 N. W. 878. It was there held that a contractor could not recover loss of profits because the city had not acquired the right of way across the property of a railway company for a street which he undertook to grade, pave and otherwise improve. As to such a part of the contract, it was held to be ultra vires. It was said in that case: "Plaintiff does not claim to recover for any work so performed, but claims loss of profits for being prevented from performing on the railroad right of way and loss by depreciation of material purchased for that part of the work." That case is obviously not at all inconsistent with authorities holding that "an entire contract is not invalid because part thereof

is *ultra vires*." A court should not destroy a contract made by parties further than some good reason requires: *Elliott on Municipal Corporations*, sec. 291. And see *Illinois T. & S. Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Spier v. City of Kalamazoo*, 138 Mich. 652, 101 N. W. 846; 2 *Current Law*, 977, notes 82, 83. The decision most nearly similar to the case at bar in this connection which we have been able to find is *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 811. This is the rule. That a contract void as to an inconsiderable or insignificant part is as to the rest valid is only one of its applications.

In the third place, the features of this contract objected to remain ²²¹ *ultra vires* in this restricted sense and to this limited extent, only so far as is possible with respect to an executed contract. The learned trial judge in his memorandum said: "The city paid large sums of money upon this contract to the defendant Kirkland as the work progressed. One of these sureties received one of these payments. Neither of Kirkland's sureties can lawfully plead that the contract between the city and Kirkland is *ultra vires* because so far as either of them is interested, and so far as concerns this cause, the contract has been fully performed. Where an *ultra vires* contract has been fully performed by both parties, it is justly held that it is no longer assailable by either: *Note to In re Mutual Ins. Co.*, 70 Am. St. Rep. 166." And see 2 *Morawetz on Private Corporations*, sec. 689; *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85, collecting cases at p. 285. The learned trial judge proceeds: "The above treats of contracts with private corporations, but it is applicable in this case where the rights of the municipal corporation are not involved."

In the leading case of *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659, Mr. Justice Strong approves of the following rule laid down in *State Board v. Citizens' Street Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702, in an action against a municipal corporation: "Although there may be a defect of power in a corporation to make a contract, yet, if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract." This was followed and approved in *City of East St. Louis v. East St. Louis etc. R. Co.*, 98

Ill. 415, 38 Am. Rep. 97. In *Argenti v. City of San Francisco*, 16 Cal. 255, after elaborate examination of the authorities, recovery on an executed contract with the city was allowed, although there was no evidence that the officer who signed them was expressly authorized. To the same effect are *Rogers v. City of Omaha* (Neb.), 107 N. W. 214; *Bodewig v. City of Port Huron*, 141 Mich. 564, 104 N. W. 769; *Lines v. Village of Otego*, 91 N. Y. Supp. 785; *Wilkins v. City of New York*, 9 Misc. Rep. 610, 30 N. Y. Supp. 424; *City of Tyler v. Jester & Co.*, 97 Tex. 344, 78 S. W. 1058; *Valparaiso v. Valparaiso City W. Co.*, 30 Ind. App. 316, 65 N. E. 1063 (a particularly well-considered case); *City of Fergus Falls v. Fergus Falls Hotel Co.*, 80 Minn. 165, 81 Am. St. Rep. 249, 83 N. W. 54, 50 L. R. A. 170.

We have referred to these considerations to make plain the restricted sense and extent of the ultra vires aspect of this contract and its executed character, as well as the trend of judicial position concerning the legal position of plaintiff's contract. The facts that as to a small portion of a contract with a municipality only it was ultra vires in any sense, and that it has been substantially executed by the parties basing rights of action upon it, are strong, if not conclusive, considerations for refusing to hold it absolutely void. It is, however, unnecessary, and because of the course the argument has taken in this court, undesirable, to determine whether the contract was valid in the sense that the contractor could have recovered on it from the city.

4. This is a suit against the bondsmen by a materialman. The final and real question which must be considered in the light of these considerations concerns the effect on these materialmen of the doctrine of ultra vires.

In a suit against the bondsmen of the contractor, it is difficult to discover what considerations of public policy would tend to favor the forfeiture of this plaintiff's right. Without controversy, "all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract": *State v. Minn. Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *Bazille v. Board of Commrs. of Ramsey County*, 71 Minn. 198, 73 N. W. 845; *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333; *Mitchell v. Board of Commrs. of St. Louis County*, 24 Minn. 459. It might accordingly be reasonable to hold that a materialman dealing

with a public contractor is bound to see that the contract with the city is of a class within the scope of municipal powers. But defendants' reasoning on this point, carried to its logical conclusion, would have imposed on the material-man, before he extended credit on the strength of the contract and bond, the necessity of not only passing on the validity of the action of the council, but also of determining through what premises the sewer was to pass, according to the survey, and their correct description. ²²³ He would then have been compelled to ascertain the legality of the city's rights to any streets, to any land condemned by it, or of any title acquired from property owners, and thereunto to examine and to have access to the records of the city officials, and probably to obtain and examine the abstracts of title to the various tracts involved. It would, in effect, require the city to have completed all details affecting a sewer before a valid contract could be made. This is not the law: *Keough v. City of St. Paul*, 66 Minn. 114, 68 N. W. 843. In effect, the rule for which defendants contend would tend to deprive the contractor of credit and involve serious delays and embarrassments, to legislate a new clause into the charter, and repeal the present express provisions as to the contract and the bond which are expressly designed to enable the contractor to secure labor and materials upon the credit of the contract and bond. By what authority or reasoning is one selling material to a municipal contractor made the curator of public interests, and required to do independently the work of the counsel for the city as to the correctness of titles, or of the engineer as to the feasibility of the construction of a sewer or its utility when constructed? What considerations remove him from the protection of the presumption of performance of official duty by which persons dealing on the faith of instruments ordinarily have the right to rely?

There is good authority to the effect that where the act of a corporation is done with power to do it, but without the formality prescribed for the execution of the power, persons dealing with the company are not bound to do more than to ascertain that the power to do the proposed act exists: 5 *Thompson on Corporations*, 5978; 2 *Morawetz on Private Corporations*, secs. 678, 686. *Allen, J., in Moore v. Mayor*, 73 N. Y. 238, 29 *Am. Rep.* 134, said: "Persons dealing with corporations in respect to a matter within the general scope of the powers of the city government need not go behind the

doings of the common council, apparently regular, to inquire after preliminary or extrinsic irregularities. . . . It is indispensable to any government, state or municipal, that full faith and credit be given to the acts of the governing body, and that individuals having occasion to deal with agents of the government should be permitted to regard the acts of the government valid in the absence of any apparent defect, either in the power or the manner of its exercise. If the act is not within the general powers ²²⁴ of the municipality or its governing body, the case would be different, for everyone dealing with the agents of the municipality is bound to know the limits of that power. It is not allowable, however, for a municipal corporation to perpetrate a fraud upon those contracting with it upon the faith of its laws and ordinances, apparently valid and represented as such, by repudiating them upon the allegation of some technical and formal irregularity in their adoption, an omission of some collateral act, some formality prescribed by statute, not of the substance of the power or jurisdictional in its character." That leading case and this doctrine were approved by this court in *Bradley v. Village of West Duluth*, 45 Minn. 4, 47 N. W. 166. And see *Brownell v. Town of Greenwich*, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685; *Ohio & N. R. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Miners D. Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Green's Brice's Ultra Vires*, 37, and note a, p. 506; 5 *Thompson on Corporations*, sec. 5967.

The policy of the law—and apparently the law itself—oppose the adoption of defendants' views. Nor does the admitted principle that the defendants, as sureties, are entitled to the strict construction of the facts giving rise to an action against them, and are generally favored in the law, affect the doctrine of *ultra vires*. As a matter of abstract justice, the sureties to whom a consideration of legal sufficiency has moved, although it does not appear that substantial benefits have accrued to them, have held themselves out as responsible for the validity of the contract to persons having the right to rely upon the security that bond is expressly designed to afford. Moreover, "*Volenti non fit injuria*": *Red Wing Sewer Pipe Co. v. Donnelly*, 102 Minn. 192, ante, p. 619, 113 N. W. 1. The contractor could not assert the plea of *ultra vires* against the city to escape liability on the contract or to retain benefits received under it. By parity of reasoning, the sureties are in no position to raise the same defense as against

this materialman: See *City of St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. Rep. 764, 14 S. W. 825; *City of Fergus Falls v. Fergus Falls Hotel Co.*, 80 Minn. 165, 81 Am. St. Rep. 249, 83 N. W. 54, 50 L. R. A. 170; *Baker v. Northwestern Guaranty Loan Co.*, 36 Minn. 185, 30 N. W. 464; *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; 10 Cyc. 1166; 5 Thompson on Corporations, sec. 6030. This reasoning is in exact accord with the rule founded upon estoppel, and frequently applied to defeat the plea of ultra vires which denies to a party benefited by a contract ²²⁵ the right to question its validity: *Brown, J., in City of Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7. And see *Boehmer v. Schuylkill County*, 46 Pa. 452; *Supervisors v. Bates*, 17 N. Y. 242; *Mississippi Co. v. Jackson*, 51 Mo. 23; *McLean v. State*, 55 Tenn. 22; *Mayor v. Merritt*, 27 La. Ann. 568.

6. The defendants executed a bond which recited the contract as being valid and subsisting. They are bound by that recital. It is elementary that the guaranty of the payment of an obligation imports an agreement or undertaking that its makers were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers: *Mason, J., in Remsen v. Graves*, 41 N. Y. 471. And see *Walden Nat. Bank v. Birch*, 55 Hun, 606, 7 N. Y. Supp. 934; 20 Cyc. 1422. Counsel for defendants, however, argue that to such a public bond as this the principles of estoppel do not apply. The authorities are to the contrary. It was held by this court in *Red Wing Sewer Pipe Co. v. Donnelly*, 102 Minn. 192, ante, p. 619, 113 N. W. 1, that the recital in a public bond controls the date of the contract. The general rule is: "A surety on a bond issued or taken by a municipal corporation cannot make the defense of ultra vires or total lack of power on the part of the corporation, or that it transcended its municipal powers. He is estopped from defending on the ground that in letting a municipal contract legal formalities have not been complied with": 27 Am. & Eng. Ency. of Law, 2d ed., 467. The authorities there cited in support of this proposition we have examined, and found that they substantially sustain it. And see *Stearns on Suretyship*, p. 256; *Pingrey on Suretyship and Guaranty*, secs. 59-61; 1 *Brandt on Suretyship and Guaranty*, sec. 54.

The most nearly specific authority which has been called to our attention, or which we have been able to find, is *City of Machison v. American S. E. Co.*, 118 Wis. 480, 95 N. W.

1097. The court, per Winslow, J., there said: "Taxpayers whose money is about to be spent, or property owners whose land is about to be charged, may challenge the legality of municipal acts and contracts calling for such expenditures on the ground that the proper legal steps have not been taken, but persons who enter into a contract with the city stand in a different position. Such a person cannot even make the defense of *ultra vires* or total lack of power on the part of the corporation to make the contract: *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211, 94 ²²⁶ N. W. 74. If the defense of *ultra vires* cannot be made, it is very evident that the lesser claim of failure to execute a given power in the statutory way must also be ineffective. By the express terms of the bond, the surety company has made the contract a part of the bond. They have contracted with the city, and cannot now be heard to say that the city had no power to enter into the contract or did not make the contract in the required manner."

Our attention has, however, been directed to *Conant v. Newton*, 126 Mass. 105. There sureties on a probate bond were held not estopped to assert its invalidity because the trustee had been appointed orally. A number of questions as to acts *ultra vires* of a municipal corporation were involved. The case is properly regarded as one of a group in which a surety has been held not estopped by a recital due to fraud or mutual mistake, without any fraud or negligence on his part: *Blaney v. Rogers*, 174 Mass. 277, 54 N. E. 561. No equitable relief was sought in the case at bar because of any mutual mistake or fraud. The allied cases will be found collected in 1 *Brandt on Suretyship and Guaranty*, sec. 57; cf. sec. 56. We have examined all of these cases in detail. Some of them tend to confirm the conclusion here reached; some of them are inconsistent with it and with the general trend of authority: See 40 *Cent. Dig.*, "Principal and Surety," sec. 91½. Undoubtedly there are cases, and lines of cases, more or less out of harmony with the conclusion here reached, and others in addition to those here referred to tending to support it.

7. In view of the clear tendency of the courts to avoid injustice from the application of the doctrine of *ultra vires*, of the restricted sense in which in any aspect this contract may be regarded as of that character, of the absence of reason for destroying the contract because only part was not

directly within the power of the city, of the extent to which it has been executed, and of the peculiar position of the bondsmen defending against a materialman who in good faith sold material for the benefit of the contractor, in reliance on a bond on which he had a right to rely, and which recited the contract as valid and subsisting, we are clearly of the opinion that the conclusion of the trial court on this point was correct.

Incidentally, defendants have argued that, when plaintiff furnished the material for the construction of the sewer, it is not shown where ²²⁷ the material was used. There is no merit to the contention: See *Red Wing Sewer Pipe Co. v. Donnelly*, 102 Minn. 192, ante, p. 619, 113 N. W. 1.

Order affirmed.

ELLIOTT, J., Concurring. The sureties cannot be heard to assert that this contract is *ultra vires*. A municipal corporation with charter power to construct sewers irregularly entered into a contract for the construction of a particular sewer which was to extend in part through land over which the corporation had acquired no right by grant or condemnation. The contractor executed a bond with the required sureties, conditioned upon the faithful performance of the contract with the city and the payment of the lawful claims for labor and material used in the work. This bond recited that the principal had entered into a contract with the city, and that the contract had been duly executed by each of the contracting parties. By executing this bond the sureties acknowledged that the contract was valid and the bond authorized. I think it is settled that a guaranty of payment of an obligation or the performance of an undertaking imports an agreement that the instrument is valid and the undertaking legal.

If the sureties on the bond can defeat the claims of laborers and materialmen, because of irregularities in the making of the contract referred to in the bond, it follows that every man who contemplates selling a foot of pipe to a contractor, and every laborer, before commencing work with his shovel, must employ counsel learned in the law to ascertain whether the corporation counsel has properly performed his duties and verify the formal statement of the sureties that a contract exists between the city and the contractor.

This burden rests upon the sureties, and they are bound by the recitals in the bond. I would place the decision upon this ground.

The Doctrine of Ultra Vires is the subject of a note to *In re Assignment of Mutual etc. Insurance Co.*, 70 Am. St. Rep. 156. The general rule is that where a private corporation has entered into a contract which is not opposed to public policy or positive law, the corporation cannot be heard on the plea of *ultra vires* if the contract has been in good faith performed by the other party and the corporation received the benefits thereof: *White v. Commercial etc. Bank*, 66 S. C. 491, 97 Am. St. Rep. 803; *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 127 Iowa, 350, 109 Am. St. Rep. 387; *West Maryland R. E. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 111 Am. St. Rep. 362.

SALLDEN v. CITY OF LITTLE FALLS.

[102 Minn. 358, 113 N. W. 884.]

PUBLIC STREET—Damages for Change of Grade.—Under a constitutional provision that private property shall not be taken or damaged for public use without just compensation, a city is liable to the owner of property for damages thereto resulting from the first grading of the adjacent street. (p. 637.)

PUBLIC STREET—Change in Grade.—The Measure of Damages to abutting property from the first grading of a street is the difference in the value of the property before and after the acts complained of, unless the cost of restoring the premises to their natural condition is less than the difference in value, in which case such cost is the measure of relief. (p. 638.)

NEW TRIAL.—A Motion for Judgment Notwithstanding the Verdict, which the court denies, does not bar a subsequent motion for a new trial upon a settled case. (p. 639.)

Donah Trettel, Louis W. Vasaly and Arthur P. Blanchard,
for the appellant.

Elmer A. Kling, for the respondent.

359 BROWN, J. Action to recover damages alleged to have resulted to plaintiff's property from the acts of defendant in grading one of its streets in the city of Little Falls. Plaintiff had a verdict, and defendant appealed from an order denying a new trial.

The facts, briefly stated, are as follows: Some time prior to the acts complained of by plaintiff, the city formally established the grade of the street in question, and the officers thereof leveled and graded the same in conformity therewith, resulting in raising the street in front of plaintiff's property to a height of about three feet. This was the first grade ever established by the city. The assignments of error present two questions for consideration: (1) Whether a property

owner is entitled to damages from the municipality resulting from the first grading of a public street; and (2) whether the record presents any evidence of injury to plaintiff's property within the rule of damages applicable to such cases.

1. At common law a municipal corporation, clothed with power to grade and improve its streets, is not liable to property owners for consequential damages necessarily resulting from the action of its officers in establishing street grades and improving them in conformity therewith, except in those cases where adjoining property is in fact invaded or the work of improvement has been negligently performed: *Lee v. City of Minneapolis*, 22 Minn. 13; *Alden v. Minneapolis*, 24 Minn. 254. The theory of the law in such cases is that persons owning property within the municipality are deemed to have acquired it subject to the reserved right of the authorities to make such improvements in the streets thereof as public interests may, from time to time, require, and injuries necessarily resulting therefrom the common law declares *damnum absque injuria*. But the rule has been changed in many of the states by statutory and constitutional provisions to the effect that private property shall not be taken "or damaged" for public use without just compensation first paid or secured. Under such provisions the authorities are nearly uniform in holding the municipality liable for consequential damages caused by a change from an established grade; i. e., where a grade is once established by public authority, and private property is improved with reference thereto, a subsequent alteration or change in that grade to the damage of abutting property ³⁶⁰ renders the municipality liable: *Dickerman v. City of Duluth*, 88 Minn. 288, 92 N. W. 1119 and cases cited.

But upon the question here before the court, namely, whether there is a liability for damages resulting from the first establishment of the grade and improvement in conformity therewith, the authorities are not harmonious. A few courts apply the common-law rule to the first grade and improvement, and limit the liability of the municipality to cases where injury and damage result from a change of a previously established grade with reference to which private property was improved. The question presented in this case is whether, under the provisions of our amended constitution, the defendant is liable in this action, the injury complained of having resulted from the first establishment of a grade. Originally, section 13 of article 1 of our constitution provided, in substance and effect,

that private property should not be taken for public use without just compensation being made therefor. It was amended in 1896, so that it now provides that private property shall not be taken "or damaged" for public use without just compensation being paid. It was held in the Dickerman case, just cited, that the effect of this amendment was to abrogate the common-law rule that there was no liability in such cases, at least so far as the change from an established grade is concerned.

A majority of the courts discover no reason for a distinction between the first and subsequent grades, and give force and effect to constitutional provisions such as ours by holding that liability exists for injuries resulting from the first, as well as from a change of a previously established, grade. A careful examination of the subject suggests no valid legal reason for a distinction between the two classes of cases. Private property may be as much injured or damaged by the first improvement as by the second, and unless an exception in harmony with the common-law rule is to be read into the constitution where the first improvement is involved, it must be held that liability exists in such cases. The change in our constitution by which compensation is secured where private property is taken "or damaged" for a public use was for the purpose of awarding appropriate relief in all instances where public use requires the invasion of private rights, and the effect of its adoption as a part of the fundamental law of the state was, as said in the Dickerman case (88 Minn. 288, 92 N. W. 1119), to abrogate the common-law ³⁶¹ rule that no damages resulting from improvements of this character are recoverable: *Vanderburgh v. City of Minneapolis*, 98 Minn. 329, 108 N. W. 480, 6 L. R. A., N. S., 741.

In the following cases, under constitutional provisions like those of this state, or similar statutory enactments, the liability of the municipality for damages resulting from the first grading of the street is affirmed; *New Brighton v. United Presbyterian Church*, 96 Pa. 331; *Hendrick's Appeal*, 103 Pa. 358; *Davis v. Missouri P. Ry. Co.*, 119 Mo. 180, 41 Am. St. Rep. 648, 24 S. W. 777; *Atlanta v. Green*, 67 Ga. 386; *Moore v. Atlanta*, 70 Ga. 611; *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Rear- don v. San Francisco*, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503; *Hammond v. Harvard*, 31 Neb. 635, 48 N. W. 462; *Woodbury v. Beverly*, 153 Mass. 245, 26 N. E. 852; *Bloom- ing-*

ton v. Pollock, 141 Ill. 346, 31 N. E. 146; Less v. Butte, 28 Mont. 27, 98 Am. St. Rep. 545, 72 Pac. 140, 61 L. R. A. 601; Blair v. City of Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 26 S. E. 341, 35 L. R. A. 852; City of Henderson v. McClain, 102 Ky. 402, 43 S. W. 700, 39 L. R. A. 349; Searle v. Lead, 10 S. Dak. 312, 73 N. W. 101, 39 L. R. A. 345; Hickman v. City of Kansas, 120 Mo. 110, 41 Am. St. Rep. 684, and note, 25 S. W. 225, 23 L. R. A. 658. The question is fully discussed in these cases, and they demonstrate that the constitutional and statutory enactments awarding compensation for damaged private property were intended to apply to cases of this kind. We adopt this construction of the provisions of our law, and hold that the learned trial court was right in its ruling that plaintiff was entitled to recover, if the acts of defendant resulted in any injury to her property. The suggestion of counsel for defendant that the acts of defendant's officers in improving the street before the ascertainment and payment of damages were void, and not binding upon the city, and hence that no action therefor will lie, is disposed of in Vanderburgh v. City of Minneapolis, 98 Minn. 329, 108 N. W. 480, 6 L. R. A., N. S., 741.

2. The second question presented is whether the evidence brings the case within any rule of damages applicable to injuries of this kind. The proper measure of damages is the difference in the value of the property alleged to have been injured before and after the acts complained of, unless the cost of restoring the property to its natural condition is shown to be less than the difference in value, in which case the cost of restoration is the measure of relief to which the property owner is entitled: Ziebarth v. Nye, 42 Minn. 541, 44 N. W. 1027. A thorough reading of the record discloses in this case no evidence to sustain the verdict, within this rule. In fact, there was no competent evidence of damages to plaintiff's property within any rule with which we are familiar. The only testimony bearing upon the subject was given by plaintiff's husband, to the effect that "to the best of his information and belief" the damage was one thousand dollars. No attempt was made to show the value of the property before or after the acts complained of, and in the absence of some evidence in that direction the cost of raising plaintiff's buildings to the level of the new grade cannot be made the test in determining the amount of her recovery. Such cost could be resorted to only when it was shown to be less than the differ-

ence in value: *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027. The total lack of evidence to bring the case within the appropriate rule of damages requires a reversal of the order denying a new trial.

3. Counsel for plaintiff contends that the order appealed from should be affirmed, for the reason, as he urges, that defendant waived the right to move for a new trial. This contention is based upon the fact that, after the verdict had been returned, defendant moved the court for judgment, notwithstanding the same, which motion was denied. Thereafter, upon a settled case, the motion for a new trial was made, heard by the court without objection, and denied. We discover no waiver in this state of the facts. The motion for a new trial was, so far as the record discloses, made within the time prescribed by the statute, and the right to make it was not barred by the previous separate motion for judgment. The cases cited by counsel in support of this contention (*Bragg v. Chicago etc. Ry. Co.*, 81 Minn. 130, 83 N. W. 511; *Wright, Barrett & Stilwell Co. v. Robinson*, 79 Minn. 272, 82 N. W. 632) are not in point. In those cases a motion for judgment was made, and upon that the moving party rested. No motion for a new trial was made at any time, and the court held that the party could not obtain a new trial on an appeal from an order denying a motion for judgment notwithstanding the verdict; that by limiting and resting upon the motion for judgment he waived the right to ask for a new trial. In this case the defendant did not rest upon his motion for judgment, but subsequently made his motion for a new trial, which was denied. This was proper practice.

Order reversed.

The Liability of Cities for Changing the Grade of Streets is the subject of a note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835. Under a constitutional provision that private property shall not be taken or damaged for a public use without just compensation, it has been decided that a recovery can be had for injuries received from the grading of a street to the first and only grade established thereon: *Less v. Butte*, 28 Mont. 27, 98 Am. St. Rep. 545. But see *Leiper v. Denver*, 36 Colo. 110, 118 Am. St. Rep. 101. As to whether a city is liable for removal of lateral support in grading a street, see *Talcott v. City of Des Moines*, 134 Iowa, 113, ante, p. 419.

STATE v. BOARD OF SUPERVISORS OF ROCKFORD.

[102 Minn. 442, 114 N. W. 244.]

DRAINAGE STATUTE—When Unconstitutional.—A statute providing that when any swamp land may endanger the public health, when its drainage will result in the reclamation of other waste lands, or where the construction of a ditch will benefit lands of adjoining owners, the owner of such land may petition the board of supervisors for the construction of a ditch as they may deem proper, the proceedings in respect to assessments to be analogous to those for local improvements, is unconstitutional because in effect authorizing the taking of property for private purposes and without due process of law. (p. 642.)

A. H. Cutting, for the relator.

J. T. Alley, for the respondents.

⁴⁴² JAGGARD, J. The relator secured a writ of certiorari to the board of supervisors of a given town to review the proceedings had by them in the matter of laying out a ditch or drain pursuant to chapter 191, page 215, of the Laws of 1907. The petitioner in those proceedings owned land adjoining that of the relator. His petition set forth, inter alia, that on the south side of his lands there were several acres of wet and marshy land, which on account of its wet condition endangered the public health, the drainage of which would promote the public health and would reclaim several acres of that wet land. The proposed course of the ditch was through the land of the relator. The essential question presented ⁴⁴³ by the appeal is whether chapter 191, page 215 of the Laws of 1907 is constitutional. Relator insists that the law is unconstitutional and repugnant to the fourteenth amendment to the constitution of the United States and to the constitution of the state of Minnesota, in that it sought to deprive the relator of his property without due process of law, and to take his property for a private purpose only, and for no public purpose, and to take and assess his land for a private purpose only.

The law in question (Laws 1907, p. 215, c. 191) is to be distinguished from the county drainage ditch act (Laws 1901, c. 258, p. 413). The constitutionality of that act was sustained, because the drainage of large tracts of wet and overflowed lands would operate beneficially to the public and would conduce to public health, and because, therefore, property taken in its enforcement was taken for a public purpose, and not for private advantage: State v. Board of Commrs. of

Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. And see *Lien v. Board of Commrs. of Norman County*, 80 Minn. 58, 82 N. W. 1094. The propriety of that conclusion is not questioned by this appeal, nor by this decision.

The act here in question is an essentially different one. It purports by its title "to provide for the drainage of marsh, swamp or wet lands in any town or township in the state of Minnesota by the owners of such lands when the same cannot be drained without affecting the lands of others, and providing for a penalty for obstructing or injuring the ditches or drains constructed under the provisions of this act." Section 1 provides in substance that when any swamp, marsh or wet land, on account of its condition, may endanger the public health, or where its drainage will result in the reclamation of otherwise waste lands, "or where the construction of such ditch or drain is of benefit to the lands of adjoining owner or owners," the person owning such wet lands may, in case the land owners shall be unable to agree in regard thereto, file with the designated officer a petition describing the lands through which it is desired to construct the ditch or drain and its general course or character. Thereupon, after hearing by the board of town supervisors, under section 2, upon notice and examination by them, the supervisors "shall decide upon the application ⁴⁴⁴ as they deem proper." Further provisions follow with respect to the construction of the ditch upon their favorable action, and with respect to assessments of benefits and damages, in accordance with the general analogy of local improvement assessments.

It is to be noted that the proceedings may be had under the act (1) when public health may be in danger; (2) or when the drainage would result in the reclamation of waste lands; (3) or "where the construction of such ditch or drain is of benefit to the lands of adjoining owner or owners." The use of the disjunctive in this connection is significant. It is a necessary and inherent part of the act. Under the express terms of the law the property of adjoining land owners may be taken for a private purpose only, and for no public purpose whatever. The basis of the law, in other words, has no necessary reference to either the preservation of the public health or the reclamation of large tracts of otherwise waste land. The law authorizes the taking, against the owner's will, of enough of his lands to make a ditch, or the imposition of a

burden on that land to that extent against the owner's will and for the benefit of an adjoining land owner. It is plainly designed to promote individual convenience. Of necessity, it affects the public only indirectly, as the public may share in the profit of the particular individual. If two adjoining land owners can agree upon such a ditch, the law would enforce a proper contract expressing the meeting of their minds; but it cannot compel one man to part with any part of his land, nor impose a burden upon it merely for his neighbor's advantage. It is wholly immaterial whether this is done directly or indirectly, through the general analogy of local improvement and assessments.

It is elementary and undisputed that "a legislative act which takes or undertakes to authorize the taking of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and ⁴⁴⁵ they cannot be successfully prostituted for private purposes. . . . The legislature cannot by its mere fiat make a private use a public one. It follows that a statute which attempts to authorize the condemnation of private property for other than a public use is void, without reference to any legislative declaration as to the nature of the use": *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A., N. S., 638. It is equally certain that no assessment can be levied for a purely private purpose.

An examination of other parts of the same statute has served to emphasize the propriety of the conclusion here reached. Enough, however, has been set forth to show that the law is clearly unconstitutional.

It is accordingly ordered that the order and judgment of the board of supervisors heretofore made in this proceeding be and is in all things reversed and held for naught, and that all orders, judgments and proceedings had under said law be vacated.

The Constitutionality of Drainage Statutes is discussed in *Mound City Land etc. Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727; note to *Zircle v. Southern Ry. Co.*, 102 Am. St. Rep. 832.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

HEADY v. CROUSE.

[203 Mo. 100, 100 S. W. 1052.]

EQUITY JURISDICTION to Decree Sale of Minor's Land.—Courts of equity have no inherent jurisdiction to decree a sale of a minor's land for the mere purpose of reinvesting the proceeds. (pp. 651, 652.)

JUDGMENTS—Who Bound by.—If a testator, dying childless, devises his land to his widow, with remainder to the heirs of her body, and after she marries again and has children, she and her husband obtain a decree against them authorizing a sale of the land for reinvestment, the children of a daughter of such widow, born after the entry of the decree, such daughter having died before the widow, are not bound by it, as they derive title, not by inheritance from their mother, but directly from the will as being heirs of the body of their grandmother. (p. 653.)

INFANTS—Ratification of Invalid Sale of Land.—If a decree of court rendered without jurisdiction attempts to create a lien on certain land of a father in favor of his minor children whose land he is authorized to sell for reinvestment, to secure them in the purchase money, and afterward divides all of his land among them by deeds of gift, the acceptance of such deeds does not amount to a ratification of such invalid sale of the land of the children, nor preclude them from attacking it. (pp. 653, 654.)

Norton, Avery & Young and F. W. Howell, for the appellants.

J. A. Seddon and McPheeters & Harris, for the respondents.

106 VALLIANT, J. Ejectment for certain land in Lincoln county. Charles M. Shelton was the common source of title; he died in 1848, leaving a wife but no ¹⁰⁷ child, and leaving also a will by which he devised the land in question to his wife, Jane S. Shelton, for life, remainder to the "heirs of her body." After the death of the testator his widow married Joseph M. Heady, by whom she had six children, Mary,

Charles, Laura, Sarah, Annie and Joseph W. Mary married John Carson and died before her mother, leaving two children, who are plaintiffs in this suit; Laura married Hawley Chappel and died before her mother, leaving three children, who are also plaintiffs. Jane, the widow of Charles M. Shelton, afterward the wife of Joseph M. Heady, died in 1900; the plaintiffs are the surviving children and grandchildren above mentioned, and are the only heirs of her body. Plaintiffs claim title under the will of Charles M. Shelton.

Defendants claim title through a sale of the land made under a decree of the circuit court of Lincoln county in 1871. The pleadings in that case were not in evidence, and it is said in the brief of counsel that they were lost and therefore could not be produced, but the decree was in evidence and from it the following appears: The plaintiffs were Joseph M. Heady and Jane, his wife, and the defendants were their above-named children, all of whom were then living and all of whom were minors except Mary. The decree recites that all the defendants were personally served with process, that Mary appeared by her attorney and the minors by their guardian ad litem. The court, after first finding that the land (describing it) belonged to Shelton in his lifetime, and was by his will devised to his wife for life, remainder to the heirs of her body, then finds "that it will conduce to the interest of the defendants, who are the heirs of the body of the said Jane S. Shelton, now Jane S. Heady, to sell the said real estate and to invest it in other real estate more productive and beneficial to said defendants." Then the decree goes on to recite that the court finds that ¹⁰⁶ Joseph M. Heady owns certain other lands in that county, describing it; thereupon it was decreed that Joseph M. Heady be appointed a commissioner to sell the Shelton land for not less than ten thousand dollars, and for the purpose of securing to the defendants the payment of the purchase money it was decreed to be a lien in their favor on the land owned by Heady—at least that is what respondents think it means, but if so there is a mistake in the description. The date of the decree is March 28, 1871.

Defendants' next offer was a deed from Joseph M. Heady, the commissioner, under the decree conveying the land to David H. Rashback, trustee, reciting that it was sold for ten thousand and seven dollars, and forty-six cents, and that Rashback had on the day of the date of the deed paid the commissioner six thousand dollars, the balance due on the

sale. The deed was dated September 20, 1878, more than seven years after the date of the decree. There was no report of the sale to the court for confirmation, but the deed was acknowledged in open court on the date last named. After this came other deeds purporting to bring the title, except as to an undivided one-eleventh, down to the defendants. The judgment was for the defendants and plaintiffs appealed.

1. When the decree was offered there was some objections interposed, chief among which was its alleged invalidity for lack of jurisdiction in the court, and also because it appeared on its face to have been altered by erasure and interlineation.

The question of jurisdiction in the circuit court in 1871 to render the decree is the first serious question in the case.

At the date of the rendition of this decree there was a statute which authorized the circuit court to order a sale of a minor's real estate for investment in stocks or other real estate when it should appear to the court to be for the benefit of the minor to do so: Gen. ¹⁰⁰ Stats. 1865, p. 470, secs. 34, 35. The procedure there prescribed was that the guardian or curator of the infant should petition the circuit court setting forth the condition of the estate and the facts and circumstances which were deemed to render such a proceeding desirable or necessary, whereupon the court should investigate the matter, and "if after full examination on the oath of disinterested and credible witnesses" the court should find that it would be to the interest of the ward, it might make the order, first, however, requiring the guardian or curator to give bond and security for the faithful discharge of the duty and account for the proceeds of the sale.

The same is substantially the statute law of the state now, except that the jurisdiction is now lodged in the probate court instead of the circuit court: Rev. Stats. 1899, secs. 3510, 3511.

It is now conceded that the circuit court in making the decree now in question did not proceed under those statutory provisions, but was assuming to act under its general jurisdiction as a court of equity, and the contention of respondents is that the authority for the decree is found alone in the body of equity jurisprudence.

Since the pleadings in the case are not in evidence, we can only ascertain what they contained as their contents are reflected in the decree. By the decree we learn that the life tenant and her husband were the plaintiffs, and that her children, the prospective contingent remaindermen, were the

defendants. The decree starts out with the recital that process was duly served on all the defendants, that a guardian ad litem was appointed by the court for the minors and they all appeared, and all the issues were duly submitted to the court. Then, as if in response to those issues, the court finds that by the will of Shelton the plaintiff Jane took a life estate in the land, and the heirs of her body ¹¹⁰ the remainder, that the defendants were the heirs of her body, and that it would be to the interest of the defendants to sell the land and invest the proceeds in other real estate. Upon those findings the decree was made, to sell the land and secure the proceeds by lien on other lands. There was no order to reinvest.

From this it appears there was no necessity suggested for the sale of the land, no apprehension of imminent destruction of title or loss of the property, not even a necessity for its sale for the support and maintenance of the children, but the decree rests solely on the foundation that it would conduce to the interest of the defendants to sell this land and invest the proceeds in other land—a mere business speculation. If the decree can be upheld it must be so on the ground that at that time the circuit court by virtue of its general equity jurisdiction had authority to appoint a commissioner and clothe him with power to enter into such a business speculation with the infants' real estate in the hope and for the sole purpose of bettering the infants' financial condition. There are some authorities in this country that hold that a court of equity may do that, but the weight of authority is to the contrary, and we think reason and judicial prudence are against the recognition of such a power.

Counsel on both sides have referred us to some Missouri cases bearing on the subject.

In *Kearney v. Vaughan*, 50 Mo. 284, plaintiffs derived title through a sale of real estate of minors under a decree of a court of common pleas; this court held that, as against the defendants in *Kearney v. Vaughan*, who were strangers to the record in the case wherein the decree was rendered, the decree was valid. But the minors whose land was ordered to be sold under that decree were not parties to the suit of *Kearney v. Vaughan*, and their right to question the validity of the decree was not involved. The court after saying that ¹¹¹ the proceeding under which the decree was rendered for the sale of the land was not a proceeding under the statute, said: "Under some circumstances, however, it has been held

that a court of equity will order the sale of the real estate of minors, though it is not supposed that the general power exists independently of the statute. If this were a proceeding by the heirs to recover their property notwithstanding the sale, it would be necessary to scrutinize it, to examine the authority of the court to order it, and see whether it could be sustained. But the defendants have no interest in that question; the heirs are not contesting, they are not made parties, and may be satisfied with the sale and be willing to abide by it."

Castleman v. Relfe, 50 Mo. 583, was a suit in equity by the purchaser at the guardian's sale to set aside the sale and cancel the purchaser's notes given for the purchase money on the ground that proceedings in the circuit court wherein the decree of sale was rendered were so irregular that no title passed. Those proceedings were in the circuit court, under the statute, by the guardian for the sale of his ward's land, and there were some irregularities in the proceeding, among which was the fact that the sale had not been reported to and confirmed by the court, but it was held that although in a like proceeding in a probate court a report of the sale and confirmation thereof was necessary, since that was a court of limited jurisdiction, yet such was not necessary in the same kind of a proceeding in the circuit court because the latter was a court of general jurisdiction. In that connection the court used this language: "The circuit court is a court of general jurisdiction, and when it has acquired jurisdiction, however erroneous or irregular its proceedings may be, they are regarded as valid and binding until they have been reversed or annulled by suitable proceedings instituted ¹¹² for that purpose and titles acquired by sales under them will be protected."

The language just quoted does not mean that every sale ordered by the circuit court because it is a court of general jurisdiction will be upheld until the judgment is reversed or annulled by suitable proceedings instituted for that purpose; it means that the judgment will be so upheld provided the jurisdiction of the court appears. In that case the court was proceeding to exercise the particular jurisdiction the statute had conferred and the validity of the judgment was assailed, not on the ground of want of jurisdiction, but of irregularity in the proceeding. In the case at bar the jurisdiction of the court over the subject is assailed.

In *Woods v. Boots*, 60 Mo. 546, this language occurs: "The power of ordering a guardian or curator to sell lands of the wards and invest the funds existed originally in the circuit court as a court of chancery." That language must be interpreted in the light of the context and in view of the subject to which it was applied. The court was not speaking of original equity jurisdiction, but of the jurisdiction originally conferred on the circuit court by this statute, which we have been discussing, which was originally enacted in 1861 and was afterward, in 1866, amended to confer the same jurisdiction, concurrently, on the probate courts of certain counties. The subject the court was considering was an order of the probate court authorizing a guardian to invest certain money belonging to his ward in certain real estate and it was claimed that the order was authorized by that statute. This court held that the statute did not authorize the order, and that the guardian was liable for the money so invested as for a misappropriation. Whilst that case treats only of jurisdiction conferred by statute, and is therefore no authority on the question of equity jurisdiction, the facts serve to illustrate the unwisdom and danger of such a jurisdiction ¹¹⁸ as is now claimed. There the probate court had solemnly found it to be to the interest of the ward and therefore ordered the guardian to invest the ward's money in the land, which the guardian did, leaving a balance of the purchase money unpaid and a lien for its payment on the land so purchased; when the debt became due the ward was without means and the vendor could have had his land back again and keep all the ward's money besides. The probate judge in that case was doubtless as conscientious and honest in his belief that he was acting for the best interest of the infant and as careful in guarding that interest, as the chancellor was in the case at bar, or as chancellors generally are when those whom they suppose have the interest of the minor most at heart apply for leave to sell and reinvest in any flattering scheme.

In *Hamer v. Cook*, 118 Mo. 476, 24 S. W. 180, is found this language and defendants quote it as sustaining their side of the question: "Again, it is the practice of the court of chancery to permit guardians, under the direction of those courts, to convert real property into personalty, and personalty into realty." That language was not there used to express the decision of the court upon any point in the case, because, as we will see by reference to the whole opinion,

the decree then under review was based on what the trial court had construed to be a devise of land in trust for a particular purpose, and the order of sale was to carry that purpose into effect, and the point decided by this court was that the circuit court had jurisdiction to construe that will, and if it created a trust to enforce the trust, that such a decree, though it may have been based on an erroneous interpretation of the will, was yet within the jurisdiction of a court of equity and therefore not subject to a collateral attack. The decree, the validity of which was assailed in that case, was rendered in the circuit court of ¹¹⁴ DeKalb county and rested on the following facts: Lewis Hamer, owning certain land, died leaving a widow and children and leaving also a will devising and bequeathing all his estate real and personal to his wife for life for her support and maintenance, and to raise, support, maintain and educate his children and at her death what was left was to go to his children. The widow married again and afterward she and her husband filed suit in the circuit court against the children, some of whom were minors, praying for authority to sell the land for the purpose of carrying out the provisions of the will. It was alleged in the petition that there was no personal property then remaining, that but a small portion of the real estate was improved, yielding not more than sufficient to pay taxes and leaving nothing for their support, "that the intention of the testator and the purpose of said will, as expressed in the same, cannot be carried out and effectuated without a sale of the real estate." On that showing the decree of sale was made, and it was in reference to the question of the jurisdiction of the court to render that decree that the language quoted was used. The parties assailing that decree contended that under the statute the county court alone had power to sell the land for the education of the minors, but this court held that it was a suit to obtain for the trustee authority to sell the land to yield the fund to carry out the purpose of the will and in that connection the court, per Gantt, P. J., said: "It was a part of the ancient and well-defined jurisdiction of the courts of chancery to construe wills and declare the limitations of trusts created thereby, and the creation of our county and probate courts has not divested them of this power: *First Baptist Church v. Robertson*, 71 Mo. 326. And it is a familiar rule that a court of equity will never permit a trust to fail merely for the want of a trustee,

and if no other trustee is designated, the courts of equity will take upon themselves the execution ¹¹⁵ of the trust: *Bank of Commerce v. Chambers*, 96 Mo. 459, 10 S. W. 38." Then in immediate connection follows the language first above quoted, after which the court said: "Under the allegations of the petition, then, the circuit court of DeKalb county was asked as a court of equity to construe a will, declare a trust, and enforce it by a sale of those lands." That decision, therefore, bottoms itself on a ground of equity jurisdiction independent of the ground on which it is sought by defendants in the case at bar to rest the jurisdiction of the circuit court of Lincoln county to render the decree which these plaintiffs now assail.

We find nothing in our decisions to sustain the position of defendants on this question.

There is nothing in the character of this subject that especially distinguishes it as a creature of equity. That which we technically call equity, in contrast with what we technically call law, was of natural origin and growth in our jurisprudence, springing up to meet the imperative demands of justice at places where the law was inadequate to the occasion. "Equity follows the law"; it does not override or subvert the law; it comes to the aid of the law when the law, on account of its rigid cast, is unable to adjust itself to the demands of justice. Equity sits silent in the courts as long as the law is able to meet the demands of justice; it is silent to the call of a mere legal right, its voice is heard only when a cause, not contrary to law, well founded in right and justice, would suffer without its aid. It is cold to a mere legal demand, but warm to the prayer of helpless justice. It aids the law, but is not officious in its services; it does not take hold of a case merely because it has peculiar power.

Now, what was there in the nature of the case in which the circuit court of Lincoln county in 1871 undertook to exercise its power as a court of equity that especially appealed to equity for aid? What cry of ¹¹⁶ suffering justice was heard by the chancellor? The case laid before the court by the plaintiffs in that case, stripped of superfluities, was simply this: We, the plaintiffs, think we can make money for these minors (as well as ourselves) by selling their contingent interest in this land and investing the proceeds in other lands, and we ask the aid of a court of equity to enable us to enter into that speculation. It is said in the able brief of the

learned counsel for defendants that equity has always exercised jurisdiction over the estates of minors. That is so, and nothing we are now saying will deny to courts of equity their original jurisdiction in the case of minors and the protection of their property interest. But equity distinguishes between the shield and the sword; to protect the estate from a danger which the infant, because of his tender years, is unable to defend against, is one thing, to commission some one to go into the field of trade, selling and buying on account of the infant, is another thing. Courts of equity have original jurisdiction over the estates of minors, but conceding that jurisdiction for certain equitable purposes does not concede jurisdiction to do any and every thing whatsoever with the estate of a minor, *quia minor*—the act to be valid must be based on some equitable principle.

If jurisdiction in chancery to sell the land of infants for the mere purpose of investing in other property ever existed, there is no necessity for its exercise in Missouri, because under the statute above quoted ample power to do that, under the safeguards in the statute itself prescribed, is given. That statute was in force when this decree was rendered in 1871 (Laws 1860-61, p. 98), and is substantially the statute at present, except that the jurisdiction is now given to the probate court: Rev. Stats. 1899, sec. 3510. It is true, as contended by defendants, that the mere creation by statute of a legal remedy where none existed before,¹¹⁷ or the mere conference of the same jurisdiction on a court of law, does not take away the jurisdiction in equity unless the statute so declares or so necessarily implies, but the enactment of such a statute without making any reference therein to the jurisdiction of courts of equity and the continuance of the statute for over forty years in our law books, show at least the opinion of the legislative department of the government on the question, and obviate the necessity of a judicial resolving of a doubtful question in favor of the jurisdiction of a court of equity, or of establishing now for the first time a precedent in this state for the exercise of such a jurisdiction. If infants were suffering in this state because, under the rigid forms of law, their guardians could not sell their lands to invest the proceeds in flattering schemes that promise large gains, our courts might search for a precedent in equity to allow them to do so, but as our statute law now is,

there is and has been for forty years no necessity for such a stretch of judicial power.

In the briefs before us this question of equity jurisdiction is discussed with great learning and ability on both sides, and, if time and space were of no consideration, we would like to follow the counsel and review in this opinion, as we have followed them and reviewed in the library, the authorities which they have respectively arrayed. We must, however, be content to refer the inquirer for learning on this subject to the briefs of the counsel which will be reported with the case and to give, with but little further discussion, our conclusion, viz., that the decided weight of authority both in England and America, is against the contention that courts of equity have jurisdiction to decree a sale of a minor's land for the mere purpose of reinvesting the proceeds.

Counsel for defendants seem to concede that the ¹¹⁸ modern English decisions are against their contention, and that at least a large and respectable list of American decisions are also against them, yet they say that those American courts which have so held have simply followed the lead of the English courts without questioning the firmness of the ground on which the English courts rest their decisions, and without observing the difference that exists between the two countries in the tenures of real property and the constitutional restrictions on legislation. Those distinctions are referred to also in an able opinion of the Illinois court (*Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111), on which defendants strongly rely. In that case the Illinois court upheld the decree there assailed on the ground that it was within the scope of general equity jurisdiction, yet in the opinion the court said: "And it must be confessed that the decided weight of authority establishes the proposition that a court of chancery has no inherent power to decree the sale of lands belonging to lunatics, idiots, infants, or others laboring under disabilities."

We discover no essential difference between the foundation on which the English decisions are rested and that on which the decisions of our courts rest, or any reason why the same principle of equity jurisprudence is not as applicable to the conditions in one country as in the other.

There is, as the learned counsel contend, in our law an absence of that jealousy against alienation of real estate that we observe in the English law. But that jealousy applies in England with equal force to the alienation of land held

by a person *sui juris* as to that held by an infant. There is no difference, so far as the inalienable feature of the English law which we are now considering is concerned, between land held by a person *sui juris* and land held by a minor; if the inalienable feature exists in the title by which the land is held, it affects the one as well as the other. If in ¹¹⁹ England a minor holds such title to land that, if he were of age, he could sell it, the only reason he cannot sell it there is the same reason that a minor in like case in this country could not sell his land—that is, not because of the spirit of jealousy in England against the alienation of real estate, but because he has not reached the age of discretion.

It is also true that in this state and some other states of this Union there are constitutional limitations on the power of the legislatures to pass special acts to authorize the sale of particular minors' estates, and there is no such restriction on the power of the British parliament. But our General Assembly is as free as the lawmakers of England to pass a general law to cover all such cases, and it has done so in terms as ample as could be conceived.

2. There are other questions discussed in the briefs, but in view of the conclusion we have reached on the main question they are of minor importance and need only to be briefly mentioned.

Under the Shelton will the land was devised to the widow for life with remainder to the "heirs of her body"—not the "issue of her body"—as in *Tindall v. Tindall*, 167 Mo. 218, 66 S. W. 1092. The widow and her second husband, as plaintiffs, brought the suit against their children then living. Of course she had no heirs at that time because she was living; her children had then only contingent interests depending on outliving their mother; two of them never became her heirs because they died before she did, and their children, who did become heirs of her body, were not born until years after the decree was rendered. These latter were not bound by the decree, even if the others had been, because they derived their title, not by inheritance from their mother, in whom no title ever vested, but directly from the will as being heirs of the body of their grandmother.

¹²⁰ 3. The decree in question undertook to create a lien upon certain land therein said to be owned by Joseph M. Heady in favor of the children whose land Heady was to sell, to secure them in the purchase money. That was in

1871. There is no evidence that any effort was ever made by the children to enforce any such lien. In January, 1886, Joseph M. Heady and wife divided the land owned by him among their children, giving each a deed to his or her share, wherein it was expressed to be a deed of gift made pursuant to their desire to make an equal division of the land among their children. In March of that year Heady died; his estate was insolvent. By the acceptance of those deeds, the defendants in their answer say, the children of Heady ratified his act as commissioner in selling their land. We find nothing in the evidence to justify that plea. Heady may at that late day have reached the conclusion that he had wronged his children, and that may have been his secret motive for deeding to them his land before his death, but if so, it was locked in his own breast; the deeds make no reference to the old transaction and the evidence was that there was nothing said on the subject; that there was no agreement or understanding between the father and the children that these deeds were given to compensate them for their interest in the Shelton land which he had sold. Whether the children could hold the land as against the creditors of their father's estate was a question between them and the creditors; it is one in which these defendants have no interest.

There are still other questions discussed in the briefs, but in view of the conclusions above stated they are of no importance.

The life tenant died in December, 1900, and the plaintiffs, the remaindermen, brought this suit in February, 1901.

¹²¹ Under the evidence in the case the judgment should have been for the plaintiffs.

The judgment is reversed and the cause remanded to the circuit court of Lincoln county to be retried in accordance with the law as in this opinion expressed.

All concur.

**INHERENT EQUITY JURISDICTION TO DECREE SALE OF
LAND OF MINORS.**

I. English Rule of No Inherent Jurisdiction, 655.

II. English Rule, Where Followed, 655.

III. English Rule, Where not Followed, 656.

IV. Equitable Estates, 659.

I. English Rule of No Inherent Jurisdiction.

The question whether a court of equity has inherent jurisdiction, independent of statute, to authorize a sale of the real property of an infant under any circumstance, presents a problem involving an irreconcilable conflict of authority in this country. The weight of authority is in favor of such jurisdiction, but perhaps the sounder doctrine is that adopted by the English courts of chancery wherein the custody of the estates of infants was originally taken up. In England the rule is that a court of chancery has no inherent authority to sell the real estate of an infant, or to convert it, upon the ground or idea that it will be beneficial to the infant: *Calvert v. Godfrey*, 6 Beav. 97, 12 L. J. Ch. 305; *Brown v. Paull*, 16 Jur. 707; *Simson v. Jones*, 2 Russ. & M. 365. The English rule is well stated in *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8, where it is adopted. In that case, *Andrews, C. J.*, said: "The origin of the jurisdiction of the court of chancery in England over the persons and estates of infants is involved in some obscurity. The better opinion seems to be that it grew out of the transfer by the crown to the chancellor of the supervision theretofore exercised by the king, as *parens patriae*, over persons who, by reason of nonage, were incapable of acting for themselves: 2 Story's Equity Jurisprudence, sec. 1327 et seq. The chancellor intervened for the protection of minors and their property, and the precedents are numerous where the chancellor authorized the application of their property for their education and maintenance, and, at times when the interests of the infants seemed imperatively to require it, permitted even the capital of the fund belonging to the infants to be anticipated or broken in upon for such or similar purposes: *Harvey v. Harvey*, 2 P. Wms. 21; *Saunders v. Vautier*, 4 Beav. 115; *Rocke v. Rocke*, 9 Beav. 66; *In re Bostwick*, 4 Johns. Ch. 100. But this power of management and disposition exercised by the chancellor (if not always so) came to be regarded as extending only to the personal estate of infants, and to the income of their real property. It did not extend to the binding of the inheritance. The question came before Lord Hardwicke in *Taylor v. Philips*, 1 Ves. Sr. 229, and he said: 'There is no instance in this court binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done; but never as to the inheritance, for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill'. And in *Russel v. Russel*, 1 Moll. 525, the lord chancellor of Ireland said: 'I have no authority to bind an infant's legal estate. This was decided long ago by Lord Hardwicke in *Taylor v. Philips*, 1 Ves. Sr. 229. The chancellor has never since attempted to deal with the legal inheritance of infants without the aid of parliament': *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8.

II. English Rule, Where Followed.

In the case of *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8, just quoted from, the rule is approved and adopted that a court of equity

has no inherent power to direct the sale or mortgage of the real property of infants, as its power in this respect is purely statutory. And in *Stansbury v. Inglehart*, 20 D. C. Rep. 134, the rule is adopted that a court of chancery has never had, except by express legislative enactment, jurisdiction either to sell, or to exchange an infant's real estate on the ground that the sale or transaction would be beneficial to him. This is also the doctrine sustained in Missouri, although it is there held that the sale of the infant's estate is not void as being a nullity, even where the court had gone beyond its powers, but the general power to order a sale of an infant's real estate does not exist independently of statute: *Kearney v. Vaughn*, 50 Mo. 284.

"A court of equity has no inherent original authority to order the sale of real estate of infants. It proceeds, on the other hand, by virtue alone of statutory power, and, consequently, when a departure is made from that authority, the court proceeds without jurisdiction, and the acts performed are, necessarily, void": *Muller v. Struppmann*, 55 How. Pr. 521. If the legal title to an estate is vested in infants, it is error for an equity court to make a decree authorizing any person to divest them of it, the authority not having been given the court by statute: *Bent v. Maxwell, L. G. & Ry. Co.*, 3 N. Mex. 158, 3 Pac. 721. A court of equity has no inherent power to appropriate, upon petition or motion, any part of the real estate of an infant to the payment of claims against her: *In re Greenhalgh*, 64 Hun, 26, 18 N. Y. Supp. 748. In Virginia, a court of equity has not, under its general jurisdiction as guardian of infants, inherent authority to sell their real estate whenever it is for their advantage to do so. Its jurisdiction to sell the real estate of infants on the ground of infancy merely is derived from the statutes: *Pierce's Admr. v. Trigg's Heirs*, 10 Leigh, 406; *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698; *Rhea v. Shields*, 103 Va. 305, 49 S. E. 70. Courts of equity have no inherent power to sell the lands of infants, and can do so only as statutes enable them: *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014.

It is the well-settled law in Kentucky that the powers of courts of equity to sell and reinvest infant's real estate are not inherent, but purely statutory: *Walker v. Smyser's Exrs.*, 80 Ky. 620; *Elliott v. Fowler*, 112 Ky. 376, 65 S. W. 849; *Liter v. Fishbeck*, 25 Ky. Law Rep. 260, 75 S. W. 232. The jurisdiction of the chancellor to sell the real estate of infants is derived solely from the statute, and a sale made in any other way than that provided by statute is void and passes no title: *Ogden v. Stevens*, 98 Ky. 564, 33 S. W. 932. But courts of chancery have inherent power to direct the conversion of the property of an infant where it is for his benefit, if it can be so done as not to change the nature of the property or alter its descendible quality: *Thompson v. Pettibone*, 79 Ky. 319.

III. English Rule, Where not Followed.

As stated in the beginning of this note, the weight of authority in the United States is to the effect that courts of chancery have inher-

ent power to decree a sale of an infant's real estate. This rule is firmly fixed in Alabama: *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Thorington v. Thorington*, 82 Ala. 489, 1 South. 716; *Gassenheimer v. Gassenheimer*, 108 Ala. 651, 18 South. 520. In *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13, the court said: "Whatever may be the doctrine prevailing in the court of chancery in England, or whatever contrariety of opinion or doubt may prevail in the different states as to the jurisdiction of a court of equity to decree a sale of the real estate of an infant, in this state, the jurisdiction must be regarded as existing. The jurisdiction does not spring from, nor is it dependent upon, the character of the estate, whether absolute or contingent; whether in possession, or the possession postponed until the happening of a future event. It rests upon the power and duty of the court to protect infants, to take care of and preserve their estates while under disability debarring them from the administration of property."

Equity has original jurisdiction to order an infant's land sold for the purpose of otherwise investing the proceeds, if the lands are deteriorating in value and will continue to deteriorate, or if they do not yield income sufficient to keep down burdens to which they are subject, or if the income is greatly disproportionate to their market value: *Gassenheimer v. Gassenheimer*, 108 Ala. 651, 18 South. 520.

In Arkansas, independently of statute, the general jurisdiction over the persons and property of minors belongs to the chancery courts, and no other court has authority to order the sale of the land of a minor, nor to direct an investment of his funds in land: *Myrick v. Jacks*, 33 Ark. 425. The jurisdiction of equity over the estates of wards in chancery is broad, comprehensive, and plenary in Georgia, and, in the absence of any legislative provision to the contrary, its courts of equity have inherent jurisdiction to order a sale of the legal estates of minors for reinvestment whenever for the minors' interests: *Dampier v. McCall*, 78 Ga. 607, 3 S. E. 563; *Richards v. East Tennessee etc. Ry. Co.*, 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; *Reed v. Alabama & G. Iron Co.*, 107 Fed. 586, a Georgia case in the United States circuit court where the above rule is stated and affirmed.

In Illinois, courts of equity have full jurisdiction, independently of statutory provision, to order the sale of the lands of an infant. In *Smith v. Sackett*, 10 Ill. 534, it was early announced that the jurisdiction of a court of equity to order the sale of the lands of an infant whenever his interest requires it, is indisputable, and it has also been maintained that the powers of courts of chancery, by virtue of their general jurisdiction, over the estates of infants, to authorize the conversion of their real estate into personalty when it is clearly for their interests, is not only supported by the current of authority in this country, but is so well settled in this state as to be no longer an open question: *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247. A court of equity, by virtue of its general jurisdiction, and independently of statute, has power to authorize the conversion of a minor's property from real to personal, or personal to real, when such

conversion is clearly to their interest: *Gorman v. Mullins*, 172 Ill. 349, 50 N. E. 222; *King v. King*, 215 Ill. 100, 74 N. E. 89. A court of equity, under its general powers, has jurisdiction over the estates of infants and others under disability, and may, on proper application, order the sale of an infant's unproductive lands to raise means for discharging an encumbrance on productive property in which it has a reversionary interest in fee, though the latter is situate in another state, where the bill seeking such relief shows that such a course is for the best interests of the infant: *Allman v. Taylor*, 101 Ill. 185.

The depreciation in rental value of real estate from two hundred and fifty dollars per month at the time of the testator's death, to a sum barely sufficient to pay taxes, insurance, and repairs, a corresponding depreciation in market value and probable still further depreciation, before minors, who are to take the fee on coming of age, can attain majority, are sufficient grounds to authorize a court of equity to order the sale of the property for a fair cash value and the investment of the proceeds in interest bearing securities: *Gorman v. Mullins*, 172 Ill. 349, 50 N. E. 222.

It was decided in an early case in Maryland that a court of chancery, independently of statute, has jurisdiction to authorize the sale of infants' estates and to convert their real estate into money: *Dorsey v. Gilber*, 11 Gill & J. 87; and this ruling was followed in *Downin v. Sprecher*, 35 Md. 474, and *Roche v. Waters*, 72 Md. 264, 19 Atl. 535, 7 L. E. A. 533. And while a court of chancery, prior to the jurisdiction conferred by statute, had power, under some circumstances, to sell an infant's lands, where his interests demanded it, it could not decree a sale where an adult had a part interest in the lands: *Roche v. Waters*, 72 Md. 264, 19 Atl. 535, 7 L. E. A. 533.

A statute may, and sometimes does, vest in courts of equity general jurisdiction to dispose of the land as well as the chattels of infants for their benefit, and when this is the case there can be no question of the power of equity to decree the sale of the infant's land: *Williams v. Harrington*, 11 Ired. 616, 53 Am. Dec. 421; *Bowland v. Thompson*, 73 N. C. 504; *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455.

In South Carolina, it is also firmly established that courts of equity have inherent jurisdiction to order the sale of the land of an infant when it is made to appear to be for his benefit: *Clifford's Exr. v. Clifford*, 1 Desaus. 115; *Huger v. Huger*, 3 Desaus. 18; *Stapleton v. Langstaff*, 3 Desaus. 22; *Bulow v. Witte*, 3 S. C. 308. The jurisdiction of chancery to sell and convey an infant's estate, it was decided in *Bulow v. Buckner*, Rich. Eq. Cas. 401, is now too firmly established to be shaken. It ought, however, to be exercised with caution, and the court, before ordering the sale, must be satisfied of its necessity or expediency to the infant's interest.

A court of equity has power to alienate and sell either vested or contingent estates of infants who are properly made parties before it: *Bosil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627. And such court has power to alienate the contingent title of unborn remaindermen or the

contingent titles of interested persons in esse, whose names and residences are unknown, and a sale made under such a decree vests the fee simple title in the purchaser: *Bofil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627.

In Tennessee it was first announced that the court was prepared, though not without some difficulty, to assert the inherent jurisdiction of a court of equity to convert the estate of infants, by changing realty into personalty, and personalty into realty: *Case of Brown*, 8 Humph. 200. But such jurisdiction was denied in a later case, and it was held that such power in a court of equity arose solely by virtue of the statute: *Rogers v. Clark*, 3 Sneed, 665. In the latest case from that state, the court has decided that in estates in which the rights of minors are involved, when a sale becomes necessary, courts of chancery have inherent jurisdiction and discretion to sell either the realty or personalty, as appears best for those concerned: *Jones v. Sharp*, 9 Heisk. 660.

IV. Equitable Estates.

It has been decided in a number of cases that a court of equity has inherent power and jurisdiction to order the sale of the equitable estate of an infant, and this rule prevails even in states where it is maintained that such courts have no inherent power to sell an infant's legal estate: *Pitcher v. Carter*, 4 Sand. Ch. 1; *Cochran v. Van Sinlay*, 20 Wend. 365, 32 Am. Dec. 570; *Wood v. Mather*, 38 Barb. 473; affirmed in *Anderson v. Mather*, 44 N. Y. 249; *Bent v. Miranda*, 8 N. Mex. 78, 42 Pac. 91. "It is a settled principle, that whenever the property of infants consists of real or personal estate, the legal title to which is in the trustees, the chancellor, as the general guardian and protector of the rights of all infants, may authorize such a disposition thereof as he, in the exercise of a sound legal discretion, may deem most beneficial to such infants": *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570. "The power exercised by the court of chancery as to the sale of the estate of infants of an equitable nature is inherent, and not derived from statutory authority. The power conferred by statute relates to lands of which an infant is seised and not to his equitable estates": *Anderson v. Mather*, 44 N. Y. 249.

A court of equity has jurisdiction to authorize the sale of real estate held in trust for infants and the reinvestment of the proceeds, whenever it appears that it will be for the best interests of the trust estate that such sale and reinvestment shall be made: *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

MORRELL v. LAWRENCE.

[203 Mo. 362, 101 S. W. 571.]

PHYSICIANS—Implied Contract to Pay for Services.—A promise to pay a physician for his services is not implied from the mere fact that a father calls him to attend his sick son, who is a man of mature age; but if the circumstances or conditions are such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered, the father is liable under an implied contract. (p. 665.)

PHYSICIANS—Compensation—Wealth of Patient.—If a physician is entitled to recover for services rendered his patient, he is entitled to recover only the reasonable value thereof, whether the patient is a poor man or a man of great wealth. (p. 668.)

PHYSICIANS—Compensation—Wealth of Patient.—The jury, in estimating the reasonable value of the services rendered by a physician to his patient, have no concern with the question of the patient's ability to satisfy the judgment. (p. 668.)

PHYSICIANS—Compensation—Wealth of Patient.—If, in an action by a physician to recover for his services, the defendant introduces evidence to show that the physician was accustomed to charge smaller fees for similar services than those sued for, the latter has the right to show in rebuttal, if such is the fact, that the smaller fees were charged to poor men because of their poverty, and that the defendant's financial condition justified a charge for fair and reasonable compensation, and this is as far as the wealth of the defendant can be shown. (pp. 668, 669.)

PHYSICIANS—Compensation—Evidence.—A physician in an action to recover for services rendered his patient is entitled to show that he is a physician of learning and skill, and that fact should be taken as an element in estimating the reasonable value of the services rendered, but he has no right, in such case, to show what his general professional reputation as a physician is. (p. 670.)

TRIAL—Erroneous Instructions—Assuming Verdict.—An instruction assuming that the jury is going to find for the plaintiff, and assess the value of the services in question, and which is limited alone to directions as to what the jury should take into account in making the assessment, is erroneous. (p. 670.)

PHYSICIANS—Compensation—Wealth of Patient—Evidence.—If a physician sues a father on an implied promise to pay for professional services rendered his son, and such physician knew in a general way the financial standing of both father and son, it is error to exclude evidence offered to show that such son was a man of considerable fortune and amply able to pay for the services rendered. (p. 670.)

TRIAL—Excessive Verdict.—It is peculiarly within the province of the trial court to set aside a verdict as excessive. (p. 671.)

Bogle & Priest and E. T. Miller, for the appellant.

Dawson & Gavin and Rassieur, Schuurmacher & Rassieur, for the respondent.

368 VALLIANT, P. J. Plaintiff sues on an alleged implied contract of defendant to pay him the reasonable value of his services as a physician rendered to defendant's adult son at defendant's request.

The facts are: The defendant and his son, Frank Lawrence, both former residents of St. Louis, were at the time in question living in New York City. The son, forty-two years of age, was not living with his father but at a hotel; he was a man of considerable means, carrying on a business of his own. Plaintiff is a physician, residing in St. Louis. While defendant and his son resided in this city the latter became in bad health and came under the care of the plaintiff. The relation of physician and patient had existed between them for several years. Plaintiff's bills for medical services rendered in St. Louis to Frank Lawrence were presented to and paid by him. In 1899 plaintiff, in St. Louis, received a telegram from defendant, then in Virginia, 369 asking him to go to some place in Michigan, where his son then was sick, to minister to him as a physician, and plaintiff was on the eve of going when he received another telegram stating that Frank had already started for his home in St. Louis. On his arrival here plaintiff rendered him medical services and he paid the bill. In 1900 Frank Lawrence went to Europe and the plaintiff went with him as his attending physician. The plaintiff testified that he did not go on that journey at the request of Frank Lawrence alone, but on the request also of Dr. Lawrence, the defendant, who promised plaintiff that he would pay him or see him well remunerated for his services; that after their return from Europe he spoke to Dr. Lawrence about paying him and Dr. Lawrence repudiated the contract. All the pay plaintiff received for his services on that trip, lasting three months, was one thousand dollars, which Frank paid. So much for the business relations between the parties prior to the transaction now in suit.

On May 31, 1902, Dr. Lawrence and his son then living in New York and the plaintiff in St. Louis, the plaintiff received a telegram from defendant in the following words: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday via Big Four. Answer at once." Plaintiff answered June 1st: "Will leave on Big Four at noon to-day." He accordingly arrived in New York on the afternoon of June 2d, was met at the sta-

tion by a messenger of Dr. Lawrence, conducted to the latter's residence, and after tea was conducted to the hotel where Frank Lawrence lay very ill. Plaintiff remained in constant attendance on the sick man, ministering to him day and night until he died, July 9th. The particular character of the services rendered was in evidence, and there was testimony on the part of the plaintiff tending to show that the services were worth three hundred dollars, four hundred dollars, five hundred dollars ³⁷⁰ and one thousand dollars a day. The amount of the bill sued for was sixteen thousand dollars, itemized at four hundred dollars a day for forty days. The evidence on the part of the defendant was that from four thousand dollars to six thousand dollars would be ample pay for the services rendered. The verdict was for the plaintiff for twelve thousand six hundred and sixty-six dollars. The court sustained defendant's motion for a new trial on the ground of error in the instructions, and that the verdict was excessive; the plaintiff appealed.

1. Before we reach the points on which the trial court based its ruling, we must consider the point first presented in the brief for defendant—that is, that the plaintiff made out no case to go to the jury. The defendant's proposition is that from the facts and circumstances shown by the plaintiff's evidence the law implies no promise or obligation on the part of the defendant to pay for the services rendered. There is no express contract on the part of the defendant shown; if he is liable, it is on an implied contract. According to the defendant's estimate of the evidence there is shown a request by defendant of plaintiff to render services for the benefit of another and nothing more. In their brief the learned counsel quote the law as laid down in Wood on Master and Servant, second edition, section 70: "The rule is that, in order to render one liable for services rendered at his request, they must be rendered for his benefit, or under such circumstances that the person requested to render them was justified in understanding that they were for his benefit or upon his credit. But if the person performing the services knows they are not for the benefit of the person making the request, and that he is under no legal obligation to pay therefor, he cannot predicate a claim against him, unless he expressly promised to pay for them before the services were rendered."

That is a correct statement of the general rule of law on that subject, but it is not of invariable application. We see

no objection to applying it to the case ³⁷¹ of one calling a physician to a suffering stranger when there is nothing in the situation to suggest to the physician that the man calling him has any deeper interest in the case than the prompting of common humanity. And we see no objection to applying the rule to the case of a father calling a physician to wait on his son if the son is of age and living to himself, and if there is nothing in the conditions to indicate that the father is taking upon himself anything more than the office of messenger for his son. But there is something more than the dictates of common humanity between father and son, and the fact of that relationship is to be considered in connection with other circumstances, if there are other circumstances, indicating to the physician that the father calls him on his own account to serve his son.

In an early Pennsylvania case cited in the brief for defendant (*Boyd v. Sappington*, 4 Watts, 247), it was held that no contract to pay for the services was implied from the mere fact that the defendant called a physician to attend his adult son lying ill at defendant's home. The evidence showed that the father had called on the physician and made the request; the physician at first hesitated, the father insisted and the physician complied. The physician knew that the son, although living with his father, was over twenty-one years old, in business for himself, and had property to answer the demand. The father, when he was requesting the physician to go, stated to him that it was his son's request that he should come. It was held that out of those facts an implied contract on the part of the father to pay the bill did not arise. The court said: "There is nothing in the special circumstances relied on to take it out of the general principle; and it is very clear that had the defendant been a stranger, however urgent he may have been, and whatever opinions the physician may have formed of his liability, he would ³⁷² not have been chargeable without an express agreement to pay; as, for instance, in the case of an innkeeper, or any other individual whose guest may receive the aid of medical advice. A different principle would be very pernicious; as but few would be willing to run the risk of calling in the aid of a physician, where the patient was a stranger, or of doubtful ability to pay." That is the strongest case cited in the brief for defendant in support of his theory on this branch of the case. Except for the fact that in that case the sick man was the

defendant's son, there was nothing to distinguish it from the case of calling a physician to the aid of a stranger under his roof. The physician called was within the field of his daily work; there was nothing unusual in the call.

In *Crane v. Baudouine*, 55 N. Y. 256, the patient was the defendant's daughter, a married woman living with her husband separate from her father's family, and when taken sick had come to her father's home to be under the care of her mother. The father had not requested the physician's attention to his daughter, but received him when he came, conversed with him about the case, and knew the extent of the services rendered. The court held that the father was not liable for the physician's bill.

Edelman v. McDonell, 126 Cal. 210, 58 Pac. 528, is also referred to. In that case the physicians had undertaken the treatment of the defendant's son at his request, and after they had begun to render their services the father made statements to them that induced them to believe that he intended to pay the bill, and they stated that they relied on those statements and gave credit to both father and son, and the suit was against both. It did not appear in the evidence what services were rendered after the alleged statements of the father or their value. The court held that the contract was that of the son; ³⁷³ that the alleged statements of the father were not in writing, and he was not bound.

In *Rankin v. Beale*, 68 Mo. App. 325, there was testimony tending to show that a father had requested the physician to attend his son, twenty-three years old, then sick in the father's house, and that after the services had been rendered the father promised to pay for the same; there was testimony on the other side contradicting this. The court instructed the jury to the effect that although the son was over twenty-one years of age, yet if he was sick in his father's house, and the father requested the physician to attend him, or if the father stated to the physician that he would pay the bill, then he was liable. That instruction directed a verdict against the father either on an implied agreement or express contract, the implied agreement resting alone on the father's request to the physician to attend his son, the express undertaking on a promise to pay after the services had been rendered. The court held that the mere request did not imply an agreement to pay, and that the promise made after the services had been rendered was nudum pactum.

From those decisions the learned counsel citing them draw the conclusion that a promise to pay the bill is not implied from the fact that a father calls a physician to attend his sick son, who is a man of mature age, and to that extent we think the conclusion is justified, but we do not go with the counsel to the extent of holding that a father calling a physician to attend his adult son can be rendered liable only on an express contract, because we hold that the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered. Whilst the calling of a physician to the bedside of a sick man has in the nature of the case its own elements of exception ³⁷⁴ to the general rule, yet it is not put so far in a class to itself as to exempt it entirely from the category of implied contracts. Whether the facts of a case are such as to present a question of whether or not a contract may be implied is sometimes a question of fact and sometimes one of law; if in the facts relied on, taken as true, there is nothing to justify the inference, the court will so decide as a matter of law, but if they are such as that if credited the inference might or might not legitimately be drawn, it is a question of fact. We think the evidence for the plaintiff in this case tends to prove a condition of affairs from which the triers of the fact, if they should see fit to draw the inference, might with reason do so that Dr. Lawrence intended the plaintiff to understand, and the plaintiff did understand, that he would pay for the services which the telegram called the plaintiff to render. This was not a call on the plaintiff for services in the field of his daily work. It called him away from his established field of action; it called him, in effect, to resign his practice, to dedicate himself for the time being solely to the service of the defendant's son, whatever the consequence might be to his general practice. This is altogether outside of the category of the cases above referred to. The patient was not one of twenty or more for whom the physician might prescribe in a day; he was one for whom the physician must give up all other patients. The call was a very unusual one, and it involved unusual financial consequences.

The plaintiff had made a trip to Europe in professional attendance on defendant's son and, according to his testimony, he had undertaken that journey partly, at least, on

the request of defendant, but when they returned defendant denied that he had made the request and refused to recognize the obligation. The testimony on that point was meager, but it indicates that on the return from the trip to Europe there was a misunderstanding ³⁷⁵ between plaintiff and defendant as to the liability of the latter for the services rendered on that occasion, the defendant denying that the trip had been taken at his request and the plaintiff did not press the point. The matter ended with plaintiff's receiving from Frank Lawrence a sum of money which he regarded as inadequate. After that came the transaction now under consideration in which there is no room to question at least one fact—that is, that the plaintiff went to New York and entered upon this service at the request of the defendant. The telegram was not couched in form of a message from the sick man; the writer was not in the character of the conveyor of a request from another, and did not assume to express merely another's wish or merely make the announcement that there was a sick man there needing attention. He expressed his own desire, uniting his own with that of his son or possibly of some other member of the family, under the first person plural of the pronoun: "Frank is quite sick. We would like to have you come and treat him. Leave on noon train Sunday via Big Four. Answer at once."

If the plaintiff's testimony gives the correct version of the controversy or misunderstanding as to the defendant's liability for the services rendered on the trip to Europe, Dr. Lawrence should have known that the plaintiff would understand that telegram as carrying by implication a promise to pay, or at least that he was liable to put that construction on it.

The telegram is to be interpreted in the light of the relation of the parties and of their past transactions with each other. Whether in that light the defendant had reason to believe that the plaintiff would understand the telegram to imply an agreement to pay, and plaintiff did so understand, were questions for the jury under proper instructions, and if the jury should so find, the verdict should be for the plaintiff.

³⁷⁶ 2. It was shown in evidence over the objection of the defendant that he was a very wealthy man, and on the measure of damages the court in its instructions authorized the

jury to take that fact into account. The instructions covering that point were as follows:

"2. In determining what is the reasonable value of the services rendered by the plaintiff, the jury should take into account the circumstances and conditions under which the services were rendered, the length of time employed, the professional character and standing of plaintiff, the absence of plaintiff from his residence and place of business, the nature of the ailment of the patient, the nature of the services themselves, the danger, if any, of infection or contagion incident thereto, the professional skill and experience required for their proper rendition, the ability of the person liable therefor to pay, together with all other facts and circumstances shown in evidence, relative to such services; and, having considered all such facts and circumstances, the jury should fix the value of the services at such an amount as, under all the evidence, they believe to be reasonable and proper."

"3. The jury are instructed that the evidence touching the financial ability of the defendant may be considered by the jury not to enhance the fees above a reasonable compensation, but solely to determine whether the defendant, if they find, under the other instructions, he is liable at all, is able to pay a fair and just and reasonable compensation for the services rendered to his son."

The trial court sustained the defendant's motion for a new trial on the ground, partly, that those instructions were erroneous. In that ruling the court was correct.

We are referred to some decisions as sustaining the proposition that the fact that a man is amply able to respond to a judgment for the debt sued for is one ³⁷⁷ to be taken into account in determining the amount to be awarded against him, but to the extent that those cases so hold we do not agree with them. Among those cited are two Missouri cases—*Hurt v. Jones*, 105 Mo. App. 106, 79 S. W. 486, and *Ryans v. Hospes*, 167 Mo. 342, 67 S. W. 285—but we do not understand those cases as so holding. *Hurt v. Jones*, 105 Mo. App. 106, 79 S. W. 486, is only authority for saying that evidence showing a custom of trade fixing the value of the services of a real estate agent negotiating a sale at two and a half per cent of the value of the property sold was admissible; the ability of the defendant to pay was not brought into question.

In *Ryans v. Hospes*, 167 Mo. 342, 67 S. W. 285, the plaintiff sued for the reasonable value of his services as a nurse

rendered to defendant's testator in his lifetime, in his last illness. The defendant himself introduced the evidence of the value of the estate, and made the fact of the testator's great wealth the basis of an argument that a presumption of payment must be indulged. There was no instruction to the jury to take into account the wealth of the testator, in assessing the reasonable value of the services. The amount awarded in the verdict was within the value testified to by the plaintiff's witnesses, and there was no evidence for defendant tending to show that that estimate was excessive. In commenting on the amount of the verdict the court used the language quoted in the brief of plaintiff's counsel that "while the verdict would be large for such services rendered a person of ordinary means, it must be borne in mind that Dr. Bradford was a man of great wealth; that he had no family to bear a portion of the burden of nursing him in his afflicted old age," etc. That language was not used in deciding any question at issue in the case, and it seems rather to relate to the nature of the services—that is, the exclusiveness on the plaintiff of the burden of nursing. But however that may be, the question we are now to decide was not in that case. ³⁷⁸ In a case of this kind, if the plaintiff is entitled to recover at all, he is entitled to recover the reasonable value of the services rendered. He is entitled to a verdict for the reasonable value of his services, although the defendant may be a poor man; he is not entitled to a verdict for more than the reasonable value of his services, although the defendant may be a man of great wealth. The jury, in a case of this kind, have no concern with the question of the defendant's ability to satisfy the judgment.

Ward v. Kohn, 58 Fed. 462, 7 C. C. A. 314, is cited in the brief for plaintiff. There the court commented on the well-known practice in our profession of charging a poor man less for legal services rendered than those services are worth, and, on the other hand, of charging a wealthy client a full, fair and reasonable compensation, and the court said: "The fees the attorney deserves from such a client should not be measured by the inadequate compensation and small fees the gentlemen of the bar usually received from those who are unable to pay at all or to pay a fair compensation, but they should be measured by the fees usually obtained by attorneys for like service from those who are able to pay just compensation for the services rendered." That is to say, in

estimating the value of the services the jury should not take for a standard of measurement the fees a lawyer would charge a poor man, in consideration of his poverty, but should estimate the services at their full, fair value. That is sound doctrine as far as it goes, but it does not authorize the plaintiff to show to the jury the defendant's wealth as an element, to be taken into the account in the measurement of the value of the services, unless it is in rebuttal of evidence from the other side attempting to show the custom of a lower standard. If the defendant should introduce evidence to show that the plaintiff for similar services was accustomed to charge smaller fees than those sued for, the plaintiff ³⁷⁹ would have a right to show, if such was the fact, that the smaller fees were charged to poor men because of their poverty, but that the defendant's financial condition justified a charge for fair and reasonable compensation. In the case at bar there was no effort on the part of defendant to prove that the plaintiff or other physicians were in the habit of charging smaller fees for like services, hence there was no occasion for rebuttal evidence to show that smaller fees were charged out of consideration for the poverty of the patients and that defendant's financial condition did not entitle him to that indulgence.

Instruction 3 did not cure the error in this respect of instruction 2; it justified the jury in believing that there was a difference between the reasonable value of services rendered a rich man and those of the same kind rendered a poor man. There is no such difference.

3. Over defendant's objection testimony went in to show that the plaintiff was a physician of good reputation in the community, and instruction numbered 2 authorized the jury, in assessing the value of the services, to take that fact into account. That was error. The plaintiff's general professional reputation was not drawn in question, and the jury had no right to consider it in estimating the value of the services.

The plaintiff's professional reputation in the community would doubtless have some influence on the amount of income derived from his practice, and if that was in dispute and if he was suing for loss of income caused by absence from home in the service of defendant, evidence of that reputation would be admissible. But there was no question of that kind in the case. The plaintiff testified that his income

was six thousand dollars to ten thousand dollars a year, and there was no dispute of that. Besides, he is not suing for compensation for loss of income occasioned by absence from home in the service of defendant. His petition is short and to the point; ³⁸⁰ in it he says that at the request of the defendant he rendered professional services to defendant's son and that the services rendered were reasonably worth sixteen thousand dollars. It is the value of the services alone that he sues to recover.

It was competent for the plaintiff to show that he was a physician of learning and skill, and that fact should be taken as an element in estimating the value of the services rendered. But the plaintiff's general reputation as a physician had no more to do with the case than his general reputation as a man.

4. Instruction 2 is faulty also in this: It apparently assumes that the jury is going to find for the plaintiff and assess the value of the services in question, and the instruction is limited alone to directions as to what the jury should take into account in making the assessment. The instruction should have given the jury to understand that before they would reach the question of quantum valebat they should find for the plaintiff on the main issue, something for example, like this: If the jury find for the plaintiff, then, in determining what is the reasonable value of the services rendered by the plaintiff, the jury should take into account, etc. We do not regard this as a grave error, but since it has been called to our attention we pass judgment on it that it may be corrected at the retrial.

5. The court excluded evidence offered by defendant to show that the defendant's son Frank Lawrence was a man of considerable fortune and amply able to pay for the services. It was error to exclude that testimony. The testimony showed that the plaintiff, the defendant and the defendant's son were well acquainted with each other. Plaintiff knew in a general way the financial standing of the father and the son. If it had been the fact that the son was impecunious and the plaintiff knew it, and defendant ³⁸¹ knew that the plaintiff knew it, would not that fact have naturally influenced the plaintiff in drawing the inference that the defendant intended to pay for the services he called him to perform? And, on the other hand, if it was known to both parties that the son was himself a man of considerable wealth, would that not

naturally render the inference less violent? It was a fact by no means conclusive, but it was one of the many facts in the case to be taken into account and given such weight as the jury should see fit to give it.

6. The learned trial court also assigned as a reason for granting the new trial that the verdict was excessive. That is a point peculiarly within the province of the trial judge; it is one that he is better qualified to judge than an appellate court; the law puts that important responsibility upon him and it advances the cause of justice when the trial judge courageously performs that duty: *Friedman v. Pulitzer Publishing Co.*, 102 Mo. App. 683, 77 S. W. 340. We see nothing calling for a review of the ruling of the trial court on this point.

The order granting a new trial is affirmed.

All concur except Woodson, J., not sitting.

Evidence of the Value of a Patient's Estate is usually inadmissible in determining the reasonable value of the physician's services in attending him: Morrisett v. Wood, 123 Ala. 384, 82 Am. St. Rep. 127; *Cotnam v. Wisdom*, 83 Ark. 601, 119 Am. St. Rep. 157.

STATE v. SWAGERTY.

[203 Mo. 517, 102 S. W. 483.]

AUTOMOBILES, Operated and Propelled in a manner not incompatible with the safety of the traveling public, have equal rights with other vehicles upon the public highway, subject to such rules and regulations as are prescribed by law. (p. 674.)

CONSTITUTIONAL LAW—Class Legislation.—If conditions reasonably justify the distinguishing of a class, and the law affects equally all who come within that class, such law is not unconstitutional as class legislation. (p. 674.)

AUTOMOBILES—Constitutional Law—Special Legislation.—A statute regulating the operation and speed of automobiles on the public streets, roads, and highways is not unconstitutional as special legislation on the ground that it does not apply to all vehicles using the public highways. (p. 674.)

AUTOMOBILES—Police Regulations.—A statute regulating the operation and speed of automobiles on streets, roads and highways, if otherwise valid, is a police regulation, and clearly within the power of the legislature to enact. (p. 675.)

AUTOMOBILES—Regulation of Speed.—The validity of a section of a statute fixing the rate of speed at which automobiles may be operated upon the public highway does not depend upon the validity of another section of such statute requiring the obtaining of a license to operate an automobile. (p. 677.)

AUTOMOBILES—Regulation of Speed.—A statute limiting the rate of speed at which automobiles may be run on the public highways to nine miles per hour is within the power of the legislature to enact, and cannot be declared void on the ground that it is unreasonable. (p. 677.)

H. S. Hadley, attorney general, and N. T. Gentry, assistant attorney general, for the state.

R. H. Stevens and Kehr & Tittmann, for the appellant.

520 **BURGESS, J.** On the twenty-ninth day of October, 1905, there was filed by the prosecuting attorney of St. Louis county, before R. F. Stevens, a justice of the peace of said county, an information charging that defendant, J. L. Swagerty, did willfully and unlawfully, at said county, on said twenty-ninth day of October, 1905, operate and run a certain automobile, propelled by steam, gasoline, electricity or other motive power, at a greater rate of speed than nine miles per hour, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state.

Thereafter, on November 16, 1905, said justice heard said cause, and found the defendant guilty, and assessed his punishment at a fine of one hundred dollars and costs. Defendant appealed from this judgment to the circuit court of St. Louis county, where, on the twenty-third day of May, 1906, the cause was again tried by the court, a jury being waived, and the defendant again convicted, and his punishment fixed at a fine of one hundred dollars and costs. In due time defendant filed motions for a new trial and in arrest, which were overruled, and defendant appealed to this court.

The evidence showed very conclusively that on Sunday, the twenty-ninth day of October, 1905, the defendant, on the Clayton road, one of the public highways of St. Louis county, operated an automobile at a speed of ⁵²¹ twenty miles per hour, and that the automobile was propelled by gasoline. The state asked for no declarations of law. The defendant asked the court to declare the law to be that the act in question was unconstitutional and void, which the court refused to do, and the defendant duly excepted.

This prosecution is based upon the act of 1903, entitled, "An act regulating the operation and speed of automobiles on the public streets, roads and highways of this state, fixing the amount of license, and prescribing a penalty for violating same," approved March 23, 1903. It is as follows:

"Section 1. Every person, corporation, company or copartnership engaged in operating any automobile by steam, gasoline or electricity or other motive power upon any of the public streets, roads or highways of this state, shall keep a vigilant watch for vehicles, carriages or wagons drawn by animals, and especially vehicles, carriages or wagons driven by women or children, and shall when approaching any such vehicle, carriage or wagon so drawn by animal or animals, stop such automobile for such a time as to enable such person in charge of any such vehicle, carriage or wagon to pass, or if going in the same direction, shall before attempting to pass give said driver or person in charge of any such vehicle, carriage or wagon drawn by animal or animals sufficient notice of his or their intention to pass, by the sounding of a bell or whistle, and if necessary to prevent the frightening of such animal or animals bring said automobile to a stop in order to give such driver or person an opportunity to alight from such vehicle, carriage or wagon.

"Sec. 2. All persons, corporation, company or copartnership engaged in operating any automobile as aforesaid, shall, when required by the driver or person in charge of any vehicle, carriage or wagon drawn by any animal or animals, give the right of way to such ⁵²² driver of such vehicle, carriage or wagon, and shall not run such automobile at a greater rate of speed than nine miles per hour.

"Sec. 3. All automobiles operated or run upon any of the public streets, roads or highways of any city or county in this state shall have a number corresponding to the number of the license, placed at a conspicuous place; and if run or operated in the night, shall have two lighted lamps on the front part of said automobile, and on said lamps shall be painted in legible figures, at least three inches long, the number thereof.

"Sec. 4. Every person, corporation, company or copartnership desiring to operate any automobile propelled by steam, gasoline or electricity or any other motive power, shall obtain a license from the license commissioner, if in a city having such commissioner, or if desired to operate same in any county outside the corporate limits of any such city or any of the public highways, streets or roads of this state, shall obtain a license from the county clerk of such county authorizing the operating of such automobile, and shall pay to the license commissioner, if in a city having such commissioner, or if in any county to the county clerk of such county, the sum of two

dollars per annum for each automobile, so operated and run on the streets, roads and highways, which said sum shall be paid into and become a part of the general road fund.

"Sec. 5. Any person, corporation, company or copartnership violating any of the provisions of this act shall, upon conviction, be adjudged guilty of a misdemeanor and punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment": Laws 1903, p. 162.

Automobiles, operated and propelled in a manner ⁵²³ not incompatible with the safety of the traveling public, have equal rights with other vehicles upon the public highway, subject to such rules and regulations as are prescribed by law.

While it is conceded by defendant that the right to license or tax vehicles or the use of vehicles on the public streets, and to regulate such use, is acknowledged by the courts of this state (*St. Louis v. Green*, 7 Mo. App. 468, 70 Mo. 562; *Kansas City v. Richardson*, 90 Mo. App. 450), it is insisted that an analysis of those cases shows that the legislative acts construed applied to all vehicles using the streets, and demonstrates that when the reason of the rule on which these decisions are based is considered, the act in question is special legislation, and, therefore, unconstitutional and void.

There can be no question but that an act which relates to persons or things as a class is a general law, while an act which refers to particular persons or things of a class is a special law: *State v. Tolle*, 71 Mo. 645. It is well settled, however, in this state that, when the conditions reasonably justify the distinguishing of a class, and the law affects equally all who come within that class, such law is not within the constitutional inhibition: *State v. Loomis*, 115 Mo. 307, 32 S. W. 350, 21 L. R. A. 789; *State v. Miller*, 100 Mo. 439, 13 S. W. 677; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784; *State v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 492; *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508.

The principal objection urged against the act is that it is a special law because it legislates only upon automobiles, and does not attempt to legislate upon all vehicles using the public highways. We are unable to concur with the defendant in this view. The act applies to and affects alike all members of the same class; that is, every person, corporation, company or copartnership engaged in operating any automobile by

steam, gasoline, electricity or other motive power, upon ⁵²⁴ any of the public roads or highways of this state. It does not refer to particular persons or things of a class, and is, therefore, a general and not a special law. The act is a police regulation and its passage was clearly within the power of the legislature. It is the province of the legislature to exercise the police power whenever the public health, comfort or safety seems to require it. In passing upon the constitutionality of a similar act passed by the legislature of Illinois, the supreme court of that state, in *Christy v. Elliott*, 216 Ill. 31, 108 Am. St. Rep. 196, 74 N. E. 1035, 1 L. R. A., N. S., 215, said:

"The act in question was designed to secure the safety of travelers upon the public highway. It is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape and form, is capable of a high rate of speed, and produces a puffing noise when in motion. All this makes such a horseless vehicle a source of danger to persons traveling upon the highway in vehicles drawn by horses. Such laws as the act here in question have never been regarded as class legislation, simply because they affect one class and not another, inasmuch as they affect all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis. 'If these laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge': Cooley's Constitutional Limitations, 6th ed., pp. 479-481. In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, the supreme court of the United States said: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, ⁵²⁵ is not within the amendment,' which amendment referred to by the court is the fourteenth amendment to the constitution of the United States, which provides that 'no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.'

" 'Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction

is not arbitrary, but rests upon some reason of public policy growing out of the condition of business of such class': *Allen v. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707, 41 N. W. 936, 3 L. R. A. 532. In *Minneapolis & St. L. R. R. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207, 32 L. ed. 585, it was said: 'The concluding clause of the first section of the fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection of it. The equal protection of the law is afforded when this is accomplished. . . . The discriminations which are open to objection . . . are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law.' The statute in controversy in the case at bar certainly applies to all drivers of automobiles without distinction, and is therefore general as to that class, and, for the reason that such horseless vehicles constitute a source of danger to travelers upon the highway, it cannot be said that the classification is not a reasonable one. . . . In *Sanitary District v. Bernstein*, 175 Ill. 215, 51 N. E. 720, this court held that discrimination between different classes of litigants, which was merely arbitrary in its nature, is a denial of the right of litigants to equal protection of the law, but that, if there is a reasonable ground of distinction, the legislature has discretion to impose reasonable conditions or restrictions, which it ⁵²⁶ deems in furtherance of justice. In *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663, 47 L. R. A. 802, it was said by this court: 'The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference.' In *Minneapolis & St. L. R. R. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207, 32 L. ed. 585, the supreme court of the United States said: 'When the calling or profession or business is attended with danger or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise.' It is certainly true that the business of the man who operates and propels an automobile along the public highway, called a chauffeur, is such a business as is above alluded to. It is attended with danger and re-

quires a degree of scientific knowledge upon which others must rely. These horseless vehicles are certainly capable of being propelled at a greater rate of speed than any ordinary vehicles known to the traveling public prior to their invention, and if they travel at any rate of speed of which they are capable, persons injured would have no remedy, except such negligence as the common law gives a remedy for."

This prosecution is for the violation of section 2 of said act, which prohibits the running of automobiles at a greater rate of speed than nine miles an hour upon any public road or highway in this state, and has nothing whatever to do with section 4 of said act, which requires every person, corporation, company or copartnership, desiring to operate any automobile propelled by steam, gasoline or electricity, or any other motive power, to obtain a license from the proper authority for that purpose, and to pay a license fee of two dollars therefor. The validity of section 2 of the act does not depend upon the validity of section 4. *St. Louis v. Green*, 7 Mo. App. 468, and *Kansas City v. 527 Richardson*, 90 Mo. App. 450, were both actions against the operators of vehicles in said respective cities, in disregard of ordinances of said cities which required all such persons to pay a license tax for the privilege of so doing, and are not in point in this case. Numerous criticisms are passed upon the different sections of the act, none of which, however, have any bearing in this case excepting such as have reference to that provision of section 2 which limits the rate of speed at which automobiles may be run to nine miles per hour. It is claimed by defendant that this speed limit is unreasonable, because it applies only to automobiles and not to any other kind of vehicle, and because a limit of nine miles an hour is a rate of speed less than that at which vehicles as well as persons on horseback frequently go.

It is of common knowledge that automobiles are frequently run at a very high rate of speed on the public highways, and because of this, and their peculiar shape, appearance and noise, they frequently frighten horses and cause them to become unmanageable, and do much injury to both persons and property. To prevent such occurrences the act in question was passed. With the reasonableness or unreasonableness of the act this court has nothing to do. That was for the determination of the legislature, whose power as a law-making body is prescribed and limited only by the state and federal constitutions. In *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am.

Dec. 248, Judge Lumpkin, in a very able and exhaustive opinion in which he discussed the authority of the supreme court to declare invalid an act of the legislature because of unreasonableness, said: " 'I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature, as long as it acts within the pale of its constitutional competency.' The province of the court is to interpret ⁵²⁸ and obey the mandates of the supreme power of the state, however absurd and unreasonable they may appear."

The law in question is plain, and was within the power of the legislature to enact. It is as binding upon the courts as upon the citizen. If the law is harsh, the remedy is by repeal or amendment.

Finding no reversible error in the record, the judgment is affirmed.

All concur.

The Law of the Automobile is the subject of a note to Christy v. Elliott, 108 Am. St. Rep. 212. The employment of an automobile on a public highway as a means of transportation is a lawful use of the road: McIntyre v. Orner, 166 Ind. 57, 117 Am. St. Rep. 359. The use of automobiles on streets and highways is, however, subject to reasonable legislative or municipal regulation: In re Berry, 147 Cal. 523, 109 Am. St. Rep. 160; Christy v. Elliott, 216 Ill. 31, 108 Am. St. Rep. 196.

STATE v. WILLIAMSON.

[203 Mo. 591, 102 S. W. 519.]

ASSAULT with Intent to Kill.—The gravamen of the offense of assault with intent to kill is the intent with which the act is done. (p. 680.)

ASSAULT with Intent to Kill—Shooting at One, Hitting Another.—If a person shoots at one person with intent to kill him, but accidentally shoots another, he cannot be convicted of an assault with intent to kill the latter. (p. 680.)

T. B. Harvey, for the appellant.

H. S. Hadley, attorney general, and N. T. Gentry, assistant attorney general, for the state.

⁵⁹³ BURGESS, J. Upon an information filed by the assistant circuit attorney of the city of St. Louis, in the circuit court of said city, charging the defendant with an assault with intent to kill one Elmer Dorn, the defendant was convicted and his punishment assessed by the jury at imprisonment in the penitentiary for five years. The defendant in due time filed motions for new trial and in arrest of judgment, which were overruled. His sentence was afterward commuted to three years' imprisonment in the penitentiary, and judgment passed accordingly. Defendant appealed.

The information, omitting the formal parts, is as follows:

"Richard M. Johnson, assistant circuit attorney, in and for the city of St. Louis, aforesaid, within and for the body of the city of St. Louis, on behalf of the state of Missouri, upon his official oath, information makes as follows: That Walter Williamson on the twenty-second day of April, in the year of our Lord, one thousand nine hundred and five, at the city of St. Louis aforesaid, with force and arms, in and upon one Elmer Dorn feloniously, willfully, on purpose and of his malice aforethought, did make an assault; and the said Walter Williamson, with a certain weapon, to wit, a pistol loaded with gunpowder and leaden balls, then and there feloniously, willfully, on purpose and of his malice aforethought did shoot off, at, against and upon the said Elmer Dorn then and there giving to the said Elmer Dorn in and upon the head and body of him the said Elmer Dorn with the pistol aforesaid, one wound, ⁵⁹⁴ with the intent then and there him the said Elmer Dorn feloniously, willfully, on purpose and of his malice aforethought to kill; contrary to the form of the statute in such case made and provided and against the peace and dignity of the state."

The evidence on the part of the state tended to prove that the prosecuting witness, Elmer Dorn, was a newsboy, ten years old, and that on the twenty-second day of April, 1905, he was near the corner of Twenty-first street and Franklin avenue, St. Louis, selling newspapers, when the defendant, who was disputing with another man at the corner of said streets, drew a pistol and fired twice, one of the bullets striking Elmer Dorn in the knee. Thomas M. Sayman, a witness for the state, testified that he was driving along the street in a buggy, and, upon hearing the report of a pistol, looked up and saw the defendant fire two or three shots at another man, whose name was Ed. Woehrle. Witness did not notice the boy, Elmer

Dorn, at all, and only learned some two hours afterward that the boy had been struck by one of the bullets. After the shooting, which occurred between 6 and 7 o'clock in the evening, the defendant ran north on Twenty-first street, dodged into an alley and disappeared. The evidence showed that the wounded boy was confined in a hospital for about four weeks, and remained in bed some two weeks longer after he had been taken home.

Only the defendant explained the cause of the difficulty. He testified that he was at Hannibal, Missouri, engaged at his occupation as foreman of a shoe factory, and received a letter from a friend giving him some information about his wife, living in St. Louis. Thereupon he returned to St. Louis, where he resided, and found a number of letters in a wardrobe, which caused him to look for the said Woehrle. He also discovered that a little iron bank or box, containing over thirty dollars in money, was missing, and that it was ⁵⁹⁵ in the possession of Woehrle. Defendant met Woehrle on the street and told him to return the bank. Woehrle at first denied having it, but afterward told the defendant that he would go to his house for the bank, and asked defendant to meet him at the corner of Twenty-first and Franklin avenue, where he would deliver the bank to him. That a short while thereafter he met Woehrle at the appointed place, when the latter cursed him, and thrust his hand in his pocket as if reaching for a pistol, and that thereupon he (defendant) pulled out his pistol and fired at Woehrle. A day or two after the shooting the defendant went to Chicago, where he remained about four weeks, and then returned to St. Louis and gave himself up.

The only question presented by this appeal is as to whether there was any substantial evidence to support the verdict. This point was raised by the motion for a new trial, and is now insisted upon in this court.

In order to convict the defendant of the crime charged in the information in this case, it devolved upon the state to prove that he shot at Elmer Dorn with intent to kill him; not that he shot at Woehrle, and that the shot took effect upon Dorn: *State v. Mulhall*, 199 Mo. 202, 97 S. W. 583, 7 L. R. A., N. S., 630. The gravamen of the offense was the intent with which the shot was fired; and it is clear from the evidence that the defendant did not intend to shoot Dorn, for there is no evidence that he even saw him at the time he fired the shot which entered his leg.

There is, we think, an entire failure of evidence to support the verdict, and the judgment should, therefore, be reversed and the defendant discharged. It is so ordered.

All concur.

One Unlawfully Firing at A and hitting B is guilty of an assault with intent to kill B: *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686; *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257. See, too, the note to *Johnson v. State*, 90 Am. St. Rep. 582. Some courts, however, have thought otherwise: *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8.

HEWITT v. PRICE.

[204 Mo. 31, 102 S. W. 647.]

JURISDICTION—Suits Involving Title to Land.—A statute which requires suits for the possession of real estate or whereby the title thereto may be affected, to be brought in the county wherein such real estate lies, does not apply to actions in which the question of title is merely incidental to the main controversy. (p. 685.)

TRUST DEEDS—Foreclosure—Rights of Purchaser—Jurisdiction of Equity.—A person holding a trust deed cannot, by a decree of a court of equity, be compelled to pay a sum fixed by the court as the value of the land at the time of the trustee's sale, for the purpose of purchasing it. (p. 687.)

TRUST DEEDS—Foreclosure—Rights of Purchaser.—The purchase of land at trustee's sale under a deed of trust must be entirely voluntary, and if the sale is valid the purchaser is entitled to hold the land; if it is invalid by reason of any informality in conducting the sale or by any fraud perpetrated by the purchaser, it must be set aside. (p. 687.)

TRUST DEEDS—Foreclosure—Fraud—Burden of Proof.—If it is sought to set aside a trustee's sale under a deed of trust upon the ground of misrepresentation or fraud, the burden of proof is upon the person charging such fraud or misrepresentation. (pp. 687, 688.)

TRUST DEEDS—Foreclosure—Fraudulent Sale—Remedy.—If a trustee's sale under a deed of trust is unfair and surrounded by a state of facts which shows to the reasonable satisfaction of the chancellor that to permit it to stand would work a fraud upon the rights of the mortgagors, then such sale should be set aside and the parties placed in the position they occupied before any sale took place, or, at the election of the mortgagors, the sale may be set aside upon the condition that the amount of the mortgage debt, together with interest, be fully paid and satisfied. (p. 688.)

Action by J. A. Hewitt against S. C. and Clara A. Price to recover a balance claimed to be due upon a promissory note executed in July, 1891, the payment of which was secured by a trust deed in which L. D. Bell was named as trustee. The

complaint enumerated the credits to which the plaintiff admitted the defendants were entitled, and averred that the remainder of the note, together with interest, remained unpaid. The defendants in their answer sought to set up what they styled an equitable counterclaim, by which they alleged that fraud was practiced upon them by the fact that the trust deed was to be foreclosed was concealed from them, and that they had been misled by statements made by plaintiff; that the price brought at the trustee's sale was grossly inadequate, and the defendants had no notice that the sale was going to take place; that the defendant S. C. Price had received an injury incapacitating him from attending to business, and while so incapacitated, the plaintiff visited the defendant and falsely informed him that no proceedings to foreclose had been taken, and that if such defendant had not been so misled, he, or some one representing him, would have attended the sale, and the property would have brought more than enough to pay the note.

After trying the cause and hearing all the evidence offered, the trial court found, among other things, that on August 31, 1898, the trustee, at the request of the plaintiff, sold the real property described at public auction for \$385, and executed to him a deed pursuant to such sale; that after paying the reasonable costs of the sale, its net proceeds were \$366.80; that the reasonable value of the property sold at the time of the sale was, and still is, \$1,350; that neither of the defendants was present or represented at the sale, or had any knowledge thereof, and that if they had been present or had knowledge, they would have caused the real estate to bring its reasonable value; that they were kept in ignorance of the intended sale by the plaintiff, who led them to believe that it was not to take place, and that they ought now to be permitted to redeem by paying the full amount due on the note, which the court found to be \$1,520.70. The court, therefore, ordered that the defendants pay such sum to the clerk of the court on or before the 21st of October, 1901, with interest, and that if such payment were made, the plaintiff should deposit with the clerk of the court a quitclaim deed conveying the property to the defendant S. C. Price. An interlocutory decree was entered in accordance with these findings, September 21, 1901. On the 21st of January following, the court entered the final decree, in which it declared that the defendants had duly complied with the order of the court, and

that the plaintiff had refused to comply therewith by depositing with the clerk a quitclaim deed for the property, and that plaintiff might and should keep the land at its reasonable value on the date of the trustee's sale, which the court now finds to be \$1,350, and credit defendants therewith on their indebtedness, and that the amount due from the defendants to plaintiff at the date of the sale was \$1,290.93, and that the defendants recover of the plaintiff the difference, to wit, \$59.07, and the defendants and the plaintiff each pay the costs made by himself.

The plaintiff moved to set aside the finding, judgment, and decree of the court and for a new trial. The motion for a new trial was overruled and an appeal prosecuted from the decree and judgment of the trial court.

H. S. Miller and S. W. Moore, for the appellant.

Cole, Burnett & Moore, for the respondents.

⁴¹ FOX, P. J. The record in this cause discloses numerous assignments of error as ground for the reversal of this judgment. We will treat of the complaints of appellant and give them such consideration as in our opinion their importance requires.

1. It is insisted by learned counsel for appellant that the trial court had no jurisdiction to try this cause because the matters and things stated in the respondents' answer affect the title to real estate which was not located in Jasper county, where the suit was instituted, nor in Barton county, where the cause was transferred by order of change of venue, and where it was finally tried, but that the land, the title of which is sought to be affected by respondents' answer, is located in Newton county. The insistence of appellant is that the respondents' answer sets up an equitable defense and also prays for affirmative relief, which, under the code, is in effect a cross-bill for affirmative relief. This is true, and in our opinion there can be no doubt but what the legal effect of such an answer was to convert this suit into an equitable proceeding: *Dunn v. McCoy*, 150 Mo. 548, 52 S. W. 21.

It being conceded that the answer of respondents seeks affirmative relief by which the title to real estate would be affected, it is earnestly insisted by appellant that our statute, which provides that "suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought

in the county in which such real estate, or some part thereof, is situate" (Rev. Stats. 1899, sec. 564), deprived the Barton circuit court of jurisdiction to hear and determine the issues presented by respondents' answer. Upon this proposition we will say that if this suit be viewed as simply one in chancery, to cancel the trustee's deed which ⁴² conveyed the title to the land in Newton county to the appellant and leave out of consideration the nature and character of the suit as made by the pleadings in the case, it might very properly be regarded as a local action, and therefore should have been brought in the county where the land is situated, as provided by section 564, above mentioned; but, on the other hand, if we consider the answer or cross-bill as stating but a part of the contract which was entered into between appellant and respondents, and that the other part thereof is stated in the petition, and that the two when considered together constitute the real and entire transaction between the parties, then quite a different conclusion may be reached. Our code has made very liberal provisions respecting the settlement of controversies between litigants and has made ample provision, where suits are brought, for the defendants by way of cross-bill or counterclaim to assert every right to which they may be entitled connected with the subject matter of the cause of action alleged in the petition. Section 604 of the Revised Statutes of 1899 provides that "the answer shall contain a general or special denial of the allegations of the petition and a statement of any new matter constituting a defense or counterclaim." Section 605 provides: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of any of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; second, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may ⁴³ have, whether they be such as have been heretofore denominated legal or equitable, or both."

It will be observed that the first section as above quoted requires the defendant to plead any new matter or counterclaim he may have to the cause of action stated in the petition,

and the second section defines what the defenses or counterclaims may consist of which the former requires to be pleaded, and one of them is a cause of action arising out of a contract or transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action. In our opinion the respondents' defense and counterclaim clearly fall within the provisions of this section. The deed of trust in pursuance of which the sale of respondents' land was made, concerning which they now by their answer seek relief, was directly and intimately connected with the note in this controversy upon which the plaintiff predicates his cause of action. The execution of the note and the deed of trust must be considered together and constitute the entire transaction between the parties, and it was by reason of the plaintiff being the legal holder of the note upon which he brought suit which entitled him to request the sale and have the land sold in payment of such note. In our opinion the respondents had the right to set up the equitable defense and ask for affirmative relief, and it is very questionable, if they had failed to make such defense in an action upon this note, whether or not they could have sought such relief and had the questions litigated by presenting them in a different form to the court for determination: *Donnell v. Wright*, 147 Mo. 639, 49 S. W. 874.

While in the case at bar the main controversy and, in fact, the cause of action as stated by the plaintiff, was upon the note, yet the deed of trust which was given as security for the note was clearly connected with the subject of the cause of action upon the note as stated by ⁴⁴ the plaintiff in his petition, and while it may be said that the deed of trust was merely incidental in this proceeding to the main controversy, yet it is so clearly connected with the subject of the cause of action, that in our opinion there can be no question as to the right of the respondents to present such equitable defenses as they may have growing out of the sale under the deed of trust to satisfy the payment of the note upon which this suit was brought. We are, therefore, of the opinion that section 564 of Revised Statutes of 1899, as heretofore indicated, which requires suits for the possession of real estate or whereby the title thereto may be affected to be brought in the county wherein such real estate lies, does not apply to actions in which the question of title is merely incidental to the main controversy: *Royston v. Royston*, 21 Ga. 161.

In *Massie v. Watts*, 6 Cranch, 1, 148, 3 L. ed. 181, Chief Justice Marshall, in discussing the subject of jurisdiction, announced this principle. He said: "But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract or as trustee, or as the holder of a legal title acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

In *Olney v. Eaton*, 66 Mo. 563, which was a case to enforce a vendor's lien, the answer consisted of a general denial, and pleaded specifically that plaintiff agreed to receive lands in the state of Kansas as part payment of the purchase money, and in pursuance of that agreement tendered a deed and prayed for a specific performance of the contract. The reply in that case admitted the contract for the purchase of the Kansas⁴⁵ lands, but averred it was a separate and distinct transaction having no connection with the first. While the court found that the two contracts were separate transactions, yet it was expressly held that if the finding had been the other way, that the transactions were to be considered together as an entirety, then the judgment should have been for the defendant, notwithstanding the fact that the land was located in another state. The rule was announced in that case that "decrees of courts of equity do, indeed, primarily and properly act in personam, and, at most, collaterally only in rem; hence, the specific performance of a contract for the sale of lands lying in a foreign country will be decreed in equity, whenever the party is a resident within the jurisdiction of the court."

2. This brings us to the consideration of the decree finally rendered in this cause. It is the final decree that constitutes the judgment in this cause and in which the rights of the parties are declared, and is the only one with which we have to deal; therefore, we will omit any reference to the interlocutory decree. In our opinion this decree is erroneous. It will be noted that the chancellor sought to ascertain the value of the land and from the testimony heard place a certain value upon it. Then follows the recital in the final decree that the plaintiff may and shall keep the land in

controversy at its reasonable value on the date of said trustee's sale, which the court found and now finds to be \$1,350, and credit defendants therewith on their said indebtedness to plaintiff. This decree is illogical, and was doubtless based upon the theory that the land had been sacrificed at the sale; however, it certainly cannot be the law that the chancellor can fix the price upon the land upon which a deed of trust is given and compel the plaintiff to take it at the price so fixed. The plaintiff in this ⁴⁶ case has the right upon his own accord to bid upon this land at the sale, and if such sale was made in accordance with the provisions of the deed of trust, not surrounded by any conditions which would operate a fraud upon the rights of the defendants, then he has the right to keep the land at the price paid for it. If the sale was unfair and the defendants misled by the false and fraudulent representations of the plaintiff to not attend the sale or have some one to represent them, and to permit such sale to stand would operate fraud upon the rights of the defendants, then the chancellor should set it aside, but we know of no rule in equity which would authorize the chancellor to fix the price upon land held as security under a deed of trust, to say by a decree that you must take this land at this price. The purchase of land in cases of this character must be entirely voluntary, and if the purchase and sale are valid, the party purchasing is entitled to hold the land; if it is invalid by reason of any informality in conducting the sale or by any fraud perpetrated by the purchaser, then it ought to be set aside, but we are unwilling to say that a party holding a deed of trust can be by a decree of a court of equity compelled to pay any fixed sum for the land upon which the deed of trust is given.

3. It is next insisted that, under all the evidence elicited at the trial, the finding upon the issues as presented by the equitable defense in the answer should have been for the plaintiff. We repeat that we shall not undertake to review all the testimony introduced upon the issues as presented by the answer. Until there is a decree which clearly sets forth the finding of the court that the sale of this land was either fraudulent or not fraudulent, there is no necessity for doing so. The law is well settled in this state, as well as in other jurisdictions, where it is sought to set aside a sale upon the ⁴⁷ ground of false representations or fraud, that the burden of proof rests with the party charging such fraud and

false representations, and if upon the retrial of this cause the chancellor finds that this sale was unfair and surrounded by a state of facts which shows to the reasonable satisfaction of the chancellor that to permit it to stand would work a fraud upon the rights of the defendants, then such sale should be set aside and the parties placed in the position they occupied before any sale took place, or, at the election of the defendants, the sale may be set aside upon condition that the amount of plaintiff's debt, together with interest, be fully paid and satisfied.

4. Appellant complains at the admission of testimony respecting the value of the land embraced in the sale under the deed of trust. It is earnestly insisted that the court erroneously admitted testimony showing the value of the land in dispute by comparison with the value of other property. It is sufficient to say upon this proposition that the law is well settled in this state upon that subject, and while the value or selling price of similar property may be taken into consideration in determining the value of the piece of property in litigation, it is equally true that the location and character of such property should be similar and the sales of such other property should at least be reasonably near in point of time to the time at which the inquiry of the value of the property in dispute is directed.

For the reasons as herein indicated the decree and judgment should be reversed and the cause remanded, and it is so ordered.

All concur.

Sales Under Powers Contained in Mortgages and Trust Deeds are discussed in the notes to *Tyler v. Herring*, 19 Am. St. Rep. 266; *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573.

NATIONAL EXCHANGE BANK v. KILPATRICK.

[204 Mo. 119, 102 S. W. 499.]

PLEDGE—Collateral Security—Duty to Make Available.—If a bond, note, bank stock, or accepted order on a third person is transferred and delivered to a creditor as collateral security, it is the duty of the pledgee to use reasonable care and diligence to make such collateral available and effectual for the purpose for which it was pledged, and if through his negligence or wrongful act or omission, the collateral is lost, he is accountable and liable to the pledgor for its value. (p. 696.)

PLEDGE—Collateral Security—Loss of Through Negligence.—If the payment of a note given to a bank is secured by the pledge of bank stock as collateral security, and when such bank stock is worth par value, the pledgor directs the bank holding the note to sell such stock and apply the proceeds on the note, and the bank fails and neglects to do so, it must, in the event that the bank stock subsequently becomes worthless, bear the loss, the amount of which must be credited on the note. (p. 697.)

Sebree & Farrington and G. Pepperdine, for the appellant.

A. H. Livingston, for the respondent.

121 FOX, P. J. This cause is now before this court upon appeal by the plaintiff from a judgment in the Texas circuit court in favor of the defendant, Lurah T. Kilpatrick. The suit was predicated upon a promissory note executed by Lurah T. Kilpatrick and Nancy E. Sitton for the sum of \$5,200. This petition is in the ordinary form declaring upon a promissory note and there is no necessity for reproducing it here. To this petition the defendants interposed the following answer:

"Defendants, for amended answer to plaintiff's petition, admit the execution and delivery of the note sued upon in this action.

"For further answer, defendants say that the note sued upon was given and executed by them, at the instance and request of plaintiff and for its accommodation, and that no consideration whatever passed to defendants for the same; wherefore, defendants pray judgment with costs.

"Defendants, for further answer to plaintiff's petition, say that in the year 1897, T. J. Boyd & Co. executed a note to the Central National Bank of Springfield, **122** Missouri, for \$11,000 and to secure the payment thereof delivered to said bank as collateral security \$5,000 Alton Bank stock, \$6,600 Oregon County Bank stock, \$400, Thayer Canning Company stock, and \$4,000 Thayer Hardware Company stock;

that soon thereafter said T. J. Boyd & Co. failed; that the said Central National Bank disposed of the Alton Bank stock for \$3,500 and gave credit therefor on said Boyd & Co. note, leaving a balance due of \$7,500; that after the failure of said Boyd & Co., as aforesaid, the said Central National Bank requested defendant to execute their note for said sum of \$7,500 in lieu of, and in place of the said Boyd & Co. note, and allow the \$6,500 Oregon County Bank stock to be issued to them and still to allow said stock to remain as collateral security, together with the \$4,000 Thayer Hardware Company stock and the \$400 Thayer Canning Company stock, for the payment of said note of \$7,500; that under these terms and conditions defendants executed said note at the instance and request and for the accommodation of said Central National Bank; that the stock in the Oregon County Bank, while being in defendants' names, was actually held and controlled by the said Central National Bank, and that all dividends thereon and assets therefrom were received by said Central National Bank; that said contract and agreement was made between said bank and defendants in order that it might be enabled to get the said Boyd & Co. note out of the past due files, so that the amount thereof might be used as a live asset in said bank; that after the execution of said note as aforesaid, by defendants, said Central National Bank sold \$1,500 of said Oregon County Bank stock, and ¹²³ gave credit therefor on said note of \$7,500, executed to it by defendants as aforesaid; that defendants executed to said bank a renewal note for \$5,100 and secured the same by depositing the collateral securities as aforesaid with the said Central National Bank. And defendants further say that they are informed and believe that some time in the year 1898 the said Central National Bank was merged into the National Exchange Bank, the plaintiff herein; that by reason of said merger as aforesaid this plaintiff came into possession of the \$5,100 note executed by defendants to said Central National Bank, together with all of the above-mentioned stock deposited as collateral security for the payment of said note, in all amounting to \$9,500; that after said plaintiff had come into the possession of said note and collateral security, and about eight months after the maturity of said note, these defendants, at the request of plaintiff and for its accommodation, executed to plaintiff the \$5,200 note, now in suit, and deposited as collateral security for the payment thereof the \$4,000 Thayer Hardware

Company stock, \$400 Thayer Canning Company stock, and the \$5,100 Oregon County Bank stock, hereinbefore mentioned; that no consideration whatever passed to defendants for the execution of said note and for the deposit of said stock as security therefor; that after said note was executed to plaintiff by defendant as aforesaid, plaintiff sold the \$4,000 Thayer Hardware Company stock, at par value, and that no part of the proceeds of the sale of said stock was ever credited upon said note, but that plaintiff wrongfully and without authority converted the proceeds of the sale of said stock to its own use. Wherefore, defendants pray that plaintiff be required to make an accounting to them for the amount realized from the ¹²⁴ sale of the said Thayer Hardware Company stock, and the disposition of the other collaterals aforesaid, and that upon such accounting defendants have judgment against plaintiff for the amount of the proceeds found to have been received by it for the sale of said stock and other collaterals aforesaid and not credited upon said note, and for all proper relief.

“Defendants further say that while plaintiff held the Oregon County Bank stock as aforesaid as collateral security for the payment of said note, they had several offers to sell said stock at par value of \$5,100, and thereupon requested said plaintiff to sell said stock or permit defendants to sell said stock and apply the proceeds of the sale thereof toward the payment of said note, which plaintiff refused to do; that said stock had now become worthless, and by reason of plaintiff's refusal to sell or permit the same to be sold these defendants have been damaged in the sum of \$5,100, for which they ask judgment against plaintiff, with costs of this suit.

“Defendants further state that in the year 1898 the said Oregon County Bank passed into the hands of a receiver, and that at said time it owed this plaintiff \$28,000 and owed depositors and other creditors about \$35,000; that said Oregon County Bank was possessed of property and assets amounting to \$100,000; that before the appointment of the receiver of the said Oregon County Bank as aforesaid, said Oregon County Bank had turned over to this plaintiff as collateral security for the payment of its debt to said plaintiff about \$50,000 worth of its assets to secure the payment of its said debt, which said assets plaintiff has never accounted for to the stockholders of said Oregon County Bank or the receiver thereof; that after the appointment of the receiver of said

Oregon County Bank as aforesaid, said receiver, ¹²⁵ by an order of the circuit court of Oregon county, Missouri, made therein approving the same, made an agreement with said plaintiff, whereby plaintiff took possession of all the assets of the said Oregon County Bank and was to pay out of the collections of said assets its debt of \$28,000, and other debts and liabilities to go to the depositors and other creditors of said Oregon County Bank, amounting to \$35,000, making a total liability of said Oregon County Bank, which plaintiff was to pay, of \$63,000, and after the payment of the said debts aforesaid, plaintiff was to turn over to the stockholders of said Oregon County Bank the balance of said assets, and that said assets of said bank have never been turned over to the stockholders by plaintiff. Defendants further say that said Oregon County Bank was capitalized at \$10,000, of which \$5,100 was in the names of these defendants, and deposited as collateral security for the payment of the note in suit. And defendants say that they are entitled to a fifty-one hundredth part of the sums of money in the hands of plaintiff after the payment of its debt aforesaid and the payment of the depositors and other creditors of said Oregon County Bank, and that the amount to which they are entitled is about \$18,000. Wherefore, defendants pray that plaintiff be required to make an accounting as to all the assets received by it of the Oregon County Bank, and the disposition thereof; that upon such accounting, after the credit of the amount of the debt due to plaintiff from the said Oregon County Bank and the payment of all the depositors and other creditors of said bank, defendants have judgment against plaintiff for a fifty-one hundredth part of all money received by it in excess of the aforesaid debts and belonging to the stockholders of said Oregon County Bank, and for all proper relief."

¹²⁶ The reply of the plaintiff was in effect a general denial of the allegations of the new matter set up in the answer.

This cause was originally brought in Howell county, Missouri, but the venue of said cause was changed by order of court to Texas county, where the cause was finally disposed of. The testimony introduced upon the trial of this cause substantially tended to prove about the following state of facts:

In 1897, T. J. Boyd & Company was a mercantile company at Thayer in Oregon county. The Bank of Alton was a bank located in Alton in Oregon county and the Oregon County

Bank was a bank of \$10,000 capital stock located at Thayer, Oregon County, Missouri. The Central National Bank was a bank located at Springfield, Missouri, and was afterward merged with or absorbed by the National Exchange Bank, the appellant here. In 1897 the firm of T. J. Boyd & Company failed and made an assignment. At the time of the failure of this firm the Central National Bank held its note for \$11,000 and collateral for its security as follows: Five thousand dollar stock in the Bank of Alton, \$6,600 stock in Oregon County Bank, \$4,000 stock in Thayer Hardware Company and \$400 stock in a canning company at Thayer, Missouri. All these securities were assigned by Boyd & Company to the Central National Bank as collateral for the \$11,000 note. After the failure of Boyd & Company, the cashier of the Central National Bank, doubtless with a view of holding the Oregon County Bank intact (however, this does not clearly appear from the disclosures of the record), arranged with the defendants, Lurah T. Kilpatrick and her mother, Nancy E. Sitton, to execute their note in lieu of the note of Boyd & Company, and have the stocks of the different corporations reissued to them, but all to be ¹²⁷ held by the Central National Bank. This was done without any consultation with Boyd & Company. So far as the disclosures of the record are concerned, it seems that neither the defendant, Lurah T. Kilpatrick, nor her mother, Mrs. Sitton, had but very little to do with the transaction, except to sign their names to the note and transfer stock, so that the Boyd note might be kept up as a live asset of the bank. By this arrangement the Central National Bank controlled a large part of the stock in the Oregon County Bank. The Central National Bank sold the Alton Bank stock for \$5,000 and gave credit on the Boyd note, and when the defendants executed the first note in lieu of the Boyd note, the amount was for \$7,500. It was understood between the Central National Bank and Captain Sitton, husband of Mrs. Sitton and father of Mrs. Kilpatrick, that he sell \$1,500 stock in the Oregon County Bank, which would leave the Central Bank still holding \$5,100, which was a controlling interest therein. The \$1,500 in stock of the Oregon County Bank was sold and the \$7,500 note credited with the amount thereof. Then the defendants executed their note for \$6,000, and on this note appears a credit of \$800, which seems to have been placed there out of a balance realized from the Thayer Hardware stock after discharging another Boyd note they held, but in

no way connected with this transaction. Whether this credit was placed on the note by the Central or Exchange Bank does not appear. About this time or soon after the Central National Bank was absorbed or its business taken over by the appellant, Mr. Sanford, cashier of appellant bank, went to Thayer and obtained a renewal of the note for \$5,200, being the note sued on,¹²⁸ and delivered up the last note given to the Central National Bank. Plaintiff had also the \$5,100 of the Oregon County Bank stock, \$4,000 of the Thayer Hardware stock and \$400 Canning stock still assigned to it as collateral for the note sued on. Captain Sitton, the husband of Mrs. Sitton and father of Mrs. Kilpatric, testified in this cause, and he states that he was acting as the agent of the defendants and requested the plaintiff to sell the Oregon County Bank stock, or, to the same effect, to give him permission to sell it and apply it to the payment of the note in suit, and that the Exchange Bank, the plaintiff in this cause, refused to take any steps toward the sale of the stock or to permit the agents of the defendants to do so. Sometime afterward this bank stock, which was held by plaintiff as collateral, became worthless. At the time the sale of the stock was suggested to the plaintiff and a request made to permit its sale and apply it to the payment of the note, the testimony is undisputed that the stock was worth one hundred cents on the dollar, and would have brought its par value. The Thayer Hardware stock was sold and it is admitted by plaintiff that the sum of \$2,000 was realized from such sale.

At the close of the evidence the court gave numerous declarations of law; however, we deem it unnecessary to burden this opinion with a reproduction of them. This cause was submitted to the court sitting as a jury and the issues were found to be for the defendant. Timely motions for new trial and in arrest of judgment were filed, and by the court overruled. Judgment was rendered for defendant in accordance with the finding of the court, and from this judgment the plaintiff prosecuted this appeal and the record is now before us for consideration.

¹²⁹ The record in this cause discloses but one legal proposition for our consideration, that is, in which the propriety of the action of the trial court is challenged in allowing the defendant credit on the note in suit, for the \$5,100 stock in the Oregon County Bank, which was held by the plaintiff as collateral security, and while being so held became worthless.

It is practically conceded that there was \$2,000 realized from the hardware stock, which was held by the plaintiff as collateral; therefore, our attention will be directed to the correctness of the action of the court in allowing credit upon the note for the Oregon County Bank stock. The trial court in effect held that as the plaintiff permitted the Oregon County Bank to become insolvent and the stock held by it as collateral security for the note sued on to become unavailable, the plaintiff should stand the loss of such stock.

We have carefully read in detail the testimony as applicable to this subject, and there is no escape from the conclusion that, if plaintiff had undertaken to sell this stock at the time suggested by Captain Sitton, it would have realized its full value and been amply sufficient, together with the Hardware stock, to have fully satisfied this note. The testimony of Captain Sitton, who was acting as agent of his wife and daughter, who had executed this note, stands absolutely without any contradiction, and in our opinion his testimony can only be treated as a direction to the plaintiff who held this stock as collateral to dispose of it, and informed them that it could be sold for one hundred cents on the dollar. Plaintiff offers no reason why the suggestion to dispose of this stock was not followed, and there is no valid reason assigned why the stock was not sold. ¹³⁰ Plaintiff simply held it as collateral and it was its plain duty when the defendants, through their agent, Captain Sitton, insisted that the stock should be sold and applied to the payment of this note, to do so. It does not answer the contention of respondent for appellant to say that the only way in which Captain Sitton would have been authorized to have sold this stock was to first tender the amount due upon the note. His testimony does not bear out the insistence of the appellant that the defendants were trying to get possession of the collateral. His testimony, when reasonably construed, simply means that the collateral would remain in the possession of the plaintiff, and he simply asked permission to contract for the sale of it and the money realized from such sale to be turned over to the plaintiff and applied to the payment of this note and the stock transferred to whomsoever it might be sold. In other words, the testimony of Captain Sitton cannot be regarded as wanting to obtain the possession of the stock without any sale of it, but when fully considered it was a clear direction to those who had a right to make directions in relation to a collateral that belonged to them, that it

be sold when it would bring its full value. Plaintiff refused to take any steps toward the sale of this stock when its full value could have been realized and defendant's obligation fully satisfied. This stock afterward becoming worthless, in our opinion the trial court properly and correctly held that the plaintiff should stand this loss.

The law upon this subject is very correctly stated in 22 American and English Encyclopedia of Law, second edition, 899, where it is said in the text and fully supported by the cases cited in the notes that "it is well settled that when a chose in action, such as a bond, note, or accepted order on a third person, is transferred and delivered to a creditor as collateral security, it is the duty of the pledgee to use reasonable care and diligence to make ¹³¹ such collateral available; that he is bound to use proper exertions to render the collateral effectual for the purpose for which it was pledged; that if necessary he must bring an action against the maker of the collateral; and that if, through his negligence or wrongful act or omission, the collateral is lost, he is accountable and liable to the pledgor in the same manner as a pledgee of goods and merchandise is liable to the pledgor if they are lost or destroyed through the pledgee's failure to give them the necessary protection and care": *Hanna v. Holton*, 78 Pa. 334, 21 Am. Rep. 20; *Northwestern Nat. Bank v. Thompson*, 71 Fed. 113, 17 C. C. A. 638.

In *State Bank of St. Louis v. Bartle*, 114 Mo. 276, 21 S. W. 816, it was expressly ruled that it was the duty of a party holding a collateral as security to carefully and faithfully perform all acts necessary to make the collateral available, and that it was a duty owed to the surety, and, failing in it, by which the collateral is lost, the surety will be discharged to the extent he is thereby injured: *Taylor v. Jeter*, 23 Mo. 244; *Brandt on Suretyship and Guaranty*, 1st ed., secs. 384-387; *Kemmerer v. Wilson*, 31 Pa. 110; *Pickens v. Yarrowborough's Admr.*, 26 Ala. 417, 62 Am. Dec. 728; *Grisard v. Hinson*, 50 Ark. 229, 6 S. W. 906.

The learned text-writer, Mr. Brandt, on *Suretyship and Guaranty*, first edition, section 384, thus states the law applicable to this subject: "If the principal places in the hands of the creditor, as collateral security for the debt, an obligation of a third person, the creditor is, without any special agreement to that effect, bound to use due diligence to col-

lect the same, and to charge all the parties thereto, and if anything is lost on account of his failure to use such diligence, not only the surety but the principal also is discharged to the extent that he is injured. With reference to this it has been said that: 'The assignor of collaterals parts with his control over them, and the assignee should be bound to use proper ¹³² exertions to render them effectual for the purpose for which they were assigned. The principle is that when a right of action or a judgment is transferred by a debtor to his creditor, to secure the debt, or as collateral security, ordinary diligence must be used to make it available, and if a loss occurs by negligence, even passive negligence, which is unreasonable and results in loss, it will be a good defense to a suit on the original debt.' It has also been said that 'the necessary care and attention should be bestowed to preserve the value of whatever is thus voluntarily, and with a view to one's own interest, taken under his control.' It has been held that the question 'what is due diligence' is, when the facts are ascertained, one of law; and where a note was due when the creditor took it as collateral, and the maker was then solvent, but the creditor did not bring suit on it for three months, when the maker had become insolvent, it was held that this was such negligence as charged the creditor with the loss of the note."

While it may be said that the plaintiff in this cause had absolute dominion over this bank stock as collateral, as long as the note of defendants remained unpaid, yet it by no means follows that the defendants, who are the real owners of the collateral, are absolutely deprived of all interest in it, and it was the plain duty of the plaintiff in this cause, who could only be legally interested in the collateral to the extent of having the proceeds of it applied to the payment of the note in suit, and the Oregon County Bank being solvent, and the pointed demand being made by the defendants, who were particularly interested in this collateral, that it be sold and the proceeds applied to their note, in our opinion it was the plain duty of the plaintiff to then and there sell this stock for its par value and apply the proceeds to the payment of the note, and their failure to do so, and the bank subsequently becoming insolvent, and the stock worthless, in our opinion constitutes ¹³³ such negligence as fully warranted the trial court in crediting the amount of such loss upon the note.

We have carefully analyzed this record and the judgment of the lower court was clearly for the right party, and it should be affirmed, and it is so ordered.

All concur.

The Holder of Collateral Securities must use reasonable care and diligence to make them available; and if by negligence, wrongful act, or omission on his part, loss is sustained it must be borne by him: *Cooper v. Simpson*, 41 Minn. 46, 16 Am. St. Rep. 667; *Rumsey v. Laidley*, 34 W. Va. 721, 26 Am. St. Rep. 935; *Montague v. Stelts*, 37 S. C. 200, 34 Am. St. Rep. 736; *First Nat. Bank v. O'Connell*, 84 Iowa, 377, 35 Am. St. Rep. 813; *Sampson v. Fox*, 109 Ala. 662, 55 Am. St. Rep. 950.

HINKLE v. LOVELACE.

[204 Mo. 208, 102 S. W. 1015.]

DIVORCE—Void Judgment in—Affidavit.—Under a statute requiring a petition in divorce to be supported by the affidavit of plaintiff, such affidavit cannot be made by a next friend, and if thus made, the decree of divorce is void. (p. 705.)

AFFIDAVITS—Statutory Requirements.—If the statute specifically points out who may make a certain affidavit, it cannot be made by another. (p. 706.)

DIVORCE—Affidavit, When Jurisdictional.—If a statute requires that a petition in divorce be supported by an affidavit of plaintiff as to the absence of collusion, fear or restraint, and good faith, such affidavit is jurisdictional, and the absence thereof to that effect made by plaintiff personally, is fatal to the decree of divorce and renders it void. (p. 707.)

DIVORCE—Verification of Petition, Delay of.—A verification by a plaintiff of her petition in divorce on the day of the final decree, by her making the required statutory affidavit, does not cure a prior fatal defect to the petition, consisting of an affidavit made by a next friend. (p. 709.)

DIVORCE—Collateral Attack.—A petition in divorce cannot be amended in a matter of substance, after publication of notice, so as to make a valid judgment thereon against a defendant who does not appear, and a judgment rendered under such circumstances is subject to collateral attack. (p. 709.)

DIVORCE—Verification of Petition, Absence of.—The verification required by statute to be made and annexed to a petition in divorce proceedings is a matter of substance, and the court acquires no jurisdiction of the cause without it. (p. 709.)

LIMITATION OF ACTIONS—Minority—Marriage.—If a wife, during her minority, executes a conveyance of her land, and afterward obtains a void decree of divorce and contracts a second marriage, and on attaining her majority executes a second conveyance to the same grantee, after which her first husband dies, and both her conveyances are void, the statute of limitations against any action by her to recover the land commences to run on the death of her first husband. (pp. 709, 710.)

Thomas & Hackney, for the appellant.

McReynolds & Halliburton, for the respondent.

²¹³ WOODSON, J. This is an action in ejectment, and the petition is in the usual form, instituted in the circuit court of Jasper county, whereby the plaintiff sought to recover the undivided one-half interest in and to certain real estate situated in said county with damages for the detention thereof, and rents and profits.

The answer admitted the possession of certain portions of the land, and denied he had the possession of the remainder; that he had bought plaintiff's interest in the land, paying three hundred dollars therefor, and that he had expended money for improvements; that plaintiff had stood by and knew of defendant making improvements without objection and making no claim to the land; that she had not tendered back the purchase money nor paid for the improvements and taxes; and that she was estopped by her conduct from prosecuting her action.

Defendant pleaded the ten, twenty-four and thirty years' statute of limitations; and that plaintiff's marriage to Daniel Hinkle in 1867 was void; that her first husband, Daniel Edmonds, was alive at said time and ²¹⁴ did not die until some years afterward; and that she was divorced from Daniel Hinkle in March, 1903.

The plaintiff's reply denied the allegations of the answer, and further averred that at all the times mentioned in the answer she was a married woman and continued so until March, 1903.

It was admitted on the trial that Emberson Herold was the common source of title; that he died intestate in June, 1864, owning three hundred and twelve and one-half acres of land, of which the land in controversy is a part, and leaving surviving him as his heirs at law his six children, one of whom is the plaintiff; and that the value of the rents and profits of the land sued for is two dollars per acre per year.

The record of a partition suit in the common pleas court of Jasper county was read in evidence, by which it appeared that in an action between part of the heirs of Emberson Herold, deceased, and the defendant and others, the defendant had claimed the one-sixth interest of plaintiff and also another one-sixth interest purchased by him from one of the

other heirs, and that the land in controversy was set off to him as his two-sixths interest in the estate. The plaintiff was not a party to that suit.

It was shown by the plaintiff's testimony that plaintiff was born on June 7, 1850; had been twice married, first to Daniel Edmonds in the fall of 1865, and with whom she lived three months and was then divorced from him October 1, 1867; that she married Daniel Hinkle January 1, 1868, and continued as his wife until divorced from him June 22, 1903; that Daniel Edmonds died after plaintiff's marriage with Hinkle; that defendant was plaintiff's stepfather after having married plaintiff's mother, the widow of Emerson Herold.

Defendant's evidence established the following facts, to wit:

²¹⁵ That plaintiff and Daniel Edmonds were married in November, 1865, and separated in March, 1866; that on January 9, 1867, plaintiff filed a petition for divorce from Daniel Edmonds. Said petition was sworn to by J. Lovelace as agent for plaintiff, the affidavit otherwise being in statutory form for divorce proceedings. In the body of the petition is the following allegation: "That defendant is a nonresident of this state, or that he has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him." Upon which allegation an order of publication was made, notifying Daniel Edmonds to appear at the March term, 1867. At which term there was an interlocutory decree in favor of plaintiff. At the October term, 1867, on October 1st, plaintiff by leave of court amended her petition, the amendment consisting of the statutory affidavit being written onto the original petition and subscribed and sworn to by plaintiff, and on the same day final decree was entered in favor of plaintiff. On January 1, 1868, plaintiff went through a marriage ceremony with Daniel Hinkle and lived with him as his wife until sometime in 1903. The record shows that Daniel Edmonds died in Joplin, Missouri, some four or five years after said decree of divorce and plaintiff's marriage to Hinkle.

Defendant received two deeds from plaintiff for her interest in this land, one in January, 1868, while still under age, and one in December, 1868, after she became of age, but while living with Daniel Hinkle as his wife, both acknowl-

edged by plaintiff and Daniel Hinkle, but in neither does the certificate show she was examined separate and apart, etc.

Defendant took and held possession of said land, under said deeds, for thirty-five years, and paid all the taxes thereon, and the legal title and equitable title ²¹⁶ thereto emanated from the United States more than thirty-five years before the commencement of this action.

The cause was tried by the court without the intervention of a jury, at the request of plaintiff, the court gave five instructions, and refused the following: "The court declares the law to be that the decree of divorce granted in favor of the plaintiff against Daniel Edmonds on the first day of October, 1867, was valid and effective to divorce the plaintiff from said Daniel Edmonds."

To which action of the court, in refusing said instruction, the plaintiff duly excepted.

The court over the objection of the plaintiff gave declarations of law on behalf of the defendant to the effect that the decree of divorce obtained by the plaintiff from Daniel Edmonds was void, for the reason that the statutory oath attached to the petition was sworn to by the next friend instead of the plaintiff, and that the marriage between the plaintiff and Daniel Hinkle was void, and that in consequence the thirty years' statute of limitation was a bar to the recovery by the plaintiff.

Other declarations of law were given and refused, all showing that the theory of the finding for the defendant was that the decree obtained from Daniel Edmonds was void, and that the marriage to Daniel Hinkle was likewise void, and that the statute of limitations commenced to run against the plaintiff at the instant of the death of Daniel Edmonds.

The court found the issues for defendant, and rendered judgment accordingly. Plaintiff in due time filed motions for a new trial and in arrest, which were, by the court, overruled, and exceptions were duly saved, and plaintiff has brought the cause here by appeal.

²¹⁷ 1. Plaintiff's contention is that, when, in 1864, her father, Emberson Herold died, seised of the land described in the petition, she, under the statute of descent and distribution, inherited an undivided one-sixth of it, and, being a minor at the time and married before she attained her majority, the statute of limitations would not run against her until the dissolution of her marriage contract, which was on

June 22, 1903; and that when the land was partitioned and her portion was decreed and set over to defendant, ejectment will lie against him for her share of the land, notwithstanding the execution and delivery of the two deeds by her to the defendant, purporting to convey the land in controversy, for the reason, as she contends, both of them are void, because she was not examined separate and apart from her husband when she acknowledged them, as required by statute.

The defendant, upon the other hand, contends that the decree of divorce rendered in plaintiff's favor against Daniel Edmonds, her first husband, on October 1, 1867, was absolutely null and void, and that she continued to be his lawful wife until his death, which occurred in 1872 or 1873, and that on that account her marriage to Daniel Hinkle, on January 1, 1868, was absolutely null and void, because she could not have two lawful husbands at the same time.

Under that state of facts, defendant contends that when Daniel Edmonds, her first husband, died, she was of age, and the statute of limitations began to run against her, which was at least thirty years before the institution of this suit.

From these contentions of the plaintiff and defendant it is readily seen that the vital and turning point in the case is the validity or invalidity of that decree of divorce. If it is valid, then the plaintiff must recover ^{his} the land; but if it is invalid, then the defendant must be adjudged the lawful owner thereof. So this presents squarely the question, Is that decree valid or invalid?

In the first place, the defendant assails the sufficiency of the petition, upon which the decree is based, for two reasons; because, first, it alleges, "that defendant is a nonresident of this state; or that he has absconded or absented himself from his usual place of abode in this state so the ordinary process of law cannot be served upon him."

Defendant contends that these allegations are contradictory of each other, because a party cannot be a nonresident of this state and abscond or absent himself from his usual place of abode in this state at the same time; and, for that reason, the allegations were not sufficient and did not authorize the order of publication made in the divorce proceedings instituted against the defendant in that case.

- The statute in force at the time that suit was begun respecting service by publication was as follows: "In suits in . . . divorce . . . if the plaintiff, or other person for him,

shall allege in his petition . . . that part or all of the defendants are nonresidents of the state, or have absconded or absented themselves from their usual place of abode in this state, etc., the clerk shall make an order of publication," etc.: Gen. Stats. 1865, c. 164, sec. 13.

In discussing a similar question, which arose under this same section, Judge Brace used this language: "It appears upon the face of the record in the tax suit that service of notice by publication was ordered on the ground that the court had been 'duly informed by evidence of the plaintiff herein that said Samuel Burton is a nonresident of the state of Missouri.' In order that nonresidence may afford a basis for an order of publication, the statute requires the allegation of ²¹⁹ that fact in the petition or in an affidavit filed with the same, or some time thereafter. The petition in that suit contained no such allegation, nor was any affidavit containing such an allegation filed therewith or thereafter. On the contrary, the petition was silent on that subject, the said defendant was sued, and the summons issued against him as a resident defendant, and the allegation contained in the only affidavit filed in the case was that the said defendant 'had absconded and absented himself from his usual place of abode in this state.' Thus, it appeared both affirmatively and negatively that said defendant was a resident and not a nonresident of the state, and under the statute the court had no authority to order service on him as a nonresident by publication": *Parker v. Burton*, 172 Mo. 85, 72 S. W. 633.

And Judge Sherwood, in construing said section, said: "So that we have here presented a defendant sued as a nonresident, summons issued against him as a resident, and publication issued against him as a resident who could not be found. In short, the order of publication was a clear departure from the allegations of the petition and affidavit": *Harness v. Cravens*, 126 Mo. 233, 28 S. W. 971.

The two cases last cited show that the word "abode" as used in said section 13 means and is used in the same sense as the word "residence" is used.

Judge Brewer, in discussing a similar statute, said: "The grounds for the attachment alleged in the affidavit were, 'that the defendant is a foreign corporation, or a nonresident of Brown county.' There are two objections to this—one, that it is in the disjunctive: *Drake on Attachment*, sec. 101. . . . There was, therefore, no warrant for the issue of the attach-

ment, and the plaintiff in the suit obtained no lien on the goods by the service of the writ": *Dickenson v. Cowley*, 15 Kan. 269.

²²⁰ "An affidavit is insufficient which states in the alternative the grounds on which relief is sought": 2 Cyc., p. 22, par. 3c; *Collins v. Beebe*, 54 Hun, 318, 7 N. Y. Supp. 442; *Leonard v. Bowman*, 21 N. Y. Civ. Proc. 237, 15 N. Y. Supp. 822; *Billings v. Noble*, 75 Wis. 325, 43 N. W. 1131; *Harness v. Cravens*, 126 Mo. 233, 28 S. W. 971.

We are unable to understand how a party can be a "non-resident of this state" and at the same time have "a usual place of abode or residence in this state," and vice versa—he cannot have "a usual place of abode or residence in this state," and at the same time be "a nonresident of the state." The one allegation contradicts, counteracts and nullifies the other as completely as if neither had been written in the petition, and for that reason there was no allegation in the petition or affidavit filed in the case which authorized and upon which to base the order of publication against the defendant in the divorce proceedings. The foregoing conclusions are fully sustained by the authorities cited: See, also, *Tooker v. Leake*, 146 Mo. 419, 48 S. W. 638.

The plaintiff controverts the conclusions above stated, and contends that the alternative allegation of nonresidence of defendant, or his abscondence from his usual place of abode in this state, is not a jurisdictional matter, but is simply a defect which can only be taken advantage of by special demurrer or motion to make the pleading more definite and certain. No authority is cited supporting that position, while all the authorities to which our attention has been directed hold to the contrary. We are, therefore, of the opinion that the defendant in that suit was not properly served.

It may not be out of place to state here that when constructive service is authorized, instead of personal, there must be a strict compliance with the statutory requirements: *Myers v. McRay*, 114 Mo. 377, 21 S. W. 730.

²²¹ 2. It is next contended by defendant that the decree of divorce is a nullity, because the petition upon which it is based does not state facts sufficient to constitute a cause of action, because it was sworn to by one J. Lovelace as agent and not by the plaintiff herself, as required by the statute which was in force at the time of the institution of that suit, which is as follows:

"Sec. 2. The circuit court shall have jurisdiction in all cases of divorce and alimony or maintenance; and all such cases shall be tried by the court, and the like process and proceedings shall be had in such causes as are had in other civil suits, except the answer of the defendant shall not be under oath. The petition shall be accompanied by an affidavit, annexed thereto, that the facts stated therein are true according to the best knowledge and belief of the plaintiff, and that the complaint is not made out of levity, or by collusion, fear or restraint between the plaintiff and defendant, for the mere purpose of being separated from each other, but in sincerity and truth, for the causes mentioned in the petition. The proceedings shall be had in the county where the plaintiff resides; and the process may be directed, in the first instance, into any other county in the state where the defendant resides": Gen. Stats. 1865, c. 114, p. 460, sec. 2.

It will be observed that this statute requires that "the petition shall be accompanied by an affidavit annexed thereto, that the facts stated therein are true according to the best knowledge and belief of the plaintiff, and that the complaint is not made out of levity, or by collusion, fear or restraint between the plaintiff and defendant, for the mere purpose of being separated from each other, but in sincerity and truth, for the causes mentioned in the petition."

From a careful consideration of this statute, it is clear the legislature intended that the plaintiff in divorce ²²² suits should, in person, swear to the petition. It not only in express terms commands that to be done, but it goes further and prescribes the things to be stated in the affidavit which rest peculiarly and exclusively within her own knowledge, and in the very nature of the things to be sworn to by her, no one else could know whether they are true or false. How could anyone save the plaintiff know that the complaint is not made out of levity, by collusion, fear or restraint, or that the suit was not brought for the mere purpose of being separated from each other, or that she is sincere in the prosecution of the suit? They are matters that are securely locked up in the mind and conscience of the moving party, and no one else could know those things at the inception of the divorce suit before investigation had. It is not pretended that there is express authority for an agent to make the affidavit, and it is not perceived how it can be reasonably implied from anything in the statute. These views are fully sustained by

the following authorities: *Bryant v. Harding*, 29 Mo. 347; *Huthsing v. Maus*, 36 Mo. 101; *Norvell v. Porter*, 62 Mo. 309; *Quigley v. Mexico S. Bank*, 80 Mo. 289, 50 Am. Rep. 503; *In re Heath*, 40 Kan. 333, 19 Pac. 926; *Western Bank v. Tallman*, 15 Wis. 92; *Hadden v. Larned*, 83 Ga. 636, 10 S. E. 278.

The right to bring a suit for divorce is strictly personal, and under the exclusive volition and control of the injured party.

"If a guardian or next friend has the power insisted upon, we desire to learn whence it is derived. It certainly is not given by express provision of law, nor can it legitimately be deducted from the personal custody of the ward, which imposes certain duties on the guardian which he must perform. Whether after gross and repeated infidelities the wife will continue to regard him as her husband and live with him as his wife is for her decision only. Death only can dissolve the marriage relation without her consent, and no divorce ²²³ can or ought to be had in his, or any case, but through the agency and will of the injured party": *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758; 2 *Bishop on Marriage and Divorce*, 5th ed., sec. 306a.

This personal character of the suit shows more clearly why the plaintiff only can make the affidavit to the petition: *Richardson v. Richardson*, 50 Vt. 119; *Besore v. Besore*, 49 Ga. 378; 2 *Bishop on Marriage and Divorce*, 6th ed., sec. 306a; *Winslow v. Winslow*, 7 Mass. 96; *Birdzell v. Birdzell*, 33 Kan. 433, 52 Am. Rep. 539, 6 Pac. 561; *Jones v. Jones*, 18 Me. 308; *Amos v. Amos*, 4 N. J. Eq. 171; *Wright v. Wright*, 3 Tex. 168.

Where the statute specifically points out who may make a certain affidavit, it can be made by no one other than those specified: 2 *Cyc.*, p. 5, pars. A, P; *Steinbach v. Leese*, 27 Cal. 295; *State v. Washoe County*, 5 Nev. 317; *Ex parte Aldrich*, 1 Denio, 662; *In re Heath*, 40 Kan. 333, 19 Pac. 926; *Ex parte Shumway*, 4 Denio, 258; *Baker v. Knickerbocker*, 25 Kan. 288.

According to these authorities, clearly Lovelace could not make the affidavit for the plaintiff, verifying the petition, in the divorce proceedings, and for that reason the petition in law stands as though it had never been sworn to.

The plaintiff cites many authorities sustaining the proposition that the next friend may make an affidavit for the

minor when necessary to be filed by plaintiff at the commencement or during the progress of the suit, but none of the cases were suits for divorce. The rules governing cases involving property rights are not applicable to divorce cases: *Ayres v. Gartner*, 90 Mich. 380, 51 N. W. 461; *Hopkins v. Hopkins*, 132 N. C. 22, 43 S. W. 508; *Rayl v. Rayl* (Tenn. Ch. App.), 64 S. W. 309; *DeArmond v. DeArmond*, 92 Tenn. 40, 20 S. W. 422.

3. The affidavit of the absence of collusion, fear or restraint and of good faith is jurisdictional, and the absence of such affidavit to that effect is fatal.

²²⁴ In discussing a similar statute of Michigan, the supreme court of that state said: "This is a statutory requirement and is mandatory. . . . Nor can this defect be waived by any act of defendant. The policy of the statute is to prevent collusive proceedings between the parties for divorce. If in the power of defendant to waive the provision, the statute may be easily nullified": *Ayres v. Gartner*, 90 Mich. 380, 51 N. W. 461.

In the last case cited the supreme court, by mandamus, compelled the court below to dismiss the cause pending before it because it had no jurisdiction to hear and try the cause, in the absence of such an affidavit.

In discussing this same question, the supreme court of North Carolina used this language:

"The verification is in the following words: 'Julia A. Hopkins, being duly sworn, says she has heard read the foregoing complaint; that the facts set forth therein are true of her own knowledge, except the facts therein set forth on information and belief, and as to them she believes it to be true.' This verification does not conform to the requirements of the Code, section 1287. In the case of *Nichols v. Nichols*, 128 N. C. 108, 38 S. E. 296, this court has said: 'It is necessary, in order that the court may take jurisdiction of the matter of divorce, that each and all of the requisites mentioned in the affidavit required by the Code, section 1287, shall be set out and sworn to by the plaintiff. The requirements are mandatory.' This is not like the case of a complaint in an ordinary action which may or may not be verified under section 257 and 258 of the Code, as the plaintiff elects. The plaintiff is not required by these sections to verify his pleadings, but, in the case of a complaint in an action of divorce, the law is different, as the very language

and purpose of section 1287 of the Code show it was intended that its provisions relating to the verification of the complaint should be mandatory and a failure to comply with the requirements of that section is fatal to ²²⁵ the plaintiff's case, as the court is without jurisdiction unless the proper verification of the complaint is made. Verification in the very manner prescribed by the section is essential to confer jurisdiction upon the court to entertain the action or proceeding therein." Motion to dismiss was sustained: *Hopkins v. Hopkins*, 132 N. C. 22, 43 S. E. 508; *Martin v. Martin*, 130 N. C. 27, 40 S. E. 822; *Holloman v. Holloman*, 127 N. C. 15, 37 S. W. 68; *Rayl v. Rayl* (Tenn. Ch. App.), 64 S. W. 309.

The supreme court of Tennessee said:

"The defects in the affidavit in question are:

"1. It does not state that the complaint is not made out of 'levity.'

"2. It does not state that the complaint is not made out of collusion 'with the defendant.'

"3. It does not state that the complaint is made for the 'causes' mentioned in the bill. . . .

"The peace and happiness of society largely depend upon maintaining the marriage relation, and the policy of the state is to encourage and maintain that relation. For the protection of society against the manifold evils that would necessarily flow from the wanton and indiscriminate severing of that relation, the legislature has declared that divorces shall not be granted, except for certain causes, which are distinctly set out in the statute; and has prescribed what allegations shall be made in the bill or petition for divorce, and how the bill or petition shall be verified. All these requirements of the statute are for the benefit of society, and not for the benefit of the parties. They are intended to guard against the bad faith and collusion of the parties. The application must show a clear and meritorious case under the statute before the court can take jurisdiction of the cause. The statutory affidavit is an essential part of the application, and without it there is no jurisdiction." The bill was dismissed: *DeArmond* ²²⁶ *v. DeArmond*, 92 Tenn. 40, 20 S. W. 422; 14 Cyc., p. 678, par. J, and notes; *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943; *Eastes v. Eastes*, 79 Ind. 363.

The plaintiff cites us to but one case which holds contrary to the doctrine above stated, and that is the case of *McCraney*

v. McCraney, 5 Iowa, 232, 68 Am. Dec. 702. This case is against the great weight of authority in this country, and it seems to us to be against the letter and spirit of our statute upon the subject in hand, and is contrary to sound public policy, and for these reasons we refuse to follow it.

The decree for divorce in the case of plaintiff against Daniel Edmonds, her first husband, is absolutely void for two reasons; because, first, as we have heretofore pointed out the fact, that there was no proper allegation contained in the petition filed in that cause which authorized the court or clerk to issue the order of publication against the defendant, and for that reason the court acquired no jurisdiction over him; and, second, the court acquired no jurisdiction of the cause, because the petition was fatally defective, for the reason that it was not subscribed and sworn to by the plaintiff.

The subsequent verification of the petition on the day the final decree was entered in the cause did not cure the defects, because the defendant was not in court at that time.

For the reasons stated the decree was subject to collateral attack in this cause: *Jewett v. Boardman*, 181 Mo. 647, 81 S. W. 186; *Russell v. Grant*, 122 Mo. 161, 43 Am. St. Rep. 563, 26 S. W. 958; *Black on Judgments*, secs. 83, 84, 218, 219-246; 17 *Ency. of Pl. & Pr.*, p. 52, par. 2.

This would be true even conceding the defendant had been properly served by publication in the divorce suit, because an amendment of the petition in a material matter after publication of notice is void and not binding on the defendant. "A petition cannot, therefore, be amended in a matter of substance, after publication ²²⁷ of notice, so as to make a valid judgment thereon against a defendant who does not appear": *Leavenworth R. R. & B. Co. v. Atchison*, 137 Mo. 218, 37 S. W. 913; *Janney v. Spedden*, 38 Mo. 295.

The verification required to be made and annexed to the petition in divorce proceedings is a matter of substance, so much so that the court acquires no jurisdiction of the cause without it: See authorities cited under paragraph 3 of this opinion.

It must, therefore, follow according to the *Leavenworth* and *Spedden* cases, just mentioned, that the amendment made on the day of trial was void and of no effect.

4. It follows from what has been before stated that the plaintiff upon the death of her first husband, which occurred sometime between 1872 and 1873, had a complete cause of

action against defendant for the possession of the land, which he admits he is in possession of, and she has not asserted that right, notwithstanding the doors of the courts have been open to her for nearly thirty years. Upon the undisputed facts of this case, it is perfectly clear that plaintiff's cause of action is barred by both the ten and twenty-four years' statute of limitations.

Several other questions have been presented and argued by counsel for both plaintiff and defendant which we have carefully considered; and, after concluding they could not change the conclusions here reached, we deem it unimportant to discuss them in this opinion.

For the reasons before stated, the judgment of the circuit court is affirmed.

Valliant, P. J., Graves and Lamm, JJ., dissent as to paragraph 1; all concur as to rest of the opinion.

The Failure to Swear to a Complaint for Divorce does not vitiate the decree on the ground that the court has no jurisdiction: *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. Dec. 702. A statute requiring the complaint to be verified is merely directory; and an unverified petition gives the court jurisdiction and may be amended: *Rush v. Rush*, 46 Iowa, 648, 26 Am. Rep. 179.

An Answer in Divorce in the Nature of a Cross-bill must be verified in order to authorize a decree for the defendant; but if it is not verified, it may be amended in the absence of collusion: *Harrison v. Harrison*, 94 Mich. 559, 34 Am. St. Rep. 364.

STRONG v. WHYBARK.

[204 Mo. 341, 102 S. W. 968.]

DEEDS—Quitclaim—Record—Consideration—Priority Over Unrecorded Deed.—A grantee in a recorded quitclaim deed for a recited consideration of "natural love and affection and five dollars," without any notice or actual knowledge of a prior unrecorded warranty deed of the same land, from the same grantor, and without any fraud or collusion between such grantee and his grantor, takes title as against the grantee in such warranty deed. (p. 712.)

DEEDS—Consideration.—It is not necessary that the consideration for a deed be adequate in value. Although such consideration is small or even nominal, in the absence of fraud, it is enough to support the deed against a prior unrecorded conveyance. (p. 713.)

DEEDS—Quitclaim—Notice.—The rule that a quitclaim deed is notice of pre-existing equities, and that the grantee therein and those who claim under him take with notice that his title is question-

able, has no application where the grantee under a subsequent quitclaim deed from the same grantor acquires title for value and without notice of a former unrecorded deed. (p. 713.)

DEEDS—Quitclaim—Record—Notice.—A purchaser for value by quitclaim deed is as much within the protection of the registry act as one who becomes a purchaser by warranty deed. (p. 713.)

DEEDS—Record—Consideration.—If the controversy is between the vendee in a duly recorded deed and the vendee in a prior unrecorded deed from the same grantor, the consideration in the former to make it superior must be a valuable, as distinguished from a good, consideration, but such consideration need not be full and adequate. (p. 713.)

DEEDS—Want of Consideration—Evidence of.—In the absence of fraud, want of consideration cannot be shown against a recital of consideration for the purpose of defeating the operative words of a deed. (p. 714.)

DEEDS—Quitclaim—Fraud.—If fraud in its execution is relied upon as a defense to a quitclaim deed, the defendant must allege and prove it. (p. 714.)

J. G. Strong and E. R. Lentz, for the appellant.

W. N. Barron, for the respondents.

344 WOODSON, J. This is a bill in equity, instituted in the circuit court of Butler county, wherein plaintiff seeks to have her title quieted to five hundred and twenty acres of land. John R. Boyden was one of the several defendants named in the bill. He filed an answer claiming an interest in and to one hundred and sixty acres of said land, and also denied generally the allegations of the bill. No point is made against the pleadings, and he is the only defendant whose interest is involved in this appeal.

The facts in the case are undisputed and are as follows:

345 Seth D. Hayden was the common source of title, and on March 6, 1861, by his warranty deed, for a recited consideration in the deed of six hundred and forty dollars, conveyed said land to William A. Moore, and on August 26, 1863, said Hayden, by his quitclaim deed, for a recited consideration of "natural love and affection and five dollars," conveyed the same land to Josephine Hayden. The deed to Hayden was recorded April 11, 1868, and the one to Moore was recorded December 14, 1874.

The plaintiff's title is derived through mesne conveyances from Josephine Hayden, while defendant's title is derived through similar conveyances from William A. Moore. It was admitted that the land was wild and unoccupied. This was all the evidence in the case.

The court found for defendant and rendered judgment for him. The plaintiff in due time filed his motion for a new trial, which was overruled by the court, and to the action of the court in overruling said motion the plaintiff duly excepted, and has appealed the cause to this court.

1. The sole question involved in this case is, Did the subsequently executed quitclaim deed of Seth D. Hayden to Josephine Hayden, dated August 26, 1863, by virtue of its prior recordation, have the force and effect of conveying to her the title to the land in controversy by force and operation of the registry act, and thereby render invalid and inoperative the prior warranty deed made by him to William A. Moore, dated March 6, 1861, but not filed for record until December 14, 1874?

There is no evidence whatever in this record tending to show that Josephine Hayden had any notice or knowledge of the execution of the prior unrecorded warranty deed from Seth D. Hayden to said Moore, at the time he made the quitclaim deed to her, nor is there any evidence of fraud or collusion between Seth D. Hayden and Josephine Hayden. Both William A. ³⁴⁶ Moore and Josephine Hayden neglected for years to file their deed for record, as provided for by section 923 of the Revised Statutes of 1899, yet the latter filed her deed about six years prior to the time when he filed his.

The statute provides that "no such instrument in writing shall be valid, except as between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record": Rev. Stats. 1899, sec. 925.

According to the provisions of this section, the deed from Hayden to Moore was invalid, and conveyed no title to the land in controversy in so far as Josephine Hayden was concerned, because she had no notice of its execution at the time she filed her deed for record. If the exception mentioned in the section just quoted was the only exception or limitation to that statute, then there would be no question as to the title of Josephine Hayden and those claiming under her, but the courts upon principles of equity and justice have repeatedly held that if the subsequent purchaser either had notice of the prior unrecorded deed, or if he was a purchaser without having paid a good and valuable consideration for the land, then he would take nothing by his purchase and deed: *Maupin v. Emmons*, 47 Mo. 304; *Aubuchon v. Bender*, 44

Mo. 560. The question now presents itself, Was Josephine Hayden a purchaser of the land in question for a good and valuable consideration? The deed recites that the conveyance was made for and in "consideration of natural love and affection and five dollars to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged."

A valuable consideration is defined to be money or something that is worth money: 2 Washburn on Real Property, 4th ed., p. 394; 1 Chitty on Contracts, 11th Am. ed., 27. It is not necessary that the consideration should be adequate in point of value. Although small ³⁴⁷ or even nominal, in the absence of fraud, it is enough to support a contract entered into upon the faith of it: *Forbs v. St. Louis etc. R. R.*, 107 Mo. App. 661, 82 S. W. 562; *Marks v. Bank of Missouri*, 8 Mo. 316; *Ridenbaugh v. Young*, 145 Mo. 274, 46 S. W. 959; *Blaine v. Knapp & Co.*, 140 Mo. 241, 41 S. W. 787; *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726; *Green v. Higham*, 161 Mo. 333, 61 S. W. 798; 6 Am. & Eng. Ency. of Law, 2d ed., p. 694, par. 5. It seems to us that it would be a useless waste of time and energy to cite authorities in support of the proposition that five dollars or any other stated sum of money in excess of one cent, one dime, or one dollar, which are the technical words used to express nominal considerations, is a valuable consideration within the meaning of the law of conveyancing.

It has been suggested that a quitclaim deed is notice of pre-existing equities, and that those who claim under Josephine Hayden had notice that her title to this land was questionable, and that neither she nor they could defend upon the ground that they were bona fide purchasers for a valuable consideration without notice of the title of the true owner: *Stivers v. Horne*, 62 Mo. 473; *Mann v. Best*, 62 Mo. 491; *Ridgeway v. Holliday*, 59 Mo. 444.

But the rule last suggested has no application to a case where the grantee under a subsequent quitclaim deed from the same grantor acquired the title for value and without notice of the former unrecorded deed: *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 216. "A purchaser for value by quitclaim deed is as much within the protection of the registry act as one who becomes a purchaser by a warranty deed": *Munson v. Ensor*, 94 Mo. 504, 7 S. W. 108; *Campbell v. Laclede Gas Co.*, 84 Mo. 352; *Brown v. Banner etc. Coal Co.*, 97 Ill. 214,

37 Am. Rep. 105; *Elliott v. Buffington*, 149 Mo. 663, 51 S. W. 408; *Ebersole v. Rankin*, 102 Mo. 488, 15 S. W. 522.

Where the controversy is between the vendee of a duly recorded deed and the vendee of a prior unrecorded ³⁴⁸ deed from the same vendor, the settled rule of law in this state seems to be that the consideration in the latter must be such as the law denominates a valuable consideration as distinguished from a good consideration. We know of no case which has gone further and holds that the purchaser under the recorded deed must have paid a full and adequate consideration for the land.

If fraud is made an issue in the case, then the inadequacy of the consideration paid may be taken into consideration with all the other facts and circumstances in the case for the purpose of establishing fraud; but in the absence of fraud, a want of consideration cannot be shown against a recital of a consideration for the purpose of defeating the operative words of a deed: *Bobb v. Bobb*, 89 Mo. 411, 4 S. W. 511; *Henderson v. Henderson's Exrs.*, 13 Mo. 151; *Hollocher v. Hollocher*, 62 Mo. 267; *McConnell v. Brayner*, 63 Mo. 461; *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Farrington v. Barr*, 36 N. H. 86; *Kimball v. Walker*, 30 Ill. 482.

In the case at bar, however, there was no evidence introduced tending to prove the recited consideration of five dollars was not in fact paid.

Counsel for defendant, in both his oral and written arguments, contends that Josephine Hayden procured her deed from Seth D. Hayden by fraud. It is a sufficient answer to that to say that no such issue is made by the pleadings in the case, nor was there a word of evidence introduced at the trial tending to establish that fact.

If defendant wished to rely upon fraud as a defense, he should have alleged and proved it. The burden of proving such an issue is upon the defendant: *Jackson v. Wood*, 88 Mo. 76; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Taylor v. Crockett*, 123 Mo. 300, 27 S. W. 620.

³⁴⁹ It follows from what has been said that the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

All concur.

The Operation and Effect of Quitclaim Deeds, and the rights of the grantees thereunder, are discussed in the note to *Babcock v. Wells*,

85 Am. St. Rep. 854. It has recently been affirmed that such deeds are not an assertion of any particular, or of any title, and does not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title: *Olmstead v. Tracy*, 145 Mich. 299, 116 Am. St. Rep. 299; and that an unrecorded warranty deed has precedence over a subsequently executed and recorded quitclaim deed purporting to remise, release, and quitclaim the grantor's interest in the premises: *Fowler v. Will*, 19 S. Dak. 131, 117 Am. St. Rep. 938.

STATE v. WEBER.

[205 Mo. 36, 102 S. W. 955.]

STATUTES—Title of Act.—“An Act Relating to the preservation, propagation, and protection of game animals” is sufficiently broad to embrace all kinds of deer, whether wild or tame. (p. 719.)

GAME LAW—No Owner of Deer Raised in Captivity has a better right thereto than has the hunter at common law to the deer captured or killed by him. (p. 719.)

GAME LAW—Domesticated Animals.—A statute making it unlawful to have in possession the carcass of any deer not having thereon the evidence of its sex applies to all deer, wild or domesticated. (p. 720.)

GAME LAW—Domesticated Animals.—A statute making it unlawful to have in possession the carcass of any deer not having thereon the evidence of its sex is not unconstitutional as applied to a dealer in meats who has purchased the carcasses of deer from one who raised them in captivity. (p. 722.)

Chas. B. Adams and Wash. Adams, for the appellant.

Isaac B. Kimball and Bruce Barnett, for the state.

³⁹ **BURGESS, J.** At the January term, 1906, of the Jackson county criminal court, under an information filed by the prosecuting attorney of said county, the third count of which charged the defendant with having in his possession the carcasses of three deer which did not have thereon the natural evidences of their sex, in violation of section 13 of the act known as the game law, approved March 10, 1905 (Laws 1905, p. 158), the defendant was found guilty as charged in said third count, and his punishment assessed at a fine of twenty-five dollars. The cause was tried by the court, trial by jury having been waived. From the judgment of the court defendant appealed to the Kansas City court of appeals, by which the cause has been transferred to this court for its determination, sections 15, 20, 21, and 30 of article 2 of the constitution being involved.

The evidence on the part of the state showed that the defendant had in his possession and was offering for sale at his meat market in Kansas City, on December 14, 1905, the carcasses of eight deer, from which the natural evidences of their sex had been removed, which facts were not denied by the defendant.

Defendant introduced evidence showing that the deer in question had been fawned and raised in captivity upon a stock farm in Henry county, Missouri, owned by Mrs. George M. Casey, and were killed there ⁴⁰ and their carcasses sold and shipped to the defendant at Kansas City. The deer had belonged to a herd raised upon the Casey farm, and were descended from a pair of tame deer raised as pets some twenty-five years before on the lawn of the Casey home. They were kept in a pasture inclosed by a high fence, were permitted to run with the cattle, were raised under similar conditions, and were fed and cared for like cattle. The inclosure in which they were kept was never maintained as a game preserve, nor were the animals raised or used for hunting purposes. The herd at one time had increased to one hundred and fifty head. A number of deer were killed every year for food purposes, and it had for several years been the custom of the defendant, during the holiday season, to purchase a small number of deer from Mr. or Mrs. Casey for sale at his meat market in Kansas City.

The defendant asked the court to declare the law to be as follows:

"The court, sitting as a jury, declares the law to be, that if it appears from the evidence that the deer described in the information against defendant were purchased by defendant from Mrs. George M. Casey for value and were shipped to him from Clinton, Henry county, Missouri, to be sold in the Kansas City market; that said deer consisted of part of a herd of tame or domesticated deer which were bred and raised on the Casey farm near Clinton, Missouri, as domestic animals; that said deer were kept constantly inclosed by fences, and were not, and had never been, permitted to run at large or to be hunted as game; that said herd of deer was the product of a pair of deer raised as pets on the lawn of the Casey home more than twenty years ago, and that a part of said herd were killed annually and sold and shipped to the Kansas City and other markets for food purposes, and that on and prior to June 16, 1905, the date on which the game law of Missouri, ⁴¹ under

which the information against defendant was brought, went into effect, the said deer were held by private ownership, legally acquired, then said deer are not within the provisions of said game law, and the defendant is not guilty of the offense or offenses charged in said information, and must be discharged."

This declaration of law was refused, and defendant excepted at the time.

The sections of the act having any connection with this prosecution are as follows:

"Section 1. The ownership of and title to all birds, fish and game in the state of Missouri, not held by private ownership, legally acquired, is hereby declared to be in the state and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession except the person so catching, taking or killing or having in possession shall consent that the title to said fish, birds and game shall be and remain in the state of Missouri for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state for the purpose of regulating the use and disposition of the same and said possession shall be consent to such title in the state."

"Sec. 13. It is hereby declared unlawful to kill or attempt to kill any deer in the state of Missouri under one year of age. It is further declared unlawful to kill any deer of any age between the first day of January and the first day of November in each year and for the purpose of preventing the extinction of the species it is hereby declared unlawful to kill any doe. It is further declared unlawful to make use of any artificial light in hunting or killing deer; and the wearing or ⁴² having such light on the head shall be prima facie evidence of the violation of this section. It is also declared unlawful for any person to wound, kill or capture any deer in the waters of the streams, ponds, or lakes within the jurisdiction of this state, *or to have in possession or transport at any time the carcass of any deer, or any portion of such carcass, unless the same has thereon the natural evidence of its sex.* Any person violating the provisions of this section shall be punished by a fine of not

less than twenty-five dollars nor more than one hundred dollars."

"Sec. 43. It shall be the duty of the game and fish warden to enforce all laws now enacted and which may be hereafter enacted for the protection, preservation and propagation of the game animals, birds and fish of this state, and to prosecute, or cause to be prosecuted, all persons who violate such laws. Said game and fish warden may make complaint and cause proceedings to be commenced against any person for the violation of such laws, and he shall not be obliged to furnish security for costs. Said game and fish warden shall at any and all times seize any and all birds, animals or fish which have been caught, taken or killed at a time, in a manner, or for a purpose, or had in possession, or which had been shipped, contrary to any of the laws of this state."

"Sec. 45. All birds, animals or fish, seized by the said game and fish warden shall be donated to some charitable institution in the county where such seizure was made. It is hereby made the duty of every warehouse, cold storage plant, merchant or common carrier, agent, servant or employé thereof, to permit the game and fish warden to examine any package in the possession of said warehouse, cold-storage plant, merchant or common carrier, or agent, servant or employé thereof, which the said game and fish warden shall suspect or have reason to believe contains fish, ⁴³ game or birds protected by the laws of the state, and not entitled under such law to be transported or had in possession, or when the said game and fish warden shall suspect or have reason to believe that the said package is falsely labeled. Any person, firm or corporation refusing the game and fish warden or any officer charged with the enforcement of the fish and game laws permission to examine or open any such package or impede such action by the game and fish warden shall be punished by a fine of not less than fifty dollars nor more than one hundred and fifty dollars. Said game and fish warden shall not be liable for damages on account of any search, examination or seizure made in accordance with the provisions of this act."

"Sec. 71. All bird, game and fish laws or parts of such laws formerly enacted and inconsistent herewith are hereby repealed."

Defendant asserts that the deer in question were not game animals in the ordinary and accepted meaning of the term, and were not embraced in or germane to the subject of the

game law, as expressed in its title, and were not, therefore, within the provisions of said law.

Section 28 of article 4 of the Constitution of Missouri provides that "no bill . . . shall contain more than one subject, which shall be clearly expressed in its title."

The title of the act in question is as follows: "An act relating to the preservation, propagation and protection of game animals, birds and fish; creating the office of game and fish warden; creating a game protection fund, and appropriating therefrom."

As is said by counsel for defendant, the above provision of the constitution has been construed by the supreme court to mean that an act cannot be broader than its title, and cannot include within its provisions ⁴⁴ any subject which is not embraced in, or germane to, its title: *State v. Baker*, 129 Mo. 482, 31 S. W. 924; *State v. Great Western Coffee & Tea Co.*, 171 Mo. 634, 94 Am. St. Rep. 802, 71 S. W. 1011. But we think the title of the act is broad and comprehensive enough to embrace within its meaning all kinds of deer, whether tame or wild. They belong to that class of animals known as game animals; and the legislature had the right to enact laws for the protection of all deer in order to prevent their extinction. In the case of *State v. Mead*, 71 Mo. 266, it is held: "A provision in an act 'concerning popular elections,' authorizing the governor to fill vacancies in elective offices, is germane to the general subject, and is valid." The term "game animals," as used in the title of the act, includes all kinds of deer within this state, whether wild or reduced to captivity.

No owner of deer raised in captivity has a better title thereto than has the hunter at common law to the deer captured or killed by him, and it has always been held that the state has authority to regulate the sale of such game, or prohibit it altogether. In *Commonwealth v. Gilbert*, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439, it is said: "In order to make the protection of the trout more effectual, it was deemed necessary by the legislature to punish the sale, during the close season, of all trout except those which are alive. This was probably on account of the difficulty in distinguishing between trout which had been artificially propagated or maintained and other trout. On the construction contended for by the defendant, the law could not be so well enforced." In *People v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A., N. S., 163, the court says: "To the argument that the exclu-

sion of foreign game in no way tends to the preservation of domestic game, it is sufficient to say that substantially the uniform belief of legislatures and the people is to the contrary, and that both in England and many of the states in this country legislation prohibiting the possession ⁴⁵ of foreign game during the close season has been upheld as being necessary to the protection of domestic game, on the ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded"; citing *Whitehead v. Smithers*, L. R. 2 C. P. Div. 553; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 429, 37 Pac. 402; *Magner v. People*, 97 Ill. 320; *State v. Randolph*, 1 Mo. App. 15; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Commonwealth v. Savage*, 155 Mass. 278, 29 N. E. 468. So, in the case of *Haggerty v. St. Louis Ice Mfg. & Storage Co.*, 143 Mo. 238, 65 Am. St. Rep. 647, 44 S. W. 1114, 40 L. R. A. 151, it is said: "It was to prevent the easy evasions of the statute that the law was passed in its present shape. And on this ground it is analogous to statutes prohibiting the manufacture or sale of oleomargarine, and it is the only ground upon which such enactments can be upheld. The end being granted, to wit, the power of the legislature to enact a law for the protection and preservation of game, the means to effectuate that end, to wit, the authority to prevent the law thus passed from being evaded by prohibiting and making penal the possession of game after a certain period, follows as an indubitable corollary." In *State v. Randolph*, 1 Mo. App. 15, the court says: "The game law would be nugatory if, during the prohibited season game could be imported from neighboring states. It would be impossible to show, in most instances, where the game was caught."

The end and object of the law, as expressed in the title, is the preservation and protection of game animals, and the provision inhibiting the possession by anyone of the carcass of any deer which has not thereon the natural evidence of its sex is a means to that end.

As we have said, the deer in question come within the meaning of the term "game," which means animals *ferae naturae*, or wild by nature. It makes no difference that said deer were raised in captivity and had become tame, they are naturally wild. "There is ⁴⁶ property in wild animals until they have been subjected to the control of man. If one secures and

tames them, they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control": Cooley on Torts, 2d ed., 435; Manning v. Mitcherson, 69 Ga. 447, 47 Am. Rep. 764; Amory v. Flynn, 10 Johns. 102, 6 Am. Dec. 316; Commonwealth v. Chace, 9 Pick. 15, 19 Am. Dec. 348. That deer are animals *ferae naturae* is held by all the authorities and disputed by none.

The evidence shows that Mrs. Casey, from whom defendant bought the deer, was the owner thereof, having raised and held them in captivity up to the time they were sold to defendant. Defendant's ownership was, therefore, such private ownership in game as is recognized by the first section of the act. Mrs. Casey had the same right to sell and deliver the deer to defendant that she had to sell and deliver any other property which she owned and possessed; but the deer is game, within the meaning of the act which the legislature had the power to enact for the preservation and protection of game, and the property rights of defendant in the deer were in no way infringed upon.

That the act prohibits the having in one's possession the carcass of any kind of deer, unless the same has thereon the natural evidence of its sex, is indisputable. The section (13), refers to "any deer," meaning any and all kinds of deer, and regulates the use thereof under the police power. The privilege of selling deer is not restricted or qualified by the act, but it makes it unlawful to have the carcass or any portion of it in one's possession, unless the same has thereon the natural evidence of its sex. The section permits the killing of deer in certain seasons of the year, except deer under one year of age, and does, the provision in regard to the killing of does being declared to be "for the purpose of preventing the extinction of the species"; and to render effectual the provision as to does, ⁴⁷ there is the provision which forbids the possession by anyone of the carcass of any deer not having thereon the natural evidence of its sex. These restrictions and regulations do not interfere in any way with his property rights in and use of the deer by the private owner. The provisions of the section are clearly embraced within the police power of the state, under which rights in private property must, to a reasonable extent, yield to the public welfare. Indeed, as said in *State v. Judy*, 7 Mo. App. 524: "The legislature may, in some cases, pass laws which destroy the right of property. The protection of game is a public advantage, to which private

interests may be made to yield to some extent." In *Commonwealth v. Gilbert*, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439, it is said: "Such laws are not to be held unreasonable because owners of property may thereby, to some extent, be restricted in its use. It has often been declared that all property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community. Many illustrations might be cited where such restrictions on the use of property have been held valid. But the cases are familiar. The limitation is that the restrictions must not be unreasonable. The legislature may 'make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth': Mass. Const., c. 1, sec. 1, art. 4. The legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their ⁴⁸ own lands. The statute under consideration falls within this power."

We entertain no doubt of the constitutionality of section 13 of the act. The case, so far as the constitutional provision invoked is involved, differs in no material respect from *State v. Heger*, 194 Mo. 707, 93 S. W. 252; *Haggerty v. St. Louis Ice Mfg. & Storage Co.*, 143 Mo. 238, 65 Am. St. Rep. 647, 44 S. W. 1114, 40 L. R. A. 151; *State v. Randolph*, 1 Mo. App. 15; *State v. Judy*, 7 Mo. App. 524; *People v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A., N. S., 163; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793; all of which in effect hold that game laws regulating the sale or possession of game imported from other states, where the same was not taken in violation of law, do not interfere with any constitutional rights. While these adjudications recognize that game lawfully taken and acquired in other states is the property of the person taking it, they hold that, under the police power of the state, certain uses of private property may be prohibited by statute for the public good, and that, for the better protection of game within the state, laws may be

enacted excluding all game from the markets of the state during certain seasons of the year, or entirely.

If the provision of section 13, which declares it unlawful to have in possession the carcass of any deer which has not thereon the natural evidence of its sex, should be construed as referring to deer in a wild state, and to such only, the evasion of the law would be an easy matter. Suppose the deer which defendant purchased and had in possession had been killed while in a wild state, there is no doubt that, the evidence of sex being removed, he would be guilty of a violation of the law; and, so far as the question of title or ownership is concerned, the title which a person holds to deer which he has raised and kept in captivity is no better than his title to the wild deer which he kills or captures, and reduces to his possession.

Defendant, however, contends that the word ⁴⁹ "deer," as used in section 13, should be construed as meaning deer "not held by private ownership, legally acquired," and that, otherwise, the exception contained in section 1 is disregarded and the act brought in conflict with section 21, article 2 of the constitution, which prohibits the taking of private property for public use without compensation. For reasons already stated, we are unable to concur in this contention.

There is no restriction or burden imposed by the provision of the act which the defendant has been found guilty of violating, save that it declares it unlawful to have in possession the carcass of any deer, or any portion of such carcass, unless the same has thereon the natural evidence of its sex, which, if a burden at all, is a very light and insignificant one, and fully justified as a police regulation.

The judgment should be affirmed. It is so ordered.

All concur.

The Constitutionality of Game Laws is the subject of a note to *Ex parte Maier*, 42 Am. St. Rep. 138. The legislature has plenary power to regulate or prohibit the taking of game and the handling and possession thereof after it is taken: *State v. Niles*, 78 Vt. 266, 112 Am. St. Rep. 917, and cases cited in the cross-reference note thereto. A statute making it unlawful to sell or have in possession for sale any trout applies to trout lawfully caught in another state and shipped into this state, as well as to those caught herein: *State v. Schuman*, 86 Or. 16, 78 Am. St. Rep. 754.

ST. LOUIS, MEMPHIS & SOUTHEASTERN RAILROAD
CO. v. DRUMMOND REALTY AND INVESTMENT
COMPANY.

[205 Mo. 167, 103 S. W. 977.]

EMINENT DOMAIN.—The Payment into Court, in condemnation proceedings, of the amount of the commissioners' award as a condition precedent to the right of the condemning corporation to take possession of the land, and the receipt thereof by the owner of the land, do not preclude either of them from further litigating the amount of compensation. (p. 725.)

EMINENT DOMAIN—Jury Trial.—While condemnation proceedings may be commenced by the appointment of commissioners, either party may thereafter demand a jury to reassess the damages. (p. 726.)

EMINENT DOMAIN—Entirety of Tract.—The fact that public roads pass through a tract of land is not alone sufficient to destroy its continuity so that it cannot be considered as an entirety in assessing damages. (pp. 727, 728.)

L. F. Parker and John W. Booth, for the appellant.

James L. Minnis, for the respondent.

¹⁷¹ VALLIANT, P. J. This is a proceeding begun in the circuit court of St. Louis county by the plaintiff railroad company to condemn a right of way for its railroad through land of the defendant in that county. The commissioners made their report assessing defendant's damages as nine thousand four hundred and seventy dollars, which amount plaintiff paid ¹⁷² into court and took possession of the land. In due time defendant filed exceptions to the report and demanded a jury to assess the damages; afterward defendant demanded of the clerk the money paid into court and it was delivered to him. When the exceptions came on to be heard, the court sustained the same, and ordered a new assessment of damages to be made by a jury. On application of plaintiff the venue was changed to Gasconade county; the cause was tried in the circuit court of that county with the result of a verdict of the jury assessing defendant's damages at twenty-two thousand five hundred dollars, whereupon the court rendered judgment for defendant for thirteen thousand and thirty dollars, being the amount of the jury's award less nine thousand four hundred and seventy dollars, the amount of the commissioners' report which the defendant had already received; from that judgment the plaintiff has appealed.

1. Plaintiff's first proposition is that defendant having accepted the damages awarded by the commissioners that was

the end of the controversy, there was nothing left for trial by the jury.

This court has already decided that point against the plaintiff's contention in several cases, the last one being a case in which the plaintiff was a party: *St. Louis etc. R. R. Co. v. Aubuchon*, 199 Mo. 352, 116 Am. St. Rep. 499, 97 S. W. 867, 9 L. R. A., N. S., 426. The law is that the condemning corporation shall pay the amount of the commissioners' award into court as a condition precedent to its taking possession of the land, and upon such payment the corporation may take possession and proceed with the construction of its road, and at the same time the owner of the land so taken or damaged may take the amount of money so deposited, but the payment of the award into court does not preclude the corporation, nor does the receiving of it by the land owner preclude him from further litigating the question of the amount of compensation. Notwithstanding such payment into court by the plaintiff and such receiving of the amount by the defendant, ¹⁷³ either party may, within the time prescribed, file exceptions to the commissioners' award and litigate the *ad quod damnum* question to a final judgment: *Rothan v. St. Louis etc. R. R. Co.*, 113 Mo. 132, 20 S. W. 892; *St. Louis etc. R. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. 157; *St. Louis etc. R. R. Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771; *St. Louis etc. R. R. Co. v. Donovan*, 149 Mo. 93, 50 S. W. 286; *Kansas City etc. R. R. Co. v. McElroy*, 161 Mo. 584, 61 S. W. 871.

The learned counsel for appellant think that in our former decisions a word in section 4, article 12, of the constitution has not been given due consideration—that is, the court has not observed the significance of the word “trials,” but has treated it as synonymous with the word “claims.” The language of section 4 is: “The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.” The point advanced is that in such case the right of trial by jury in that section guaranteed applies only to trials provided for by act of the General Assembly under authority of section 21, article 2 of the constitution, where it is ordained: “Such compensation shall be ascertained by a jury or board of commissioners of not less than twelve freeholders, in such manner as may be prescribed by law.” And it is argued that since the legislature under authority of that

section of the constitution has chosen, in section 1266 of the Revised Statutes of 1899, to provide for the ascertainment of the damages by a board of commissioners instead of a jury, there is to be no trial in the sense in which that word is used in section 4, article 12. We cannot follow that argument without bringing the two sections of the constitution mentioned into seeming conflict. Since section 21 of article 2 confers on the General Assembly the right to prescribe a procedure for the assessment of damages either by board of commissioners or a jury, if section 4, article 12, guarantees a right of trial by jury only in case the General Assembly sees ¹⁷⁴ fit to so provide under the authority conferred in section 21, article 2, then section 4, article 12, might as well have been omitted from the constitution. In *Rothan v. Railroad*, above referred to, the court discussed these two clauses of the constitution as bearing on the subject we are now considering, and placed a construction on them which renders both of them effective and in harmony with each other. Referring to section 4 of article 12, the court in that case, per Black, J., said: "It has been before this court on various occasions, and we have uniformly held that it secures to either party a trial by jury in the class of cases there mentioned; that the proceeding to condemn may be commenced by the appointment of commissioners, but if either party demands a jury to reassess the damages, the court has no discretion in the matter, and a jury must be awarded": Citing cases.

We are satisfied with our former decisions on this subject.

2. The defendant's land consisted of a tract of seven hundred and ninety-four acres, lying chiefly in St. Louis county, partly in St. Louis city. It was purchased by the late Mr. Drummond in his lifetime at the cost of one hundred and seventy-five thousand dollars, and was improved at the cost of one hundred and twenty-five thousand dollars. There are two public roads crossing the land, but, according to defendant's testimony, it was held, used and occupied as one body of land and esteemed particularly for that fact. The testimony for defendant tended to show that the tract as an entirety located so near the city was more valuable than if cut up into lots. In instruction No. 1 for defendant the court said: "In passing upon this question [compensation] the jury should consider all the land owned by the defendant mentioned in the evidence, as one tract or body, if they believe from the evidence that the defendant used and occupied its said land as an

entirety or as one place or premises at the time of the location of plaintiff's railroad on defendant's ¹⁷⁵ land, notwithstanding parts of the same are separated from other parts thereof by public highways; and if the jury believe from the evidence that all of said land was so used and occupied by the defendant, and that the same constituted one tract or body of land," then in estimating the damages the jury should take into account not only the land taken, but the depreciation, if any, in the market value of the whole tract. Plaintiff objects to the part of the instruction which authorizes the assessment of damages to the whole tract as an entirety.

The instruction does not assume that the land was used and occupied by the defendant as one tract, but submits the question of whether or not it was so to the jury, and only authorizes the jury to consider the damage to the whole tract as an entirety provided it was so used and occupied. We find no fault with that. The plaintiff's instructions were along the same line.

In the second instruction for plaintiff the measure of damages is stated to be "the difference in the fair market value of defendant's whole property before and after the appropriation by the plaintiff for the strips," and so forth. And in instruction 8 for plaintiff the jury are directed that if they find that any part of the defendant's land was not damaged, they should not allow any damages for such part.

Plaintiff complains of the refusal of its ninth instruction, which is as follows: "If the jury believe from the evidence that the lands of the defendant referred to in the evidence in this case were divided into three separate bodies by public roads, in such a manner that there was no other connection between them than that all were the property of one owner; and that any one or more of such separate bodies was not in fact damaged by the taking of part of defendant's land for railway purposes, then in their assessment of damages in this case the jury will not allow anything as damages ¹⁷⁶ to any of such bodies of said land as on the evidence they may find has not in fact been damaged by the taking for railroad purposes of the land actually taken by plaintiff."

There was evidence to show that there were three public roads, one forming the western boundary and two crossing the defendant's land, thus dividing the tract into three parts, assuming the roads to be divisional lines, but there was no evidence tending to show that those roads effected such a division

of the property into separate bodies as that there was nothing left of the entirety feature of the whole tract except the ownership.

Under that instruction the jury would have been authorized, if they had seen fit to do so, to find that the three roads alone were sufficient to destroy the continuity of the tract. The instruction was properly refused.

3. The third assignment is that the damages awarded are excessive.

In view of the evidence we think the award was a very conservative one.

The judgment is affirmed.

All concur.

If Commissioners Appointed to Assess a land owner's damages from the appropriation of a right of way through his premises have fixed the amount, and the railroad excepts to the reward, but subsequently pays the amount into court and takes possession of the right of way, and the property owner accepts the amount of the award in money, the railroad company is not thereby estopped to further litigate with him the amount of damages: *St. Louis etc. R. R. Co. v. Aubuchon*, 199 Mo. 352, 116 Am. St. Rep. 499.

SEVIER v. WOODSON.

[205 Mo. 202, 104 S. W. 1.]

WILLS—Interpretation of Valid and Invalid Portions.—A will may be valid in part and invalid in part, but in determining what was the real scheme of disposition in the mind of the testator, the valid and invalid portions must be alike considered, since it is presumed that in formulating his scheme he supposed all portions legal and valid. (p. 732.)

WILLS—Cutting Down Gift by Subsequent Clause.—An estate granted in plain and unequivocal language in one clause of a will cannot be lessened or cut down by a subsequent clause, unless the language therein is as clear, plain and unequivocal as that in the first grant. (p. 734.)

WILLS—Clause Dispensing with Administration.—A provision in a will directing the executor to administer the estate "without going into court or taking letters testamentary" is void. (p. 736.)

WILLS—Elimination of Invalid Clauses.—Invalid provisions in a will may be rejected and the valid provisions given effect, if the general scheme of disposition entertained by the testator is not thereby changed. (p. 738.)

Lovelock & Kirkpatrick, for the appellants.

James L. Farris and Sandusky & Sandusky, for the respondents.

207 GRAVES, J. This is an action to construe the will of Thomas P. Woodson, instituted in the circuit court of Ray county, by Virginia E. Sevier, formerly Virginia E. Woodson, one of the devisees in said will, and her husband. It becomes necessary to set out the whole will. This will is in words, as follows:

"In the Name of God, Amen:

"I, Thomas D. Woodson, of the city of Richmond, in the county of Ray, and State of Missouri, being of sound and disposing mind and memory, and in good health, but knowing the uncertainty of life, and having an earnest desire to make disposition of my means and property to and among my dear children, and to give to them such and so much of my property as I desire each shall have, do make, ordain and publish this as and for my last will and testament.

"Item 1st. It is my will and desire that all my just debts be first paid.

"Item 2d. I will and desire that two thousand dollars be loaned out on real estate security for the benefit of my dearly beloved mother, Auldah Ann Woodson, and that the interest be paid to her as is needed for her comfort and maintenance for and during her natural life, and after her death said amount to go to my children.

"Item 3d. I will, desire and direct that one thousand dollars be given to the Board of Trustees of the Conference Fund of the Missouri Conference of the Methodist Episcopal Church, South, to be loaned and the interest accruing thereon to be paid annually to **208** and in support of superannuated preachers of said conference and their widows and orphans of same.

"Item 4th. I will and bequeath to my son Harrie Philip Woodson, my two-thirds interest in lot number ninety-seven, including store building and appurtenances thereto, in Old Town, now city of Richmond, Ray county, Missouri, for which property he is to be charged the sum of two thousand dollars.

"Item 5th. I will and devise to each of my daughters, Lydia Ann Woodson and Virginia Elizabeth Woodson, each one-third of my estate for and during their lifetime, then to go to their bodily heirs, if any, if not then to their brother,

Harrie P. Woodson, and his bodily heirs, and it is my will and I hereby so direct, that the share, interest and estate hereby devised be held in trust for each of them and their only and sole use and benefit by their brother Harrie P. Woodson, who is hereby appointed and created their trustee, and I further direct that he be not required to give any bond or security as such trustee. *And I further direct and will that he, the said Harrie P. Woodson, trustee as aforesaid, pay over to each of said sisters as much of the interest accruing on the means hereby devised to each of them as will abundantly provide for their comfort and necessities.*

"Item 6th. I further will and devise that the remaining third of my estate go to my son, Harrie Philip Woodson, absolutely.

"Item 7th. I hereby nominate, constitute and appoint my son Harrie P. Woodson, the executor of this my last will and testament and direct that he be not required to give bond for security as above directed as trustee for his sisters.

"Item 8th. *I will and direct that my son, as executor and heir as aforesaid, manage and control my estate, hold and divide the same without going into court or taking letters testamentary.*

200 "Item 9th. It is my will and I hereby authorize and empower my said executor to sell, on such terms as he may think best, any or all real estate that I may have and own, and upon sale, to make and execute and deliver as such executor, deed or deeds conveying the same.

"Item 10th. It is my will and I hereby direct, that my brother Philip J. Woodson take complete charge of and manage our partnership matters and business, as survivor, and as fast and as soon as he can divide and pay over to my executor my two-thirds interest in said partnership assets or estate, and I further will and direct that said brother be not required to give bond in and about such partnership business.

"In Witness Whereof, I have hereunto signed my name and affixed my seal. This 11th day of April, A. D. 1885.

"THOMAS D. WOODSON. (Seal.)"

The plaintiff in her petition sets forth the contentions of the parties in full and with great precision. It will not be necessary to reproduce them here. Suffice it to say that the fifth and eighth paragraphs are alleged to be invalid and void, and that by reason thereof the whole scheme of the testator

has failed, and all that portion of the will disposing of the bulk of the estate is of no effect and invalid.

The real fight is upon the last clause of the fifth paragraph and the eighth paragraph. With these eliminated, plaintiff claims that the whole will must fail.

The prayer of the petition reads thus:

"Wherefore, the plaintiffs herein pray for an order, judgment and decree of this court for the determination of the validity or invalidity of the items of said will hereinbefore mentioned, and if for any ²¹⁰ reason the same or any part thereof be invalid or inoperative, that they be so adjudged and decreed, and that the legal effects of such invalidity on the remaining portions of said items be declared, and that if the intended scheme of the testator cannot be carried out by the execution of the valid portions of said items, and the testator's scheme and purposes as expressed therein be effectuated, on account of the illegality of other parts thereof, then that the whole of said items be declared void, and if the whole of said items are valid, then for a construction thereof, and for a decree adjudging the rights of said plaintiff in and to the property of said testator disposed of, or attempted to be disposed of, by the items of his will aforesaid, under said will, if it be valid, or under the law, if it be invalid, and for instructions and directions, for future guidance and protection of the interests of said plaintiff and the parties to this suit, and for such other and further orders, judgments and decrees touching the premises as to equity and justice may seem right and proper."

All parties necessary were brought in as defendants and filed appropriate answers. We think the real contentions fairly appear from the above, and further analysis of the pleadings superfluous. Thomas D. Woodson died August 28, 1902, leaving three children, viz., plaintiff, Virginia E. Sevier, and defendants, Harrie P. Woodson and Lydia Ann Woodson, an invalid. Upon a hearing, the trial court found these portions of the will which we have italicized to be void and non-effective.

Plaintiffs appeal.

1. The trial court was of opinion that the latter portion of clause 5 of this will was void, and was further of the opinion that the eighth clause was void. To this extent the judgment of the trial court was in favor of the plaintiffs and against the contentions of ²¹¹ defendants. But plaintiffs go

further and contend that if these portions of the will are void, then the whole scheme of the testator's devise has been broken, the scheme fails, and the whole devise in said clause 5 contained and other dependent clauses must fail and be by the court declared void, which would leave the deceased as if dying intestate save and except as to some minor bequests contained in the will. It occurs to us that the real questions, although verbosely stated in the pleadings, may be summarized thus: 1. Does clause 5 contain a valid and enforceable devise, and under the law should it be enforced? 2. If, as a whole, it cannot stand, can a portion thereof be eliminated so as to leave a valid and enforceable devise? 3. Is the eighth clause violative of law? 4. If clause 5, or any portion thereof, cannot be sustained, and clause 8 cannot be sustained, then does the elimination of such condemned portions of the instrument so change the general scheme of the disposition of the property in the mind of the testator at the making of the will, as to compel the court to say that there is no will in this respect. In other words, if we find invalid portions to be in the instrument, do these invalid portions, when taken out of the instrument, so change the instrument as not to give effect to the general scheme and purpose of the testator in the disposition of his property? These questions we take in their order. In so doing we must and do recognize that it is the duty of courts to construe and not to make wills; that wills may be valid in part and invalid in part; that in determining what was the real scheme of disposition in the mind of the testator, the valid and invalid portions must be alike considered, and this for the reason that the presumption must be indulged that the testator in formulating his scheme of disposition thought all portions legal and valid; that if the elimination of the invalid portions, if any there be, so ²¹² changes the general scheme and purpose of the testator as would make the remaining portions amount to a new and different will, then the whole devise must fail.

2. With due regard to the views of construction hereinabove stated, let us proceed to consider clause 5 of this will. No objection is or could be urged as to the preceding clauses. Nor in our judgment could there be any objection urged as to clause 5, if it be stopped with the first provision, to wit: "I will and devise to each of my daughters, Lydia Ann Woodson and Virginia Elizabeth Woodson, each one-third of my estate for and during their lifetime, then to go to their bodily heirs,

if any, if not, then, to their brother, Harrie P. Woodson, and his bodily heirs, and it is my will and I hereby so direct, that the share, interest and estate hereby devised be held in trust for each of them and for their only and sole use and benefit by their brother, Harrie P. Woodson, who is hereby appointed and created their trustee, and I further direct that he be not required to give any bond or security as such trustee."

This clause of paragraph 5, in our judgment, gives to each of the two daughters a life estate in one-third of the residue of the decedent's property, after minor bequests are satisfied. But this interest or beneficial life estate is placed in trust, so as to give to each daughter the earnings of said life estate, as their absolute property, the corpus itself to be preserved. Upon their death this corpus to go, first, to their respective bodily heirs, and if there are no such bodily heirs, then to H. P. Woodson "and his bodily heirs." By the use of the term "each one-third of my estate for and during their lifetime," there is created two estates, one to the plaintiff, Mrs. Sevier, and one to the defendant, Lydia Ann Woodson, each of which is placed in trust, the usufruct or earnings going respectively to the beneficiaries therein named. ²¹⁸ Under this clause, or portion of the fifth paragraph of the will, there can be no question that the beneficiaries are entitled to the full proceeds of the trust property, and such proceeds become their individual property and cannot be added to the corpus of the trust fund. With only this clause in the will, upon the death of either beneficiary therein, the corpus (the third part of the whole residuary estate) thus preserved by the trust would vest as by the will directed, but the earnings, whether in the hands of the trustee or in the hands of the deceased beneficiary, would be a part of the estate of such deceased beneficiary and pass by the laws of descents and distributions, or in accordance with the terms of such beneficiary's will, if any she had made.

By the latter portion of paragraph 5, the testator undertakes, in a vague, uncertain and indefinite way, to limit the amounts of the earnings of the corpus, which are to go to the beneficial owners of the life estate. By the first portion, the beneficiaries were entitled to it all; by the latter, they are presumably only entitled to such portion "as will abundantly provide for their comfort and necessities." This might be all of such earnings, or it might be none. If the

beneficiary had no "comfort and necessities" to be provided for, then it might mean that none of the interest or earnings should go to that beneficiary so situated. In other words, if either of these two daughters had the good fortune to be possessed of the comforts and necessities of life, in property, other than the property described in this will, such beneficiary, so conditioned, would not be entitled to any of the interests or earnings of the trust estate held for her. And if she was partly supplied with the comforts and necessities, then she would only be entitled to such portion of the interest or earnings as would make the quantum of her "comfort and necessities." This quantum, as we take it, to be ²¹⁴ judged by the trustee. So, at least, there are two elements which render the amounts, if any, to be received by the respective beneficiaries of these two trusts uncertain, viz., (1) the condition of the beneficiary, as to whether or not any portion was required, in order that she have the comforts and necessities of life, and (2) the judgment of the trustee as to what are comforts and necessities, and the amounts necessary to furnish them. At least this is one view which might be taken of the meaning of this clause. It might be viewed, however, as meaning that notwithstanding the beneficiary had other means of "comfort and necessities" yet she would be entitled to receive from the earnings of this trust estate sufficient to meet the requirements of her "comforts and necessities." If this construction could be given it, we would still be met with uncertainty, thus: (1) One's station in life determines in a measure what are comforts and necessities, and (2) the judgment of the trustee as to the amount required for the same, as well as his judgment upon the station in life.

In reaching a conclusion as to the validity of this latter portion of the fifth paragraph of the will, it must be remembered that with the exception of certain small bequests, by this paragraph, with paragraph 6, which gives one-third of the estate absolutely to H. P. Woodson, the whole estate is disposed of and taken into consideration.

We take it to be well-settled law that where a certain estate is granted in plain and unequivocal language in one clause of a will, the same cannot be lessened or cut down by a subsequent clause of the will, unless the language used in such subsequent clause is as clear, plain and unequivocal as the language of the first grant.

In *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291, the New York court said: "Where an estate is given in one ²¹⁵ part of a will in clear and decisive terms, that it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words giving the estate, is a well-established rule applicable to the construction of wills. As was said by Judge O'Brien in *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729: 'Whenever the will begins with an absolute gift, in order to cut it down the latter portion of the will must show as clear an intention in that direction, as the prior part does to make it.' In *Clark v. Leupp*, 88 N. Y. 228, this court said: 'It is well settled by a long succession of well-considered cases that, when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use and benefit of the estate absolutely to the donee, it will not be restricted or cut down to any less estate by subsequent or ambiguous words, inferential in their intent.' "

Our court has followed the New York court. In *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395, we said: "Again, an estate in fee created by a will cannot be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the real estate: *Freeman v. Coit*, 96 N. Y. 63; *Byrnes v. Stillwell*, 103 N. Y. 453, 57 Am. Rep. 700, 9 N. E. 241; *Landon v. Moore*, 45 Conn. 422."

And again, in *Small v. Field*, 102 Mo. 104, 14 S. W. 815, it is said: "Under this statute it is obvious that the absolute estate in fee granted to Mrs. Kate Green could not be impaired, cut down or qualified except by words as affirmatively strong as those which conveyed the estate to her. Such has been the ruling upon similar statutes elsewhere: *Roseboom v. Roseboom*, 81 N. Y. 356, and cases cited. And this seems to be the proper rule to apply apart from any statutory regulation: ²¹⁶ *Lambe v. Eames*, L. R. 10 Eq. Cas. 266; *Thornhill v. Hall*, 2 Clark & F. 36; *Clark v. Leupp*, 88 N. Y. 228, and cases cited."

And to the same effect is *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Roberts v. Crume*, 173 Mo. 572, 73 S. W. 662; *Roth v. Rauschenbusch*, 173 Mo. 582, 73 S. W. 664, 61 L. R. A. 455; *Underwood v. Cave*, 176 Mo. 1, 75 S. W. 451.

Measured by these rules the latter clause of paragraph 5 of this will is, in our judgment, void and of no effect. The trial court so held and we think correctly.

3. The next question presented is the validity of the eighth paragraph of this will. As will be seen, this expresses the preconceived notion of the testator, that by an obiter in his will he could overturn the statutes of the state upon the subject of administration of estates. In this the testator was wrong. Such a provision is, in our judgment, violative of public policy, and violative of public policy as expressed by the statutes of this state. The testator has no inherent right to keep his estate from the courts given jurisdiction to administer the same. To declare such a policy would be a very dangerous precedent. This court has heretofore indicated the views we entertain upon this question: *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129. We therefore hold this paragraph void and of no effect. This was the view entertained by the learned trial judge, and we but add our approval to his judgment thereon.

4. We now reach the problematical part of this contest. Plaintiff claims that with the portions eliminated, as we have here indicated should be eliminated, then the whole scheme of the testator for the disposition of his property has been changed, and what is left does not express the will of the testator. If this is true, then the whole of paragraph 5 and ²¹⁷ paragraph 6 must fail, for in these two paragraphs we find the general scheme of the testator for the disposition of his property. We do not agree with counsel for the plaintiff in their contention that paragraph 8 of this will seriously affects or becomes a part of the testator's general scheme. This general scheme, we think, is found in paragraphs 5 and 6, for in these the bulk of the estate receives its disposition. Paragraph seventh simply provides the instrument or person for the execution of the will, and paragraph eighth simply expresses an erroneous idea of the power which the testator thought he could invest in this instrument or agent. Both of these paragraphs could be stricken from the will, and yet the general scheme of the testator as to the disposition of his property remain intact. So that as to the effect of eliminating the eighth paragraph we find no trouble. The serious question is in the elimination of the last clause of the fifth paragraph. We find no case exactly in point. All will cases are decided upon the peculiarities of the different instruments

presented, so that in the cases we have judicial expressions peculiarly applicable to the instrument then before the court in each case. At best the cases but suggest thoughts of value in the consideration of the question in hand.

Reverting to the sole proposition left in this case, we are asked to say that by striking from this will the last clause of paragraph 5, the whole scheme of the testator has been changed, and we would therefore be making for him a new will, if the remainder were permitted to stand as his will. We think not. What was the general scheme of the testator, for the disposition of his property? This can be determined by what he says as to the bulk of the property. The minor gifts cut but little figure in this case. But answering our own question, what was testator's general scheme, as appears from this will, and gathering such intent from ²¹⁸ within the four corners thereof, and considering valid as well as invalid portions? First, we find a purpose to husband and hold the property in the hands of the testator's blood relatives. Second, we find a desire upon his part that the son have one-third of his estate absolutely, thoroughly in keeping with the first general purpose. Third, we find the desire upon the part of the testator, that each of his daughters have the benefit of one-third of his estate, for and during their life, with remainder over to testator's blood relatives, likewise in keeping with the first-named general purpose. The only change contended for by plaintiff, save and except such as she imagines comes through the striking out of the eighth paragraph, is this: that with the last clause of paragraph 5 stricken out, plaintiff has a full life estate in trust, but with that clause in the will she has less than a life estate, and for that reason we have changed the scheme of disposition by striking out such clause.

In this plaintiff argues too much. Clauses of wills may be invalid for several reasons. They may violate express statutes, as in the Fair Will, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; they may violate public policy; they may be too indefinite and uncertain to be enforced at all by the courts, as in Board of Trustees v. May, 201 Mo. 360, 99 S. W. 1093; or they may be too indefinite and uncertain in terms to overcome previous express, clear and definite terms theretofore found in the same instrument, as in the case at bar. There may be other reasons for invalidity

of specific clauses in wills, but these will suffice to illustrate the idea we have. But for whatever reason the clause or clauses are declared invalid, it does not always follow that the general scheme of the testator has been changed and the whole will must fail. However, the reason for declaring the clause invalid may lend some light upon the question as to whether or not the general scheme has been changed by the ²¹⁹ elimination of the particular clause. In the case at bar had the last clause of paragraph 5 been as clear, definite and certain in its terms, as was the grant expressed in the first part of said paragraph, then it would have modified and changed the first, and we would have had there an expression of the scheme of the testator. But we have held, upon the contention of the plaintiff that the language here used was too indefinite, uncertain and ambiguous to modify the first clause, and therefore by parity of reasoning, it must be too indefinite and uncertain to express any general scheme of the testator. Plaintiff is in the attitude of saying that it is too indefinite, uncertain and ambiguous to modify the scheme of disposition as expressed in the first clause, yet it is clear, definite and certain enough to show a scheme of disposition other than that expressed in the first clause, and when we cut it out, the scheme as left in the first clause is not the general scheme of disposition in the mind of the testator. We cannot assent to this reasoning. If by cutting out this last clause we have written for the testator a new will, it must be because there is such definite and certain language in the last clause as would show a scheme and purpose of disposition within itself. If it is definite, clear and certain enough to show that, then it is definite, certain and clear enough to modify the first clause, and we have erred in cutting it out as invalid. We are not satisfied that the elimination of this latter clause so changes the general scheme of the testator as to invalidate this will, or even paragraphs 5 and 6 thereof, which are the dependent paragraphs. We think this can be cut out, and the general scheme as heretofore outlined still remain. We have read with care the judgment entered by the learned trial judge, and it sufficiently covers the full situation of this case. In this judgment, which upholds the will, save and except the two clauses indicated as invalid, ²²⁰ and construes the remaining portions of the will, the trial court was right, and the judgment is affirmed.

All concur, except Woodson, J., not sitting.

WHEN A WILL IS VOID IN WHOLE BECAUSE VOID IN PART.**I. General Principle Controlling, 739.****II. Illustrations.****a. When Valid and Invalid Parts are Separable, 740.****b. When Valid and Invalid Parts are not Separable, 743.****I. General Principle Controlling.**

The elementary principle that in construing a will the intent of the testator must govern when it can be gathered from the language of the will itself has led to a rule hardly less universal; namely, that when a will is void in part and good in part, the will as a whole will not be set aside, but will be allowed to stand as to the portions that are valid, provided the invalid portions can be eliminated without destroying the general scheme of the testamentary disposition, or working a manifest injustice to the beneficiaries or to some of them. A very few of the earlier New York cases have been sometimes referred to as seemingly holding that a will which is void in part is void in toto. But, as we shall see, even these cases do not sustain the inference sought to be drawn from them, and if they did, they have long since been repudiated by the courts of that state. One of the earlier and leading cases showing that a will may be upheld though void in part is that of *Kane v. Gott*, 24 Wend. 641, 35 Am. Dec. 641. This case is referred to in nearly all of the later cases involving this question, and it mentions the earlier cases citing as upholding a different doctrine. Said the court: "That a will or any other instrument passing an estate may be void in part, and yet good for the residue, was never doubted, when the division into good and bad parts was made by force of the common law; and *Darling v. Rogers*, 22 Wend. 483, maintained a trust deed under the Revised Statutes in such parts as were good, though one declaration of trust was void. I know there are a sort of standing quotations to the contrary, of cases decided by this court: *Coster v. Lorillard*, 14 Wend. 265; *Hawley v. James*, 16 Wend. 61; *Root v. Stuyvesant*, 18 Wend. 257. So far from sanctioning the doctrine for which they are cited, the opinion of every judge who spoke to these cases expressly denied it. It is true that the wills in question went pretty much by the board; but all that can be said as a consequence is that the conservative rule was not liberally applied. If that be so, it is sufficiently unfortunate; for there is no rule of law which calls for greater latitude and even ingenuity in enlarging and extending it. The most able and safe judges have said that the courts should be astute in allowing it a comprehensive operation for the giving effect to all instruments, and especially to last wills and testaments; and though some parts may be contrary to the rules of law, yet all other parts should be saved. Any court acting systematically upon the opposite principle would be a great evil." In *Parks v. Parks*, 9 Paige, 107, it was held that where part of a will is valid and part void, the valid parts will be permitted to stand, though the latter are illegal and void, unless the different parts are so dependent on each other that they cannot be separated.

And in *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880, 14 L. R. A. 33, it is said: "The appellants invoke the aid of the principle, that when several trusts are created by a will which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut off and the legal ones permitted to stand. This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. The rule, as applied in all reported cases, recognizes this limitation, that when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be construed together, and all must be held illegal and must fall." The courts are practically unanimous in upholding the rule laid down in cases above quoted. But difficulty sometimes arises in the application of the rule because in every case involving wills the peculiarities of the instrument regarding which the rule is sought to be applied lead to some confusion. We can only give illustrations showing when it has been held that the valid and invalid portions of a will are separable and when not; and also when the wills have been rejected as a whole because the separation of the legal and illegal portions thereof would work manifest injustice to the beneficiaries.

II. Illustrations.

a. **When Valid and Invalid Portions are Separable.**—In *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 891, 35 L. R. A. 41, one item of the will gave all the testator's personal property to his three children, share and share alike. Another item devised all the real estate to the executor and his successors in trust upon the following conditions: After providing out of the income of the real estate for payment of taxes, insurance, repairs, and some small annuities, the residue of the income of the real estate to be divided equally among his said three children, share and share alike, and at the death of the last of said three children, the title to the real estate should become vested in their heirs; and in case either of said three children died leaving no children, then his or her share of the real estate should be equally divided and distributed, one-half to each of the surviving children. And providing further that if his children desired to avail themselves of the privilege of improving the real estate, they could amicably agree upon a division of the property, but that in case of such division, the executor should pay over the income to the three children, to each the amount collected from his or her portion of said real

estate as divided; and providing further that "in case of a division of said property, the income thereof shall nevertheless in all respects be distributed and disposed of as heretofore first provided in jointure."

Another item provided that if, in the opinion of the executor, the income of the estate was being improperly expended by either of said children, that after providing for the wants of such child, he withhold the residue and reinvest it as he deemed best for the "parties interested."

The validity of the will was attacked on the ground of incurable uncertainties in the above provisions, which it was claimed were inseparably connected with the general plan of the testamentary disposition. But the court held that even if the paragraphs quoted were void for uncertainty, the will disclosed that its primary object was that ultimately his grandchildren living at the time of the death of the last one of his three children should have the fee simple title to all his real estate, and that until that contingency did happen that his three children should have the income therefrom.

In *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675, it is held that an attempt in a will to manumit a slave avoided only that part of the will which related to that subject; and to a like effect is *Cheairs v. Smith*, 37 Miss. 646. In *King v. Talbert*, 36 Miss. 367, the will was only effectual as a bequest of the personal estate, for want of due attestation to devise real estate. By the first item in the will the testator directed that his property be kept together, and the expenses of his family paid and his children educated out of his effects. By the third item he directed that his farm be continued, and for this purpose directed his executors to sell the farm and purchase another in some more suitable location. It was contended that it was impossible to carry out the intention of the testator expressed in the third item, because the direction in the first item that the property should be kept together was made on the condition that the provision of the third clause directing a sale of the farm and the purchase of another could be legally carried out, and that condition failing, said direction was void. Said the court: "That it was obviously the intention of the testator that his property should be kept together on his farm, mentioned in the will, by his executors, until such time as they could sell it and purchase another in a more suitable location, we cannot doubt. That the realty did not pass by this will, for the want of proper attestation, but descended directly to his heirs at law, subject to the widow's claim, is equally evident. But it by no means follows, that because the trust in relation to the land is invalid, that therefore the whole must fail."

A similar case to the one last quoted is *Howley v. James*, 5 Paige (N. Y.), 318, where a very thorough review is made of the cases bearing on the topic now under discussion, the court there holding that although some of the objects for which a trust is created, or some future interest limited upon the trust estate, are illegal and void, if

any of the purposes for which the trust was created are legal and valid and would authorize the creation of such an estate, the legal title vests in the trustees during the continuance of the valid objects of the trust, except when the legal and valid objects are so mixed with those which are illegal and void that it is impossible to sustain the one without giving effect to the other.

And in *McClellan v. Weaver*, 4 Cal. App. 593, 88 Pac. 646, it is held that where a will, notwithstanding the illegality of a trust, attempted to be created, disposed of the property to the devisees in such a way as to require the same to be upheld, the invalidity of the trust did not avail the next of kin as a ground for setting aside the will.

In the recent case of *Sevier v. Woodson*, 205 Mo. 202, ante, p. 728, 104 S. W. 1, a testator in one clause of his will gave to each of his two daughters one-third of his estate for life, and then to their bodily heirs, if any, and if not then to their brother and his bodily heirs; and directed that the same be held by the brother as trustee in trust for the daughters. The will directed that the trustee "pay over to each of said sisters, as much of the interest accruing on the means hereby devised to each of them as will abundantly provide for their comfort and necessities." It was contended in this case, that by striking out the invalid direction as to payment of the income, the plaintiff would have a full life estate in trust, whereas with that clause she would have less than a life estate and hence the general scheme of the disposition would be changed. In denying this contention, the court said: "But for whatever reason the clause or clauses are declared invalid, it does not always follow that the general scheme of the testator has been changed and the whole will must fail. However, the reason for declaring the clause invalid may lend some light upon the question as to whether or not the general scheme has been changed by the elimination of the particular clause. In the case at bar, had the last clause of paragraph 5 been as clear, definite and certain in its terms, as was the grant expressed in the first part of said paragraph, then it would have modified and changed the first, and we would have had there an expression of the scheme of the testator. But we have held upon the contention of the plaintiff that the language here used was too indefinite, uncertain, and ambiguous to modify the first clause, and, therefore, by parity of reasoning, it must be too indefinite and uncertain to express any general scheme of the testator. Plaintiff is in the attitude of saying it is too indefinite, uncertain, and ambiguous, to modify the scheme of disposition as expressed in the first clause, yet it is clear, definite, and certain enough to show a scheme of disposition other than that expressed in the first clause, and then when we cut it out, the scheme as left in the first clause is not the general scheme of disposition in the mind of the testator. We cannot assent to this reasoning. If, by cutting out this last clause, we have written for the testator a new will, it must be because there is such definite and certain language in the last clause

as would show a scheme and purpose of disposition within itself. If it is definite, clear and certain enough to show that, then it is definite, certain and clear enough to modify the first clause, and we have erred in cutting it out as invalid. We are not satisfied that the elimination of this latter clause so changes the general scheme of the testator as to invalidate this will, or even paragraphs 5 and 6 thereof, which are the dependent paragraphs."

In *Sanford v. Goodell*, 82 Hun, 369, 31 N. Y. Supp. 490, the first clause of the will gave a portion of the testator's land to one of his daughters for life. The second clause gave the residue of his real estate to his other three daughters for life, with remainder in E. The third clause gave the surplus of his personal property to E. and the three daughters mentioned in the second clause of the will. It was held that the invalidity of the second clause, because violative of the statute against perpetuities, did not invalidate the whole will.

In *Barbour v. De Forest*, 61 How. Pr. 181, the testator directed the trustees appointed by his will to set aside one-third of the income of his residuary estate for the use of his great-granddaughter during her life, the principal sum to go to her children, or in case of her death without issue, to others. By a codicil, he directed that so much of said income as should not be needed, in the judgment of his executors, for her support should be invested during her minority, and any accumulation of interest should be added to the principal. It was held that though the codicil was invalid, the residue of the trust was not thereby invalidated, and the will was sustained without the codicil.

In *Guthrie v. Owen*, 2 Humph. 202, 36 Am. Dec. 311, it is held that where a will was finished with the exception of the attestation clause and the clause appointing an executor, and the scrivener left and did not return till the next day, when the testator having become non compos mentis, the scrivener filled in those clauses himself, the will, though void as to the real property, was valid as to personalty. And in *Deane v. Littlefield*, 1 Pick. 239, the will of a married woman, which disposed of both real and personal property, was upheld as to the personalty though it was void as to the realty.

b. When Valid and Invalid Portions are not Separable.—In *Estate of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000, it is held that an invalid trust to convey to certain beneficiaries who were living at the time of the conveyance after the expiration of a trust for the lives of the testator's children, carried with it the otherwise valid trust for the lives of such children and rendered the whole trust void.

In *Eldred v. Meek*, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536, by the terms of one clause in a will the interest devised to the testator's grandchildren was contingent upon their reaching twenty-five years of age, and by another clause that upon said grandchildren failing to do so, but leaving issue, their respective issue should not enjoy the property until they should arrive at the age of twenty-five years.

This was held to constitute one entire scheme of devise, and the latter clause being void on account of the perpetuity created for the unborn issue, the entire will must fail.

In *Slade v. Patten*, 68 Me. 380, a testator gave and devised his estate to each and all of his seven children, "one-seventh part to each of them and their heirs," with a proviso that the parts and proportions devised and bequeathed to his four daughters and their heirs should be paid into the hands of two trustees who should hold and manage and dispose of said parts and the property received therefor, for the use and benefit of his said four daughters and their heirs according to the discretion of said trustees. In a subsequent clause it was provided that if one of the daughters should die before her husband without issue that her part, after the expiration of six years, should go to the six other heirs and be equally divided among them. Held, that the two clauses were so connected together, that the first clause being void for perpetuity, the other also fell.

In *Lockridge v. Mace*, 109 Mo. 162, 18 S. W. 1145, the will devised (1) a life estate to the wife; (2) a life estate to the son; (3) a life estate to the grandchildren with remainder in fee to the great-grandchildren. The devise to the great-grandchildren being void for perpetuity, the other gifts were adjudged also invalid.

In *Benedict v. Webb*, 98 N. Y. 460, the testator created separate trusts in two-thirds of his estate for the benefit of his four children. Three of these trusts were valid, but the fourth invalid. Said the court: "We should feel disposed to sustain the trusts in favor of the other children, except for the reason that to uphold those, while setting aside the trust in favor of Anna Augusta, would seriously interfere with the intention of the testator, that all the children and their issue should share equally in his estate and would produce great injustice. The result of sustaining the trusts in favor of the other children would be that each would take one-fourth share of the estate, and also as heirs and distributees an equal share with Anna Augusta in the share intended for her. No case, we think, can be found which would justify upholding a part of a will, when by so doing it would produce such manifest injustice." And in *Knox v. Jones*, 47 N. Y. 389, where the will created a trust to pay the income of testator's estate to his brother for life, and then to his two sisters, with cross-limitation over as between them, it was held to be an entirety, and not to be avoided in part and sustained in part, the general scheme of the testator being to provide for the brother and sisters during their lives.

The doctrine that unless the invalid part of a will can clearly be separated from the valid part, the whole must fail, is also clearly illustrated in *Re Christie*, 133 N. Y. 473, 31 N. E. 515. In this case, the testator devised one-third of his estate to his widow and the residue among his eight children and one grandson, payable one year after the last period of infancy, five being minors, and giving the executrix discretionary power of sale, with express directions that

such power was not to be exercised until the end of the last minority. It was held that the express restraint of power of sale could not be stricken out without materially changing the purpose of the will to keep the estate undivided during the infancy of the children. The direct question before the court in this case was upon the appointment of a trustee to take the place of the executrix who had died, and this the court refused to do for the reason that the unlawful restriction could not be separated from the valid devise without maiming the general purpose of the will. While the validity of the devise to the widow was not determined in this case, she being dead, it is plain from the language of the court that the will as a whole was invalid.

In *Johnson's Estate*, 185 Pa. 179, 64 Am. St. Rep. 621, 39 Atl. 879, a testator devised his real estate to his executors in trust for a period of seventy-five years, giving the executors power in the management of the estate, and directing them to pay all charges against the land, and all legacies out of the rents and profits. After all of the legacies were paid, he directed his children to select a trustee and that such trustee should collect the rents and profit of the land, and after paying for land and taxes, etc., should distribute the balance to his children and their legal descendants until the expiration of the seventy-five years, at the expiration of which time the trustee was authorized to sell the land and distribute the proceeds "to and among all my children, share and share alike, that may be then living, and the legal descendants of any of my said children that may be then dead, the legal descendants of such child or children to take, however, only such share and portion of said proceeds as their deceased parents would have taken if then living." It was held that as the gift of the future ulterior remainder was void for remoteness, and that as the testator's general scheme was to keep his estate entire for an unlawful period, that the particular estate must fall with the ulterior estate, and the whole will was void. And a case on all-fours with this is that of *Gerber's Estate*, 196 Pa. 366, 46 Atl. 497.

BAUMHOFF v. ST. LOUIS AND KIRKWOOD RAILROAD COMPANY.

[205 Mo. 248, 104 S. W. 5.]

SPECIFIC PERFORMANCE—Contract to Deliver Stock.—Specific performance may be had of a contract to deliver stock, the pecuniary value of which is not provable. (p. 753.)

JUDGMENTS—*Res Judicata*.—Where one who has constructed a railroad under a contract to receive money, also stock and bonds placed with a trust company, sues the railroad company, joining the trust company as defendant, but dismissing it at the trial, and is adjudged entitled to a lien, the money, and a certain amount of stock,

no money judgment being rendered for the stock, because having no pecuniary value, the judgment does not bar him from suing in equity to compel the trust company to deliver the certificates of stock and the railroad company to make a transfer of the shares on its books. (p. 759.)

ACTIONS.—The Rule Against Splitting Causes of Action does not obtain where there is one contract, but the performance is several. (p. 759.)

Jefferson Chandler, T. M. Pierce and S. P. McChesney, for the appellant.

Lehmann & Lehmann, for the respondent.

²⁵² LAMM, J. Plaintiff, suing in equity for specific performance, sought to compel defendant trust company to deliver to him a certain certificate No. 2 for two hundred and fifty shares of the full-paid, nonassessable capital stock of the defendant railroad company, held by the former in trust under a contract, and to compel the railroad company to transfer said shares of stock to him upon its books in the manner and form prescribed by its by-laws, and for such further and general relief as may be deemed just and equitable.

The decree went as prayed. The trust company made no defense so far as disclosed and abides the decree—the railroad company (hereinafter called defendant) alone appealing.

Defendant makes two questions here. Thus: (a) “The court erred in holding that the former suit was not *res adjudicata*, and did not finally dispose of the suit in controversy”; and (b) “The court erred in holding that plaintiff could split up his cause of action and could legally maintain his present suit.”

To dispose of these propositions understandingly, it will be necessary to summarize here the history of a former case (called herein the “lien case”), viz.:

In 1895 plaintiff and defendant entered into a contract ²⁵³ in writing whereby plaintiff agreed to build and equip for defendant an electric railroad from the limits of St. Louis city to a local point in St. Louis county, known as Meramec Highlands, on a line shown by plats called for and attached. The scheme contemplated that defendant should issue three hundred bonds of \$1,000 each, due in twenty years, with six per cent semi-annual interest coupons attached, to be secured by a good and sufficient first mortgage deed con-

veying to said trust company its properties, real, personal and mixed, and all its franchises, and should deliver said mortgage deed, said bonds, with \$25,000 of its capital stock (duly indorsed by the person in whose name said stock may stand upon defendant's books), and also certain bonus subscriptions, to the trust company, and the trust company at certain designated times should turn over certain of said bonds to plaintiff as part payment for building and equipping said road; and, upon full performance, was to turn over to plaintiff enough more bonds to make \$250,000 in bonds, and turn over to him said \$25,000 of capital stock and so much as \$5,000 of said bonus, aggregating in cash, stock and bonds \$280,000, in full consideration for due performance.

The bonds were issued, the mortgage deed executed and defendant caused to be issued a certificate for \$25,000 in face value of its full-paid, nonassessable capital stock, to wit, certificate No. 2 for two hundred and fifty shares, standing in the name of one Pitman, trustee, bearing his blank indorsement, attested by its secretary, and did cause said bonds, mortgage deed, stock certificate and bonus subscription to come into the hands of said trust company to be held and dealt with under said construction and equipment contract.

²⁵⁴ Presently, plaintiff entered upon performance, and from time to time received from the trust company part payment in bonds. There came a time when he had taken down his full quota of bonds, and, claiming full performance, demanded of the trust company full payment. But a squabble arising at that time between plaintiff and defendant, the trust company, under notice from defendant not to make full payment, declined to do so, and a suit followed.

It will be convenient to follow with some particularity, not only the pleadings, but other parts of the record in such suit (the lien case), because in those pleadings and in that record (made part of the record of the case at bar) are laid away the facts relied upon by defendant to show res judicata and a splitting of a cause of action, i. e., estoppel by record.

It seems defendant, having entered into possession of the railroad and its equipment, turned round and leased them to another corporation known as the Highland Scenic Railroad Company. In this fix, plaintiff took steps to fasten a contractor's lien upon the roadbed, rolling stock, etc., under article 4, chapter 47 of the Revised Statutes of 1899, pro-

viding for liens of contractors, materialmen and laborers against railroads, designing to make said lien have precedence over said three hundred thousand dollars encumbrance. Having in due time filed his lien paper with the circuit clerk, and served defendant and the said Scenic company with a copy, he sued to recover \$30,000 as the balance due him under his contract, and to foreclose his lien—making three corporations, viz., both the present defendants (the St. Louis Union Trust Company being impleaded under its former name of “St. Louis Trust Company”) and the Scenic company, parties defendant.

The lien case was tried on an amended petition, wherein plaintiff pleaded the incorporation of the ²⁵⁵ three defendants, set forth his construction and equipment contract, averred due performance, alleged the facts entitling him to a lien, admitted the receipt of \$250,000 in bonds by way of part payment, averred nonpayment of the stock and bonus through the wrongful interference of the railway company, and prayed judgment against the latter company (defendant here) for the sum of \$30,000 balance due and unpaid under the terms of the contract, and that such judgment be made a lien, that the same be foreclosed, and that the Scenic company be compelled to show its interest and be bound by the judgment. The petition also contained an averment that the lease to the Scenic company was “a pretended lease,” and another to the effect that the said capital stock was to be of the value of \$25,000, and still others questioning that defendant’s stock was full paid and nonassessable as contemplated in the contract.

The trust company filed a separate answer admitting the contract, that plaintiff entered upon its performance, the filing of the lien paper, that the railroad company entered into possession and began operating the railroad, the deposit of the mortgage deed, bonds and stock certificate with it, and that the railroad company had notified it not to deliver the stock to the plaintiff; but it denied that it had refused such delivery, and averred it was now willing to deliver, and had no knowledge or information sufficient to form a belief, and, therefore, could neither admit nor deny that the stock was to be of the value of \$25,000. After admitting some and denying other allegations not material here, the answer pleaded matter intended to defeat any preference of plaintiff’s lien over the mortgage indebtedness, and immaterial

matter relating to the bonus. The bonds having gone into circulation, the life of this answer was the protection of said ²⁵⁶ mortgage indebtedness from any preference in favor of plaintiff for the unpaid contract price; and issue was joined by a reply.

Thereafter the Scenic company filed its separate answer, directing itself in the first instance to the allegation that it held under "a pretended lease." It says its lease was quite to the contrary, to wit, "valid and lawful"; that plaintiff had abandoned his contract without substantial performance; had been paid an amount largely in excess of the value of his labor and material; that the lien paper damaged the property of the defendant as lessee, in that it stated that plaintiff's claim for a large sum of money and the account filed are "true and correct," whereas such statement was "wholly false and defamatory and libelous"; that plaintiff "without probable cause and well knowing that the statement filed by him (to wit, the lien paper) was wholly false, did maliciously and for the purpose of injuring this defendant, destroying its credit and crippling it in the operation of said railroad, utter and publish said false statement," etc.; that it had desired to issue \$100,000 in bonds and borrow said amount, etc., and had been unable to do so by reason of the premises; that the market value of its bonds was destroyed and they became unsalable, etc., to its damage in the sum of \$20,000, for which it prayed judgment.

The railroad company filed its separate amended answer, admitting the contract but denying performance, and setting forth a schedule of faults, defaults, etc. Said answer admitted the execution and deposit with the trust company of the mortgage deed, bonds, stock and bonus subscriptions, averred that the stock was fully paid up and nonassessable within the purview of the scheme as understood and participated in by plaintiff, put plaintiff upon his proof on the allegations pertaining to the lien, admitted plaintiff obtained ²⁵⁷ possession of the bonds from the trust company, but averred that he got possession wrongfully, and that the trust company participated in such wrongful delivery, put in issue the allegation that the trust company had refused to deliver the stock to plaintiff, but averred that plaintiff was not entitled to receive said shares of stock, and that defendant had so notified said trust company, admitted notifying the trust company not to pay over \$5,000 of the bonus subscription in

its hands, and made affirmative allegations pertaining to said bonus subscription not material here, admitted the lease to the Scenic company, said it was an honest and valid lease, that said company had control and possession of the railroad, averred that time was of the essence of plaintiff's contract, and that he had defaulted in that regard. The answer then pleaded the waiver of the mechanic's lien by the contract provisions for, and acceptance of, other security, to wit, the bonds, bonus and stock aforesaid; and finally, by an array of allegations relating to omissions and nonperformance by plaintiff, the answer predicated damages in the amount of \$40,000 in failing to perform within the contract time, which damages it claimed from plaintiff alone, and \$110,000 additional damages for nonperformance and misperformance in other particulars and in wrongfully getting possession of said bonds. The latter item of damage defendant said accrued to it from the wrongful conduct of the trust company and plaintiff, inter sese, in delivery and accepting delivery of said bonds before the work was completed, in violation of the contract; and judgment was demanded against plaintiff and defendant trust company for that sum.

It seems that presently the mortgage securing the \$300,000 bond issue was released, payment being made through some refinancing scheme. ²⁵⁸ Thereupon the trust company conceived it had no further interest in the suit and filed its formal disclaimer of interest. Thereupon the plaintiff dismissed his suit as against said trust company. This was in January, 1898, and the following record entry was made: "On motion of plaintiff by attorney it is ordered by the court that this cause be dismissed as to the defendant, the St. Louis Trust Company."

We deem it of importance to observe right here that no exception was taken to the dismissal of the trust company, that the order of dismissal was never set aside, and that, though the dismissal was questioned and threshed over long afterward at the trial of the lien case, yet, to all intents (for legal purposes), the trust company disappeared from that case as a party litigant in January, 1898. So that the lien case in its legal aspect stands precisely as if the trust company never had been a party.

Issue was joined by plaintiff's filing replies to the separate answers of the Scenic company and the railroad company,

and that was the status of matters for over a year and during several terms of court.

In May, 1899, the lien case came on for trial to the court without a jury. By the trend of the evidence introduced, all of which is reintroduced in the case at bar, and of the instructions given and refused (likewise appearing in this record) it appears that the lien case was tried by plaintiff, speaking on broad lines, on the theory that he had fully performed his contract and was entitled to his full pay, that he had received in bonds \$250,000, and that by reason of the allegations in his petition and the probative force of his proof sustaining the same he was entitled to a judgment for the balance of his pay withheld by the railroad company, and which, he contended, was of the value of \$30,000, for which sum he was entitled to a lien and a foreclosure thereof; ²⁵⁹ and was tried on the theory of defendants that plaintiff had not performed, that heavy damages resulted from his nonperformance and misperformance, that he, at least, had waived his lien; and, further, that as to the stock item plaintiff was compelled to take that item of pay in stock, that if there was a wrongful conversion of the stock left in escrow with the trust company no lien could be adjudged against the railroad property as an incident to a judgment for such conversion.

So much for the theories of the litigants, nisi. But the trial judge also had theories, and must be reckoned with on that score, since his judgment presumably was predicated on his own, rather than on litigants' views. Anent his theory on the stock item, the first glimpse we get of it was at the commencement of the trial. It seems that the trust company having been dismissed out of the case, the other defendants asked leave to amend their answers so as to raise the question of defect of parties defendant. Leave to amend was refused, and in doing so, the court said: "I don't see that it [the trust company] is actually a necessary party, either on plaintiff's theory or on defendants' theory of this case. *I don't see how an order could issue against the St. Louis Trust Company to turn over the stock to the plaintiff.*" Later the court put itself in bonds somewhat by instructions, and its theory on the stock item is further somewhat foreshadowed in their terms. Thus, it instructed (itself) that: "There is no evidence in this case showing the market value, as such, of the said capital stock stipulated in the contract to be deliv-

ered to said Baumhoff"; and, further, that, "If the plaintiff is entitled to recover the value of said capital stock, he is entitled to recover the highest value which it may have possessed at any time after he was entitled to recover the same and prior to the beginning of this suit, not exceeding the sum of \$25,000"; and further, that: "No judgment ²⁶⁰ establishing a contractor's lien upon a railroad can be rendered unless a breach of contract is shown; even though the court find from the evidence that the St. Louis and Kirkwood Railroad Company converted to its own use any property deposited by it in escrow with the St. Louis Trust Company, no lien can be adjudged against any property of said railroad company as an incident to or in connection with a judgment against said railroad company for such conversion"; and another instruction in substance set forth that if the court found that plaintiff was entitled to recover in money, then the measure of damages should be adjusted with due reference to the fact that the consideration to be paid included a certain quantity of stocks, not money, and that plaintiff agreed to perform the contract for the actual value of the stocks at the time plaintiff was entitled to them plus the money payment out of the bonus subscriptions, and that aside from any damage by reason of nonpayment of the cash from the bonus subscriptions, "the measure of damages, if any," must be the value of any stocks wrongfully withheld from plaintiff at the time of such withholding, estimated in lawful money of the United States.

The lien case was held sub judice until October, 1899, at which time the court made its finding and rendered judgment. It found against the counterclaims of both the railroad defendants; found full performance of the construction and equipment contract by plaintiff, and that he was entitled to his pay, etc. When it came to the stock item it found as follows: "That he [plaintiff] was to receive for the work of constructing said road . . . \$25,000 in paid-up shares of the capital stock of the St. Louis and Kirkwood Railroad Company [here follows other elements of the construction contract]; . . . that he is entitled to receive twenty-five thousand dollars (\$25,000) in paid-up shares of the capital stock of the St. ²⁶¹ Louis and Kirkwood Railroad Company, and the further sum of five thousand (\$5,000) in cash, with interest on said cash sum from the — day of —, A. D. 189—. The court further finds that the said shares of

the capital stock of the St. Louis and Kirkwood Railroad Company are not shown by the evidence submitted to possess any pecuniary value."

The judgment entered was that plaintiff recover of the defendant railroad company "the said sum of \$5,897.50"—which sum is confessedly the cash item due from the bonus subscriptions plus the interest thereon, and none other—and his costs against both of the remaining defendants, that plaintiff have a lien for said sum on the roadbed, etc., and that the same be foreclosed, etc.

From this judgment, the defendant railroad companies appealed to this court, and it was in all things affirmed by division 1 in December, 1902: 171 Mo. 120. In the opinion by Brace, P. J., the judgment and finding of the St. Louis circuit court are set forth in *haec verba*, and it was said: "There is abundant evidence in the record to support the finding of the trial court." It was further said: "The fact that he [plaintiff] may have had a right of action against the trust company therefor [that is, for the properties and money held in escrow by it] was no reason why he should have been forced to have abandoned his lien, and resort to such action. While he was entitled to but one satisfaction, he might have several remedies."

So much for the lien case.

And when it is further stated that presently after being affirmed here said money judgment was collected on *fi. fa.*, that defendant in its answer herein pleaded the former adjudication as a bar by estoppel, that it substantially appears that plaintiff claimed possession of the stock certificate from the trust company, but it ²⁶² was not turned over to him because of the continued objection of defendant, and that thereupon the present suit for specific performance was instituted, we have before us all facts necessary to understand the two propositions "a" and "b" relied upon to reverse the decree.

1. Where the pecuniary value of corporate stock is not provable (as here), and where, in consequence, one may not have adequate damages at law, he is not remediless against those who withhold such stock to which he is entitled, but a suit for specific performance of a contract to deliver lies: *Dennison v. Keasby*, 200 Mo. 408, 98 S. W. 546, and cases cited; 26 Am. & Eng. Ency. of Law, 2d ed., 122. It is thus seen that, on the plainest principles of equity, unless plaintiff's

right to the stock be otherwise barred, he is entitled to his remedy.

2. In considering whether plaintiff is estopped by the judgment in the lien case, it is well enough to note that plaintiff relies on that very judgment as determining his right to the stock. As we grasp it, the theory of plaintiff may be said to be that the present proceeding is in the nature of an equitable execution issued on that judgment—that is, an equitable proceeding to enforce a judgment at law already determining plaintiff's right. That he sues in affirmance of the judgment. On the other hand, the defendant contends, in effect, that plaintiff pursued his remedy in that case to its final determination, that he asked judgment for the value of the stock and got precisely what the proof showed him entitled to, to wit, nothing. Therefore, defendant argues, that is the end of it and it may not be vexed twice—nothing he got then, and shall get the same now.

In view of these contrary views of the judgment in the lien case, it will be well enough presently to ²⁶³ point out precisely what was determined in that case, because the general principles controlling *res judicata* are not in doubt—the difficulty lies in the application of those principles to particular cases. For instance, learned counsel for both parties accept and rely on the doctrine of *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. Rep. 18, 42 L. ed. 355, in which Justice Harlan said: "The general principles announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals

in respect of all matters properly put in issue and actually determined by them."

In the course of that opinion Justice Harlan reviews many cases, among others, *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195, and sums up the doctrine of the *Cromwell* case by stating it to be this: "That a judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action in respect to every matter offered and received in evidence, or which might have been offered to sustain or defeat the claim in controversy, while if the second ²⁶⁴ action is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered, the injury [inquiry?] in such case being 'as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined.'"

In *Womach v. St. Joseph*, 201 Mo. 467, 100 S. W. 443, 10 L. R. A., N. S., 440, the following exposition of the law of *res judicata* was approvingly quoted from the *Duchess of Kingston's Case*, 2 Smith's Lead. Cas., 8th ed., pt. 2, p. 734: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

In *Clark v. Blair*, 4 McCrary, 311, 14 Fed. 812, McCrary, Circuit Judge, had under determination a case in point here, and held, quoting from the syllabi, that "the judgment in a former suit based upon the same facts, or between the same parties or their privies, but to enforce a different demand and obtain another form of ²⁶⁵ relief, is conclusive only as to what was in fact litigated and decided in such suit."

Attending, now, to what was determined in the lien case, it will be seen that plaintiff's absolute right to the stock was determined by the judgment. So much stands out boldly and is clear. That judgment was in all things affirmed by this court, and, therefore, under the authorities quoted, all reagation of that question is concluded as between plaintiff and defendant. What else, if anything, was determined by the lien judgment? When it is seen that the prime object of that suit was to establish and foreclose a lien for any money judgment recovered, that defendant asked and was allowed an instruction that no damage for conversion of the stock could be enforced by way of a lien, that the court found that no pecuniary value was established for the stock, and followed that finding by assessing the lien amount at the \$5,000 and interest due plaintiff out of the bonus subscriptions—we say all these things appearing, it sufficiently appears that the force and effect of the determination in the lien case was that plaintiff was entitled to two things: First, to the stock in kind; and, second, to a money judgment on the items of bonus subscriptions. Having so found, judgment followed for the money, foreclosure of lien and award of execution. It must be remembered that the record before us shows also that the trial court was of the opinion it could not grant relief in kind in the lien case, it being a suit at law, hence could not order the stock turned over to plaintiff. This appears in its ruling refusing leave to amend the answers. These things sufficiently appearing, we are not inclined to hold that the judgment in the lien case, either in terms or intendment, undertook to assess plaintiff's damage on the stock item or its value at nothing, and then so merge that impalpable or shadowy value into the concrete money judgment ²⁰⁸ that he would stand precluded from thereafter claiming the stock itself. Why, indeed, should the trial court have strained a point to preclude plaintiff's claim of stock solemnly found to be his? To have done so would have been to toy with plaintiff's rights and press to his lips a judicial Tantalus' cup. The court did not do so. The force of its judgment is precisely the other way and should be construed to mean that, as to stock, the judgment contented itself with finding and pointing plaintiff to his title in, and right to possession of, the thing itself—a right that could not be enforced by final process in the lien case but must be pursued elsewhere. Hence, plaintiff, having received satisfaction on the money judgment, is estopped to

claim anything more on that score. But in so far as the judgment in the lien case determined his right to the stock, he has never received satisfaction to this day. His right being established, shall he have no remedy because the arm of a law court was too short to give him one? Under what more favorable auspices could equity step in with its corrective power?

It seems to us that any other conclusion would be to dig a pit and spread a net to ensnare the feet of justice; because, aside from money value, the stock had sentimental values, and conferred powers and privileges upon its owner—for example, voting power, the right as a share owner to a voice and finger in the corporate management—all of which are privileges given and protected by law and which can only be exercised by the transfer of the stock to him. Having these property rights, it would seem to be paltering with the situation to deny a remedy, unless we were constrained to take that course by some inflexible principle of law. *Ubi jus, ibi remedium*, as said by counsel.

If this were a suit for the value of the stock or one based on some alleged conversion by defendant prior to the lien case, the doctrine of *res judicata* might be ²⁰⁷ held to apply, because it could with propriety be urged that the court had in judgment the question of value in the lien case. But, being in effect a suit to complete and round out a right established by the former suit, the latter ought to be held good as far as it went.

In *Nickerson v. California Stage Co.*, 10 Cal. 520, Terry, C. J., quoted with approval the following passage from *Swift's Evidence*: "Where the cause and object of both actions are the same, the judgment in the prior bars the subsequent suit. When the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action, but the verdict is a matter of evidence to prove the point."

In *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663, it was held, quoting from the syllabus, that: "To sustain a plea of a former judgment in bar it must appear that the cause of action in both suits is the same, or that some fact essential to the maintenance of the second suit was in issue in the first action and was decided adversely to plaintiff. The bare fact that two causes of action spring out of the same contract does not *ipso facto* render a judgment on one bar to a suit on the other."

Litigation being only "a means of administering uniform justice," it has been held that where plaintiff's ultimate right to sue was not determined in the first proceeding, or where the determination proceeded upon some technical objection not affecting it, the first judgment will constitute no bar to the second suit: *Carmony v. Hoobler*, 5 Pa. 305. It was said by McIver, J., in *Sease v. Dobson*, 34 S. C. 345, 13 S. E. 530, that: "It is true that parties may, and sometimes do, fail to obtain that justice which the real facts entitle them to, by the manner in which their cases are presented to the court; but such an unhappy result ought always to be avoided, if it is practicable to do so without infringing settled rules of law which it is essential ²⁶⁸ to the welfare of the commonwealth to preserve in their fullest integrity, for, being established for the guidance and control of the whole community, they should never be distorted or strained to suit the fancied justice of a particular case."

Conceding the foregoing dictum sound, nevertheless, we find no inflexible principle of law impinged upon in granting relief to plaintiff in this case. In getting at ultimate right it has been held that a suit for specific performance of a contract, dismissed on hearing on the merits, is not a bar to an action at law between the same parties to rescind the contract and recover back money paid under it: *Ballou v. Billings*, 136 Mass. 307. The judge writing that case, Oliver Wendell Holmes, later and now a member of the United States supreme court, spoke for that court in an opinion in *Northern Assur. Co. v. Grand View Building Assn.*, 203 U. S. 106, 27 Sup. Ct. Rep. 27, 51 L. ed. 109, holding that a suit at law to recover on an insurance policy, in which plaintiff was denied recovery as the policy stood, is not an adjudication that the contract of insurance cannot be reformed in an after suit in equity. The first suit had proceeded on the theory that a recovery could be had without reformation; and in disposing of the question of election, Justice Holmes, epigrammatically, said: "Its [plaintiff's] choice of law was not an election but an hypothesis." So, too, in *Garland v. Smith*, 164 Mo. 1, 64 S. W. 188, it was said: "Where the purpose and object of the former action are the same with the later action, it is not to be questioned that the judgment concludes everything which might have been brought forward, although not in fact pleaded or in evidence, but where the subsequent action is upon a different claim, the former judgment only bars those things which were

in issue or included in the issue in the former action or suit, nor will the judgment bar another cause which might have been joined with the former cause of action ²⁶⁹ but was not, and if different proofs are required to sustain two actions, the judgment in one is no bar to the other": Citing *Cromwell v. Sac County*, 94 U. S. 354, 24 L. ed. 195.

Many other cases might be cited, by parity of reasoning sustaining the decree in this case against the attack delivered by defendant in its assignment of error "a," but when it is further said that the cause of action and the objects of the two suits are dissimilar, that, the trust company having been dismissed out of the former suit and included in this, the parties are not the same, enough appears to give the grounds of our conclusion, which is, that the court committed no error in holding that the lien case was not *res judicata*.

3. But it is contended by defendant that, laying the lien case and specific performance case side by side, it is apparent plaintiff has split up an entire cause of action, and, therefore, is estopped to maintain his last suit. It is elementary law that an indivisible, hence, single and entire, cause of action may not be split at the whim of plaintiff into a series of suits, to the harassment of a defendant. The law abhors a multiplicity of suits; it grants its benediction to arbitration, to compromise, to accord and settlement. It concerns the law that there be an end to lawsuits. Plaintiff may have but one action for one entire wrong, and but one action for one entire contractual right; but the rule against the splitting causes of action does not obtain where there is one contract but the performance is several. Here the performance is several, though the two causes of action arose on the same contract. This is a suit against the trust company to deliver the physical custody of stock over to plaintiff and to compel defendant railroad company to transfer that stock on its books in accordance with its by-laws and issue a new certificate. Performance of the contract in kind was contemplated by its terms. Failure ²⁷⁰ to deliver the stock and perform in that behalf created a single, entire cause of action for specific performance. It matters not that the contract was violated in the particular that plaintiff was not paid \$5,000 out of the bonus subscriptions, whereby plaintiff had another entire and indivisible cause of action rightfully culminating in a money judgment and lien. One cause is in equity, the other at law, though

both spring from one contract. There is no merit in this contention.

The decree is sustained by the reasoning of *Christopher & Simpson etc. Foundry Co. v. Kelly*, 91 Mo. App. 93; *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Boyce v. Christy*, 47 Mo. 70; and other cases cited under point 2 of plaintiff's brief.

4. Finally, it is said, *arguendo*, in the brief of plaintiff's learned counsel, as follows: "The substantive law of the case is found in the Decalogue, Exodus 20:15," to wit: "Thou shalt not steal." Replying to that contention it is argued, *contra*, in the brief of defendant's learned counsel that the foregoing interdiction is not in point here, but that an old case decided by a pseudo-judge, one Portia, reported in *Merchant of Venice*, Act IV, Scene I, is on all-fours (*quatuor pedibus*)—a case known to the profession as the *Pound-of-Flesh-and-Drop-of-Blood Case*. These ingenious and rather tense contentions *pro* and *con* have been looked into for substance and are disallowed; because on the one side there is absent certain venerable elements essential to constitute larceny, known to scholars in jurisprudence as the *asportavit*, the *animus furandi* and the *doli capax*. Did the defendant have the stock in possession? No—*ergo*, there is no *asportavit*. What of the *animus furandi*? Is there any? No. Is a corporation in law *doli capax*, so that it may be guilty of larceny? Doubted, and the question reserved. So, too, the doctrine of Portia's case seems to be *afield*; for in the opinion handed down as reported ²⁷¹ by Mr. Shakespeare it was held that said pound could only pass to the plaintiff on a condition subsequent, *viz.*, his "lands and goods are by the laws of Venice confiscated to the State of Venice" if (much virtue in that "if") in the cutting thereof by plaintiff "one drop of Christian blood" was shed. Accordingly, observe that plaintiff in that case entered a *remitter* for the pound, in fact suffered a nonsuit, rather than face the loss of all his assets, real, personal and mixed; while here defendant concedes plaintiff the pound itself, and says he has it. Is Portia's law, law? We may answer that question in the phrase of the same learned reporter in another case (see *Hamlet's case*), to wit: "Ay, marry, is't; crowner's quest law." Thus it falls out that the last questions raised may be put aside as mere *flotsam* and *jetsam*.

The decree was right and should be so affirmed. Let it be so ordered.

All concur.

Specific Performance of a Contract to convey corporate stock will be decreed if the remedy at law is inadequate (*Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811; *Adams v. Messinger*, 147 Mass. 185, 9 Am. St. Rep. 679; *Goodwin Gas Stove etc. Company's Appeal*, 117 Pa. 514, 2 Am. St. Rep. 696), but not otherwise: *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892; *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404.

The General Rules of Res Judicata are stated in the recent case of *Chicago etc. B. B. Co. v. Cass County*, 72 Neb. 489, 117 Am. St. Rep. 806; *Scottish-American Mtg. Co. v. Buckley*, 88 Miss. 641, 117 Am. St. Rep. 763; *Gouwens v. Gouwens*, 222 Ill. 223, 113 Am. St. Rep. 394.

BATES v. SYLVESTER.

[205 Mo. 493, 104 S. W. 73.]

TORT—Survivorship of Action.—At the common law actions in tort do not survive the death of either the wronged or the wrongdoer. (p. 762.)

DEATH—Right of Action for Causing.—At the common law the death of a human being gave rise to no civil action in behalf of any person under any circumstances. (p. 762.)

DEATH—Survivorship of Action for Causing.—A cause of action for wrongful death does not survive the death of the wrongdoer. (p. 771.)

Lyon & Swarts and Thomas J. Hoolan, for the appellant.

Block & Sullivan, for the respondent.

⁴⁹⁵ GANTT, J. The plaintiff brought suit under section 2865, Revised Statutes of 1899, for the alleged negligent killing of her husband, Depello Bates, by an employé of James J. Sylvester, by negligently driving a horse and carriage belonging to said defendant over her said husband on or about April 11, 1903. After the suit was filed the cause was dismissed as to the defendant Crissie L. Sylvester and the other defendant, James J. Sylvester, died; his death was suggested to the court and the plaintiff having complied with the statutes, sought to revive the action against ⁴⁹⁶ W. W. Sylvester, the administrator of said James J. Sylvester, deceased. The writ of scire facias was issued against the said administrator who appeared in court, and for his return to the citation to

show cause why this action should not be revived against him, represented to the court that this action did not survive the death of the said defendant, James J. Sylvester, and thereupon the court overruled the plaintiff's motion and application to revive the cause, and ordered the same to be abated as to the administrator and estate of the said James J. Sylvester. From this order the plaintiff appeals to this court, and the only question presented for our adjudication is whether or not an action based on the damage act survives to the widow against the administrator of the deceased defendant.

1. At common law actions in tort do not survive the death of either the wronged or the wrongdoer. This rule of the common law forbidding the survivor of actions, or right of action *ex delicto*, was first modified in this state in 1835, by the enactment of what is now sections 96 and 97 of the Revised Statutes of 1899, which are as follows:

"Sec. 96. *Actions for torts by and against administrators, what may be maintained.*—For all wrongs done to property, rights or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as actions founded upon contract.

"Sec. 97. *Last section not to extend to what actions.*—The preceding section shall not extend to actions for slander, libel, assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the ⁴⁹⁷ testator or intestate of any executor or administrator."

In *Higgins v. Breen*, 9 Mo. 497, it was pointed out by Judge Scott that the statute of 4 Edward III "only gave actions to executors, and not against them, for as against the person committing the injury, the action dies with him: Chitty, 59; 1 Saunders, 217. Our statute has changed the English law in this respect, and has given an action both to and against executors and administrators, and by employing much broader language than the statute of Edward, seems to have included by express enactment the injuries which were comprehended in that statute only by construction. The words of our statute are, 'for wrongs done to the property, rights or interest of another,' etc., with the exception of actions for slander, libel,

assault and battery, or false imprisonment, and to actions on the case for injuries to the person: Rev. Stats. 1835, tit. "Administration," art. 2, secs. 24, 25."

Sections 96 and 97 have been construed by this court. Thus in *Vawter v. Missouri Pac. R. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105, Judge Black, speaking for this court, said: "An administrator appointed in this state receives his power and authority to sue from the laws of this state, and from this state alone, to which he is amenable throughout the entire course of the administration. There is no statute of this state by which he has or can have anything to do with suits of this character, or the damages when recovered. He may, by section 96 of the Revised Statutes of 1879, bring an action for all wrongs done to property rights or interests of the deceased against the wrongdoer. Section 97 provides: 'The preceding section shall not extend to actions . . . on the case for injuries . . . to the person of the testator or intestate of any executor or administrator.' For fear that section 96 might be construed to confer upon the administrator a right to sue for injuries ⁴⁹⁸ to the person of the intestate, the next, as will be seen, declares in express terms that he shall not do so. To sustain this action we must say he may maintain such actions, and that, too, because of a statute of another state . . . This we cannot do."

The learned counsel for the plaintiff insist that any action sounding in tort which does not expressly fall within the limitations of section 97 can be revived by or against the representatives of a deceased party to the action, and as section 97 only bars actions on the case for injuries to the person of the plaintiff, the only question before this court in this case is whether or not this is an action for injuries to the person of the plaintiff, and as this is not an action for injury to the person of Mrs. Bates, her cause of action survives against the administrator of the alleged wrongdoer, James J. Sylvester. We are unable to concur in this deduction of the counsel for plaintiff, for the reason that at common law the rule was just the other way—that is to say, actions for tort did not survive, and under section 96, actions for tort do not survive unless they are within the terms of section 96. And if by virtue of the general provisions of said section an action might be said to survive, nevertheless if included within the prohibition of section 97 it will not survive. By reference to section 96, it will be noted that the statute refers to "wrong done to prop-

erty, rights or interests of another," and counsel for plaintiff cite us to *James v. Christy*, 18 Mo. 162. That was an action by the administrator of James for the negligent killing of his son by the explosion of a steam ferry-boat on which the son was a passenger. The son was living with his father and was fifteen years old. The question was whether the action survived to the administrator of the father, and it was held by this court that the father had a property right in the service of his son during his minority and whilst he was under his ⁴⁹⁰ guardianship, and if by the misconduct of another he was deprived of these services, or the son's ability of performing them, the law awarded him a compensation in damages. And it was pointed out by Judge Scott that the damages in such case must be limited to the actual value of those services and that all other damages die with the father. In other words, the language of section 96, to wit, "Property, rights or interest" mean and should be read "property, rights or interest," and this was the construction placed upon it by this court in *Vawter v. Missouri Pac. R. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105. At common law the death of a human being gave rise to no civil action in behalf of any person under any circumstances, as has often been decided by the appellate courts of this state: *McNamara v. Slavens*, 76 Mo. 329; *Barker v. Hannibal etc. R. R. Co.*, 91 Mo. 86, 14 S. W. 280; *Brink v. Wabash R. R. Co.*, 160 Mo. 87, 83 Am. St. Rep. 459, 60 S. W. 1058, 53 L. R. A. 311; *Stoeckman v. Terre Haute R. R. Co.*, 15 Mo. App. 503.

James v. Christy, 18 Mo. 162, was decided in 1853, two years before the enactment of any statute in this state providing for recoveries in cases of injury resulting in death, and it is clear that if the father in that case had brought an action for the death of the infant son he could not have recovered, because section 96, then in force, dealt only with the survivor of existing actions and not with the creation of new ones, and by the common law such an action could not have been maintained. Sections 96 and 97 are literal transcriptions of the New York statutes on this subject. In *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, the court of appeals of that state, construing the two sections of the New York statute, said: "Reference to the law as it stood prior to the revision (and the application of the maxim *noscitur a sociis*) would seem to require such an interpretation of the words 'property, rights or interests' as will confine their

application to injuries to property rights only, and such as were therefore enforceable by ⁵⁰⁰ the deceased." Indeed, we are of the opinion, in view of the state of law when sections 96 and 97 were enacted, it was the intention of the legislature to provide for the survivor by and against personal representatives of actions for wrongs to property rights and interest only, and that by this enactment, without more, no action would lie based upon the death of a human being, and no right of action for tort to the person would survive the death of either the wronged or the wrongdoer. In 1865, thirty years after the enactment of those two sections, the legislature enacted our damage act, now sections 2864 to 2868, and those adopted the spirit of Lord Campbell's act. The act of 1855 and the subsequent amendments thereto, as they appear in the revision of 1899, did provide for the survivor of actions for personal injuries resulting in death. These sections have been construed in a number of cases by this court. Thus, in *Proctor v. Hannibal etc. R. R. Co.*, 64 Mo. 112, it was said: "It is conceded by all that the third section of the act was only designed to transmit a right of action which but for the section would have ceased to exist, or would have died with the person; in other words, that under section 3, whenever a person dies from such wrongful act of another as would have entitled the party to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, notwithstanding the death of the party receiving the injury. It creates no new cause of action, but simply continues or transmits the right to sue, which the party whose death is occasioned would have had, had he lived. It is not only a right transmitted, but it is restricted by limitations as to the persons who are to enjoy the right, the time within which it is to be enjoyed and the amount of damages to be recovered." And the doctrine thus announced has been repeated in *White v. Maxcy*, 64 Mo. 552; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398; ⁵⁰¹ *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 68 Am. St. Rep. 554, 46 S. W. 966, 41 L. R. A. 385; *Strode v. St. Louis T. Co.*, 197 Mo. 616, 95 S. W. 851.

What was said in *Behen v. St. Louis T. Co.*, 186 Mo. 430, 85 S. W. 346, arguendo, that our statute authorizing recovery for the wrongful death creates a new cause of action and does not simply provide for the survivor of an existing one, is not in harmony with the cases above cited, and is contrary to the last expression of this court in bank on this subject in *Strode*

v. St. Louis T. Co., 197 Mo. 616, 95 S. W. 851. Having thus reached the conclusion that this action did not survive by reason of section 96 of the Revised Statutes of 1899, is there anything in sections 2864, 2865 and 2866 which provide that this action shall survive the death of the tort-feasor or wrongdoer? The language of section 2865 is that whenever the death of a person should be caused by a wrongful act, neglect or default of another the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. And section 2864 provides when any person shall die from an injury resulting from or occasioned by the negligence, etc., of any officer, agent, etc., whilst running, conducting or managing any locomotive, car or train of cars, etc., or when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, etc., the corporation or individual in whose employ any such officer, agent, etc., shall be at the time of such injury, or who owns any such railroad, etc., at the time the injury is received, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered, first, by the husband or wife of the deceased, or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, ⁵⁰² whether such minor child or children be the natural born or adopted child or children, etc. Thus, it will be seen that the statute provides that actions for personal wrongs shall not die with the party whose death was occasioned by the wrongful act, but shall survive to certain parties designated in the act, but no provision whatever is made for the contingency of the death of the person who wrongfully caused the death. Whether intentionally or by oversight, the General Assembly made no provision for the survivor of the action against the personal representatives of the wrongdoer. That this is the case is tacitly conceded by counsel for the plaintiff by invoking section 96 as affording it. Our damage act, like Lord Campbell's act, and similar statutes in almost all of the states in the Union, is clearly in derogation of the common law. It is complete in and of itself, and, as we have already said in our opinion, provides for a transmission of the right of action to the parties designated in the act, the parties against whom it will lie, and fixed the measure of dam-

ages and its own statutes of limitation. Both section 2864 and 2865 name the person who shall be liable in such cases "as the person who or the corporation which would have been liable if death had not ensued." And at the time this act of 1855 was passed such action would not have survived the death of either the party injured or the wrongdoer. It is to be noted that the legislature had this specific question of survivor in mind when it enacted our damage act, and if the lawmakers had intended that the action should lie against the representatives of the person who would have been liable had death not ensued, they would not have left it in doubt. It is not the province of the courts to supply this omission in the statute, if such it may be called, but to construe the act as we find it upon the statute books.

Counsel for the plaintiff, however, have called our ⁵⁰³ attention to the cases of *Cooper v. Shore Electric Co.*, 63 N. J. L. 558, 44 Atl. 633, and *Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145, 79 Am. St. Rep. 635, 58 N. E. 50, 51 L. R. A. 235. An examination of those cases will demonstrate that they rest upon statutes unlike ours in that they permit actions for death to survive the death of the plaintiff, and it is well to remark in this connection that the New York statutes of which ours are transcripts have been radically amended since their adoption into the laws of this state. But on the point now under consideration the court of appeals of New York in *Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145, expressly approved *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, in which it was held that the cause of action for damages from negligence resulting in death abates upon the death of the wrongdoer, and that the action cannot be maintained against the representatives of the wrongdoer, saying: "This is a necessary result from the fact that the Code modifies the Revised Statutes and the common law only as to the personal representatives of the person injured, and not as to those of the person who inflicted the injury." The case of *Cooper v. Shore Electric Co.*, 63 N. J. L. 558, 44 Atl. 633, was predicated upon the statute, the efficient words of which were, "A right of survivor of an action to and against personal representatives for trespass to the person or property, real and personal," and it was held that the word "trespass" as used in the section was equivalent to the word "tort," so that the effect of the provision was to give a right of suit against the personal representatives of a deceased wrongdoer

for any injurious act of a suable nature, without reference to the form in which the remedy was sought.

We have already noted that our act, section 96 of the Revised Statutes of 1899, is confined to actions for torts for wrongs done to property rights or interest of another and not to personal torts or actions on the case for injuries to the person. An examination of the decided cases in other jurisdictions confirms the ⁵⁰⁴ views which we have expressed. Among the first cases on this subject is *Norton v. Wiswall*, 14 How. Pr. 42, decided in 1856. The case was an action brought for the death of a passenger on a ferry, the defendant having died pending the action, thus presenting the question whether it could be revived against the administrator. After advert-
ing to the fact that at common law the action would undoubtedly abate on the death of the defendant, the court said: "The statute which gives the right of action to the personal representative of the party injured does not extend that right of action beyond the wrongdoer himself. The common-law rule that the remedy for injuries to the person dies with the wrongdoer remains unchanged. The rule that *actio personalis moritur cum persona* is as applicable to the death of the wrongdoer as to that of the party injured. Indeed, it is more so; for the statute under which these actions are brought has made one exception to the rule in respect to the later, while there is no exception to the rule in respect to the former." Another case growing out of the same action was *Yertore v. Wiswall's Exrs.*, 16 How. Pr. 8. At that time the New York statutes contained provisions exactly like our sections 96 and 97 of the Revised Statutes of 1899; it was held that the action in behalf of the widow and next of kin was a new and original action, and that the life of the husband was property of the wife within the meaning of the New York statute, which is the argument made in this case by counsel for the plaintiff. Afterward, in *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, an action was brought by the widow as administratrix to recover the statutory penalty for the wrongful death of her husband, and, pending the action, the defendant died, and it was revived and prosecuted against the executor, and on appeal to the court of appeals of New York, the only question considered was whether or not under the New ⁵⁰⁵ York statutes the action survived. The court of appeals disapproved the decision in the *Yertore* case, and held that the action abated at the death of the defendant. *Ruger, C. J.*,

speaking for the whole court, discussed the provisions of the sections of the New York act corresponding to our sections 96 and 97, and held that the words "property, rights or interests" should be confined in their application to property rights only, and such as were therefore enforceable by the deceased, and then taking up the damage act which provided for an action by the administrator for the benefit of the widow or next of kin in case of death, said: "It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or impliedly, to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party. The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action enforceable against, as well as by, representatives. The cause of action thereby given is not to the estate of the deceased person, but to his or her representatives as trustees, not for purposes of general administration, but for the exclusive use of specific beneficiaries. The wrong defined indicates no injury to the estate of the person killed, and cannot either logically or legally be said to affect any property rights of the person, unless it can be maintained that a person has a property right in his own existence. The property right, therefore, created by this statute is one existing in favor of the beneficiaries of a recovery only, and depends for its existence upon the death of the party injured. It had no previous life and cannot ⁵⁰⁶ be said to have been injured by the very act which creates it." The court distinguished the case of *Cregin v. Brooklyn etc. R. R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459, and 83 N. Y. 595, 38 Am. Rep. 474, which has been urged as authority in this case for the plaintiff, and pointed out that in the *Cregin* case the action was by the husband for the death of his wife, and the husband according to the view of the New York court had a property right in the services of his wife, and therefore the injury to the wife diminished the estate of the husband, and, consequently, for the loss of the services of the wife, between the date of her injury and the date of her death, the husband's administrator might recover. Upon a statute of the same import as ours this same question arose in *Russell v. Sunbury*,

37 Ohio St. 372, 41 Am. Rep. 523, and it was held that the right to commence an action for wrongfully causing death under "an act requiring compensation for causing death by wrongful act, neglect or default," passed March 25, 1851, abated by the death of the wrongdoer. The court expressly disapproved the decision in *Yertore v. Wiswall's Exrs.*, 16 How. Pr. 8, and held that the death of the husband did not vest in the widow or next of kin a property interest in the deceased, and was not an injury to the estate of the deceased within the meaning of the law.

The same question has received the consideration of the supreme court of Indiana in *Hamilton v. Jones* (1890), 125 Ind. 176, 25 N. E. 192, and *Mitchell, J.*, with great care and discrimination reviewed the cases of *Hegerich v. Keddle*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, *Yertore v. Wiswall*, 16 How. Pr. 8, *Cregin v. Brooklyn R. R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459, 83 N. Y. 595, 38 Am. Rep. 414, *Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523, already noted, and *Moe v. Smiley*, 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341, and *Ott v. Kaufman*, 68 Md. 56, 11 Atl. 580, and disapproved *Yertore v. Wiswall*, 16 How. Pr. 8, as the supreme court of Ohio, and the court of appeals of New York have, and reached the conclusion "that statutes in derogation of the common law are to be strictly construed, and one who seeks to maintain an action which was ⁵⁰⁷ within the prohibition of the common law must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by the statute must present a case clearly within the statute which creates the right. The language of section 284 seems to repel any implication that the personal representative of one whose death had been caused by the wrongful act or neglect of another might maintain an action against the administrator or other personal representative of the wrongdoer," and held that the action abated in that case.

The same question has been considered by the supreme court of Arkansas in *Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880. That court also refused to accept the doctrine of *Yertore v. Wiswall*, 16 How. Pr. 8, and *Cockrill, C. J.*, said: "The statute under which that branch of the suit was maintained authorizes an action against a wrongdoer, but it is silent as to the administrator of the wrongdoer; and unless the provisions of the statute first cited [corresponding to our sec-

tions 96 and 97] cure the defect, the action must abate under the familiar rule of the common law that the wrongdoer and the wrong are buried together. The question has arisen frequently under statutes which, like ours, are modeled after Lord Campbell's act, and it has been invariably decided against the right of revivor. . . . The courts were driven to that conclusion in the cases cited, because it was found that the common-law rule as to the survivability of actions had not been changed by legislation—the duty of the courts being to declare the law, and not to make it.” And he added: “These cases clearly show that the right of the widow to recover damages for the death of her husband is not based upon an injury to property within the meaning of the statute.” To the same effect will be found *Moe v. Smiley*, 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341; *Johnson v. Farmer*, 89 Tex. 508 610, 35 S. W. 1062; *Green v. Thompson*, 26 Minn. 500, 5 S. W. 376; *Ott v. Kaufman*, 68 Md. 56, 11 Atl. 580.

Our conclusion is that in the light of the common law and the construction placed upon our damage act by this court, the action of the plaintiff did not survive against the defendant as administrator of James J. Sylvester, and the judgment of the circuit court in refusing to permit the cause to be revived was and is correct and accordingly it is affirmed.

Fox, P. J., and Burgess, J., concur.

For Authorities Holding that an action for wrongful death abates on the death of the wrongdoer, see the note to Brown v. Electric Ry. Co., 70 Am. St. Rep. 685.

COHEN v. HERBERT.

[205 Mo. 537, 104 S. W. 84.]

WILLS—Creation of Tenancy in Common.—A devise to the testator's two daughters "jointly" creates, under the Missouri statutes, an estate in common and not in joint tenancy. (p. 778.)

WILLS—Conclusiveness of Probate.—When a will has been admitted to probate the judgment of probate is a judicial act binding upon all the world until set aside in the mode and within the time allowed by law. (p. 779.)

WILLS—Conclusiveness of Foreign Probate.—Where a will was executed and probated in New York in conformity with the statutes of Missouri, and an authenticated copy thereof was recorded in Missouri, in a county where some of the devised land is situated, the heirs cannot, after the expiration of five years without any contest, collaterally attack the probate decree in ejectment to recover the land on the ground that the will had been revoked, under the laws of both states, by the marriage of the testatrix after its execution. (p. 784.)

Herman A. Haessler and Harry H. Haessler, for the appellants.

Rowell & Zumbalen, for the respondents.

543 **GANTT, J.** This is an action in ejectment to recover two-eighths of the premises known as No. 305 North Broadway, in the city of St. Louis, Missouri, being a lot of twenty-nine feet on the west side of Broadway, by a depth of one hundred and two feet, the south line thereof being twenty-eight feet north of Olive street, and for partition thereof between the parties. The parties in interest are all the surviving children of Hyam H. Cohen, deceased, under whom they all claim.

The first count is in the ordinary form of ejectment.

The second count alleges that the plaintiffs and defendants Julia Herbert and Elizabeth Henriques are owners in common of said premises, the plaintiffs and Elizabeth Henriques each owning one-eighth thereof, and defendant Julia Herbert owning five-eighths thereof; that defendant Richard J. Herbert is the husband of Julia Herbert, and defendant Peter Oakes the tenant in possession under a lease from Julia Herbert; that Julia Herbert's interest is subject to a deed of trust securing two notes for nine thousand dollars each, one of them being payable to each of the plaintiffs; that Hyam H. Cohen, the father of plaintiffs and of defendants Julia Herbert and Elizabeth Henriques, died owning said premises on May 10,

1874, and by his will devised the same to defendant Julia Herbert, and her sister Victoria Cohen; that said Victoria died intestate on May 7, 1876, leaving, as her sole heirs at law, the plaintiffs and the defendants Julia and Elizabeth; that defendant Julia has, ever since her sister's death, collected the rents and income, and has failed and refused to account to plaintiffs for their portions of the same; and prays for partition and an order of sale.

Defendant Elizabeth Henriques made default.

The answer of defendant Oakes admits his possession ⁵⁴³ of the premises as tenant of Julia Herbert, and denies all other allegations of the petition.

The answer of Julia and Richard J. Herbert admits that they are husband and wife, admits the tenancy of Oakes under said Julia, and denies all other allegations of the first count of the petition. It admits that Hyam H. Cohen, father of the parties, died seised of the premises on May 10, 1874; admits that said Julia has, since her sister Victoria's death, collected the rents, and denies all other allegations of the second count of the petition. Said answer then sets up the following defenses of new matter, viz.:

"1. That said Hyam H. Cohen, by his will, duly admitted to probate, devised said premises to his daughters Julia and Victoria, as joint tenants, and that upon the death of the said Victoria, defendant Julia Herbert acquired the whole of said property by right of survivorship.

"2. That said Victoria Cohen by her will, duly admitted to probate in the state of New York, by a court having jurisdiction of the subject matter and the parties, an authenticated copy of said will and the probate thereof having been duly filed in the recorder's office of St. Louis county, Missouri, devised whatever interest she had in said property to defendant Julia Herbert, and bequeathed to each of the plaintiffs, Samuel H. and Maurice H. Cohen, one-third of the proceeds of the sale of all her bonds, stocks and property, and that said Samuel H. Cohen and Maurice H. Cohen each received and took the interest given to them by said will.

"3. That on February 19, 1875, Victoria Cohen entered into an antenuptial contract with Richard J. Herbert, whereby she conveyed her interest in said premises to Samuel Cohen in trust for her sole and separate use and benefit, free from all rights of her intended husband, and for such other uses as she might ⁵⁴⁴ from time to time appoint, with power

to said Victoria to devise the same or any part thereof by her last will; that on February 23, 1875, said Victoria exercised said power of appointment so reserved, by appointing her interest in said premises to defendant, Julia Herbert, in and by her last will and testament.

"4. That plaintiffs are estopped to claim any interest in said premises, other than as mortgagees in a certain deed of trust dated July 31, 1876, made by Julia Herbert to secure a loan from each of the plaintiffs; that by said deed of trust, which was signed by plaintiffs as cestuis que trust, they acknowledged Julia Herbert to be the sole owner of the said premises, and acknowledged that the same had been devised to said Julia and Victoria Cohen, as joint tenants, and that defendant Julia Herbert, relying upon plaintiff's acknowledgment of her sole ownership, afterward spent large sums of money in improving said property.

"5. That defendant Julia Herbert now is, and for more than twenty-five years past has been, in actual, open, notorious, exclusive and adverse possession of the said premises, claiming title to the whole thereof."

The reply denied all the new matter set up in the answer.

A jury was waived and trial had before the Honorable James R. Kinealy. The plaintiffs offered in evidence the will of Hyam H. Cohen, which was duly admitted to probate in the city of New York July 27, 1874, and an authenticated copy thereof and of its probate filed in the office of the recorder of deeds of the city (then county) of St. Louis, Missouri, on September 1, 1874.

By said will the testator devised the property in suit to his "said daughters Julia and Victoria jointly," and he also gave to said Julia and Victoria five twenty-second parts jointly, and his daughter Elizabeth, eight twenty-seconds, his son Samuel four twenty-seconds, ⁵⁴⁵ and Maurice five twenty-seconds of the proceeds of the sale of his other lands, houses, bonds and stocks.

It appears that Victoria Cohen married R. J. Herbert, February 24, 1875, and died on May 7, 1876, leaving neither children nor mother nor father surviving her. She was survived by her two brothers, the plaintiffs, and her two sisters, Julia and Elizabeth. On November 14, 1877, the defendant, Julia, married Richard J. Herbert. At the time of her death, Mrs. Victoria Herbert lived in New York, and left a last will and testament which she had executed on February 23, 1875,

the day before her marriage to R. J. Herbert was solemnized. After her death, this will was duly probated in New York, and in it the plaintiff, Samuel H. Cohen, was named as one of the executors and he qualified and acted as such, and the plaintiff Samuel H. and Maurice Cohen each took and received one-third of the said Victoria Herbert's residuary estate as legatees under her said will, besides specific legacies of plate and jewelry. By the said will Mrs. Victoria Herbert devised her interest in the property in question to her sister Julia, and gave one-third of the proceeds of the sale of all her bonds, stock, etc., to her brother Samuel H. Cohen, and one-third to her brother Maurice H. Cohen, and named her brother Samuel H. Cohen and Richard J. Herbert as her executors in New York. On July 31, 1876, the defendant, Julia Cohen, now Herbert, borrowed from each of the plaintiffs the sum of nine thousand dollars, and executed and delivered to them as security for the same a deed of trust covering the whole of the property in question; since that time she had regularly paid to the plaintiffs the interest on the loan secured by said deed of trust. The principal of said loan was used by Julia Cohen in the erection of a five-story building upon the lot in suit. The defendant, Samuel H. Cohen, attended ⁵⁴⁶ to the erection of this new building for her. It was finished in 1877, and sometime afterward was destroyed by fire. The defendant, R. J. Herbert, collected the insurance upon this property for his wife Julia, and she used the insurance money in rebuilding the premises. It also appears that Victoria Cohen and her intended husband R. J. Herbert, on February 19, 1875, entered into a marriage contract properly signed and acknowledged by them and recorded in the recorder's office in the then county of St. Louis on March 3, 1875. By this contract, Victoria Cohen conveyed to Samuel H. Cohen, as trustee, her undivided one-half interest in the property in suit for the sole and separate use and benefit of the said Victoria free from all rights of her intended husband and for such other use as she might thereafter appoint by last will or otherwise.

The decree of the surrogate's court of New York shows that said will was offered for probate by Samuel H. Cohen, one of the executors named therein; that on said application the surrogate court did ascertain by satisfactory evidence who were the husband and only heirs and next of kin of the deceased and their respective residences, and did thereupon issue

a citation to said husband, heirs and next of kin requiring them to appear and attend the probate of said will on May 25, 1876; that satisfactory proof was made of the service of said citation in the mode prescribed by law; that no one appeared to oppose the probate of the will, whereupon the surrogate took the proof of said will, and, on May 26, 1876, adjudged and decreed "that the instrument offered for probate in this matter is the last will and testament of the said testatrix, and as such is valid as a will of real and personal estate, and the same is hereby admitted to probate as a will of real and personal estate." This will was executed in accordance with the requirements of the laws of Missouri, and probated in conformity to the requirements of ⁵⁴⁷ statutes of this state. It further appeared that R. J. Herbert and Samuel H. Cohen administered the personal estate, and paid the legacies given by her said will to the legatees named therein, and made their report and settlements to the surrogate's court of New York, October 24, 1878. The deed of trust of July 31, 1876, given by Julia Cohen to secure the plaintiffs the repayment of the eighteen thousand dollars she borrowed from them, covered the whole property in question and contained the following recital: "Being the same property acquired by Hyam H. Cohen, father of the first party, by deed recorded in the recorder's office of the county of St. Louis in book No. 182, page 140, and by him devised to the first party and her sister Victoria, now deceased, and the survivors of them, as may be seen by the will of the said Hyam H. Cohen and Victoria Herbert, duly filed and recorded in the probate court of the said St. Louis county." This deed of trust contained the statutory covenants of warranty and seisin, and was signed, sealed and acknowledged by both Samuel H. Cohen and Maurice H. Cohen, and recorded in St. Louis county on August 31, 1876.

Julia Herbert testified that she had been in the sole possession of this property from the death of her sister down to the present time, receiving all the rents and income therefrom and paying all the taxes and repairs; that she and her sister Victoria came into the possession of the property in July, 1874; that at the time of Victoria's death they were intending to tear down the old building and erect upon the property a five-story, iron and stone business building; that immediately after Victoria's death, she (Julia) proceeded to carry out this plan and sent her brother Samuel out here

from New York to make arrangements for the building; that she borrowed the eighteen thousand dollars secured by deed of trust from her brothers, for ⁵⁴⁸ the purpose of putting up a new building, and that it was used by her for that purpose; that the new building was completed in the spring of 1877, and she placed it in the hands of J. E. Kaime & Brother to rent for her; that said building was destroyed by fire on December 17, 1878, whereupon she sent her husband, R. J. Herbert, to collect the insurance money and make arrangements for rebuilding it; that she collected fifteen thousand dollars insurance, which was all put into the new building, together with five or six thousand dollars additional money advanced by her; that her brothers, Samuel and Maurice, never made any claim to any ownership in this property until shortly before the institution of this suit, in the fall of 1902; that in 1902, she was making arrangements to pay off the deed of trust held by her brothers, by borrowing the money from another source; that, to make this new loan, it became necessary to have the title examined; that the title examiner reported certain objections to her title, based upon the wills of Hyam H. Cohen and Victoria Cohen, and that for the purpose of removing such objection she requested her brothers and sister Elizabeth to execute to her a quitclaim deed and they then, for the first time, claimed an interest in said property.

David F. Kaime testified that Mrs. Julia Herbert placed the property in his hands in the spring of 1877, and he has had charge of it ever since for her; that he collected the rents, paid the taxes and made repairs, and has remitted the balance to Mrs. Herbert; that during the whole of that time, the property has been assessed in the name of Mrs. Julia Herbert; that he occasionally met Samuel and Maurice Cohen during the years he has had charge of the property, and on such occasions they would speak to him about the property, referring to it as "our sister Julia's property on Broadway." That neither of them claimed to him to own an interest therein until shortly before the ⁵⁴⁹ bringing of this suit; that in the summer of 1902 he had the title investigated for the purpose of making a new loan on the property for Mrs. Herbert, and the investigator reported the title defective, and in consequence of such report witness advised Mrs. Herbert to get her brothers and her sister to make her a quitclaim deed.

The defendants offered in evidence certain sections of the statutes of New York, the first of which defines the surrogate court to be a court of record; the second defines the jurisdiction of a surrogate as follows: "First, to take the proof of wills; to admit wills to probate. Second, to grant and revoke letters testamentary. Third, to direct and control the conduct and settle the accounts of executors. Fourth, to enforce the payment of debts and legacies and to distribute the estate of the deceased." The third section provides that a will executed by an unmarried woman should be deemed revoked by her subsequent marriage.

The court gave and refused certain declarations of law, which will be noticed in the course of the opinion. The court found the issues in favor of the defendants and rendered judgment for the defendants on both counts of the petition. From this judgment, the plaintiffs have prosecuted this appeal.

1. As to the first proposition advanced by the plaintiffs, to wit, that by the will of Hyam H. Cohen, his daughters, Julia and Victoria, became tenants in common of the property in controversy, and that upon the death of Victoria without children and intestate, if the court should find from the evidence that she did die intestate as to said property, then one-half of said premises descended to the brothers and sisters of Victoria in equal parts, there is no controversy, as our statute, section 4600 of the Revised Statutes of 1899, which was the same at the time of the execution of the will of ⁵⁵⁰ Hyam H. Cohen, provides: "Every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy": *Rodney v. Landau*, 104 Mo. 251, 15 S. W. 962; *Lemmons v. Reynolds*, 170 Mo. 227, 71 S. W. 135.

2. The decisive question in this cause is, Did Victoria Cohen Herbert die intestate as to the real estate in controversy herein? That she made a will which was executed, attested and probated in the surrogate's court of New York county in the state of New York, in the manner prescribed by the laws of Missouri, at that time—General Statutes of Missouri of 1865, page 528, section 3, and page 529, section 20—is conceded, or at least fully appears by the evidence in the cause. And that a copy of said will and of the judgment admitting

it to probate properly authenticated according to the act of Congress was recorded in the recorder's office of the then county of St. Louis, on June 6, 1876, as required by section 34 of the General Statutes of 1865, page 530, also appears. The statute of this state in force at that time—sections 33 and 34, page 530 of the General Statutes of 1865—as at present, dispensed with the probate anew in this state of wills admitted to probate in another state, provided they were executed, attested and proved in the manner required by our laws. And in lieu of probate anew in this state provided the “authenticated copies of such wills and the probate thereof shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in evidence in the same manner and with like effect.” Accordingly, it has been ruled that where a will executed in another state according to the laws of Missouri had been probated and recorded in the former state and an authenticated copy of such record was filed in the county where the land ⁵⁵¹ was situated in this state a copy of this last record furnished conclusive proof of the will: *Applegate v. Smith*, 31 Mo. 166; *Keith v. Keith*, 97 Mo. 233, 10 S. W. 597; and *Fenderson v. Missouri Tie & Timber Co.*, 104 Mo. App. 290, 78 S. W. 819. And it is the uniform ruling of this court that when a will has been probated in the court having probate jurisdiction, the judgment of probate is a judicial act, and, like any other judgment of the court of competent jurisdiction, it stands as a judgment binding upon all the world until set aside in the mode and within the time allowed by our law, and its validity as a will cannot be attacked collaterally: *Jourden v. Meier*, 31 Mo. 40; *Dilworth v. Rice*, 48 Mo. 124; 1 *Woerner on the Law of Administration*, 2d ed., sec. 145; *In re Broderick's Will*, 21 Wall. (U. S.) 503, 22 L. ed. 599.

But the plaintiffs contend that both by the laws of New York and of this state at the time of the execution of her will by Victoria Cohen said will was revoked by her subsequent marriage to the defendant, Richard J. Herbert: *Gen. Stats. 1865*, p. 528, sec. 6, now *Rev. Stats. 1899*, sec. 4607; 2 *Wagner's Stats. 1872*, p. 1365, sec. 6; 4 *N. Y. Rev. Stats. 1901*, p. 4889, sec. 44; 2 *N. Y. Rev. Stats. 64*, sec. 44. The learned counsel for the plaintiffs have cited us to various decisions of the New York courts, notably *Brown v. Clark*, 77 N. Y. 369, *Matter of Davis' Estate*, 1 *Tucker's Surrogate Reports*, 107, and *Lathrop v. Dunlop*, 4 *Hun*, 213, to estab-

lish the proposition that the subsequent marriage of Victoria Cohen revoked her will. Now, as to these cases, *Brown v. Clark* was an appeal from the order of the supreme court reversing a decree of the surrogate, which had denied probate to an instrument presented as the last will and testament of Mary J. Clark Proctor, deceased. Mary J. Clark executed said instrument as her last will on August 25, 1873; subsequently she married Mr. Proctor. After her marriage, and on December 7, 1876, she executed a ⁵⁵² codicil. She died October 1, 1877. The surrogate court held that the will was revoked by the subsequent marriage of the testatrix, and in this opinion the court of appeals concurred, both on the ground that by the common law the marriage of a woman operated as an absolute revocation of her prior will (*Forse and Hembling's Case*, 4 Coke, 61; *Hodsden v. Lloyd*, 2 Bro. Ch. 534, and 2 N. Y. Rev. Stats., 64, sec. 44), and that the testamentary capacity conferred upon married women by the statute of that state did not repeal either the common law or the statute providing that the marriage of a feme sole revoked her will. It will be observed that the question arose on a direct application to probate the will and not as to the effect of a probate. To the same effect is the case of *Davis' Estate* in 1st Tucker. In that case the will was adjudged revoked by the surrogate court pending the proceedings in that court and as soon as the fact of the subsequent marriage was made to appear. *Lathrop v. Dunlop*, 4 Hun, 213, was an appeal from a decision of the surrogate court refusing to admit to probate the will of Mrs. Jessie Dunlop Empson. It appears that Miss Dunlop duly executed her will and afterward married and about two months after her marriage died. Her will was presented for probate and refused on the ground of subsequent marriage, so that the case in principle is like unto *Brown v. Clark*, 77 N. Y. 369.

To the same effect is *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255, which was a direct appeal from the probate court admitting a will made by a single woman, who had subsequently married, to probate. The court held that the subsequent marriage was a revocation. And so, also, was the case of *Blodgett v. Moore*, 141 Mass. 75, 5 N. E. 470. The case of *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956, was a bill in equity brought by the surviving husband of Mrs. Crum to enforce a contract made between a husband and wife during coverture. It appears that the wife ⁵⁵³ prior to her mar-

riage had executed a will and a codicil, and it was held that the subsequent marriage revoked and annulled her will. But there was no probate of the said will, and hence the question now before us was not involved in that case, so that we recur to the original proposition, What was the effect of the judgment of the surrogate court of New York county admitting to probate the will of Mrs. Victoria Cohen Herbert, notwithstanding the law of Missouri at that time provided that the subsequent marriage of a single woman would revoke her will made prior to her marriage? We have already seen that by the laws of this state the judgment of a probate court admitting a will to probate has the full force and effect of a judgment of any other court of competent jurisdiction, and the will of the testator or testatrix stands as his or her will until set aside in the mode and within the time allowed by law, and its validity as a will cannot be attacked collaterally. That the will might have been successfully attacked when it was offered for probate in the surrogate court cannot avail the plaintiffs at this time, unless the rule forbidding a collateral attack upon a judgment of a court of competent jurisdiction is entirely disregarded.

The question is not a new one in other jurisdictions in this country. Thus in *Poplin v. Hawke*, 8 N. H. 124, the court said: "The first question is whether M. Thom took anything under the last wills of Abigail Graves and Betty Thom. These wills were made during the lives of their husbands; and it has been settled in this state . . . that a married woman has no power to devise lands by will. If, then, the question was on the allowance of the wills of Abigail Graves and Betty Thom, it must be held that they had not power to devise, and the instruments be rejected. But both these wills have been allowed and proved in the probate court. The decrees of allowance stand unreversed,⁵⁵⁴ and those interested in the estate have taken no appeal. . . . The statute of 1791 did not declare, in express terms, the effect of a decree of the probate court, allowing and approving of a will purporting to contain a devise of real estate. But, from the provisions of the act, it is not doubted that it was intended the decree, unless appealed from, should be conclusive in passing the title of the estate, according to the provisions of the will, and bind all persons interested. The construction of those provisions may come up incidentally in suits at law; but the power and capacity of devising by any person seised,

the sanity of the testator, the due attestation, and all questions relating to the validity of the will itself, are proper subjects of adjudication upon the hearing, when the will is presented for probate. This must necessarily be the case."

In *Parker v. Parker*, 11 Cush. (Mass.) 519, it appeared that the will was made in New Hampshire by a married woman, admitted to probate there, and a copy of the will and such probate recorded in Massachusetts, as provided by statute of the latter state. Under the law of both said states, a married woman had no capacity to make a will. Held, that the New Hampshire probate, filed and recorded in Massachusetts where the land was, unappealed from and unreversed, was final and conclusive upon the heirs of the testatrix, and that they could not deny the legal capacity of the testatrix to make such a will.

In *Cochran v. Young*, 104 Pa. 333, it appeared that a will devising real estate was duly admitted to probate on September 5, 1862. On February 11, 1881, a codicil of a later date disposing of the same property in a different manner was admitted to probate. An action of ejectment was brought by the devisee under the codicil against the grantee of the original devisee under the first probate. Held, the probate of the ⁵⁵⁵ original will, not having been contested within five years as allowed by statute, was conclusive upon all parties and was not revoked by the subsequent probate of the codicil. The court said: "We are bound to accept the will of October 22, 1861, as the testator's last will and testament; its validity cannot now be questioned as to the realty devised under it. We have no right to assume that the paper of June 18, 1862, was his last will, simply because it bears a later date than the former; the presumption is otherwise, and that presumption is now conclusive."

In *Winslow v. Donnelly*, 119 Ind. 565, 22 N. E. 12, the court said: "The appellants seek a decree quieting title, and allege in their complaint that their title is clouded by a devise to the appellee. They aver that the will containing the devise was procured by the fraud of the devisee. . . . The complaint also alleges that the will 'was duly admitted to probate in the district court of Cedar county, Iowa, and a duly authenticated copy of said will, and the probate thereof, had been filed and recorded, under the provisions of the statute of this state, in Parker county.' The trial court did not err in sustaining the demurrer to the complaint. The

judgment of the district court of Cedar county, Iowa, precludes the appellant from attacking the will in an action to quiet title."

In *Bowen v. Allen*, 113 Ill. 53, 55 Am. Rep. 398, the action was ejectment. The plaintiff offered in evidence the will of Ann Quinn, admitted to probate by the Marion county probate court, which judgment was affirmed on appeal to the circuit court. It was shown that the will was made while she was unmarried, and that she subsequently married. Under the Illinois law the subsequent marriage operated as a revocation of the will. The court said: "It is also urged that the marriage of testatrix after its execution revoked the will. This is concluded by the judgment of the circuit court, ⁵⁵⁶ establishing and admitting the will to probate. This was a question to be considered in that case, and no doubt was. The question tried there was, whether it was the will of testatrix, and after hearing the evidence, on the trial, it was found that it was, and that finding must stand until the judgment is reversed or otherwise annulled by some regular proceeding had for the purpose. As long as it stands unreversed and unimpeached, it imports verity in all collateral proceedings. We must, therefore, receive and act upon it as the last will of testatrix."

In *Evansville I. & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592, under a statute in terms very much like section 35, page 530, General Statutes of Missouri of 1865, it was held that where the will of a married woman had been admitted to probate in New York, and a copy thereof and of its probate filed in Indiana where the land was situated, such will could be contested in the latter state within three years of the filing thereof, on the ground that the will was, under the Indiana statute, revoked by the subsequent birth of issue to the testatrix.

Under the General Statutes of 1865, sections 29 to 35, page 530, the plaintiffs in this case might have contested the will of Victoria Cohen Herbert within five years after said will was filed for record in this state, upon the ground on which they now seek to avoid its force and effect. But having failed to avail themselves of the remedy in the mode and within the time provided by our laws, the will of Victoria Cohen by which her interest in the real estate in suit in this case was devised to the defendant Julia Herbert must be given full force and effect, and held to have passed her un-

divided interest therein to her sister Julia, as has been recently held by this court in *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492, reaffirming *Jourden v. Meier*, 31 Mo. 40, *Stowe v. Stowe*, 140 Mo. 594, 41 S. W. 951, and *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113, wherein it was said: "The suit for ⁵⁵⁷ partition cannot be regarded as a contest of the will. The will was duly probated and can be contested only by a proceeding in the manner required by sections 4622 and 4636 of the Revised Statutes of 1899." It goes without saying that the count in ejectment herein is also a collateral attack upon the judgment of the surrogate court which was duly filed and recorded in the office of the recorder of deeds of the city (then county) of St. Louis, on June 6, 1876. Accordingly, it must be ruled that the circuit court committed no error in refusing the second instruction requested by the plaintiffs.

The learned counsel on both sides have discussed other interesting propositions in this case, to wit, whether the plaintiffs are not estopped by reason of their having received and taken their share of their sister Victoria's estate under the laws of the state of New York, and by their conduct in having loaned their said sister Julia eighteen thousand dollars on this property and taken her deed of trust conveying the whole of the same to secure the said loan. Counsel on both sides have also discussed whether the statute of limitations has or has not barred the right of the plaintiffs to recover in this case, and whether the possession of the said Julia Herbert has or has not been adverse to plaintiffs' rights. And on the part of the defendants there is an able and learned discussion as to whether or not the will of the said Victoria, although not good as a will, may not be held a valid execution of the power of appointment reserved to her in her antenuptial contract with R. J. Herbert. We have considered the briefs on these points, but inasmuch as we have reached the conclusion that the judgment of the surrogate court of the county of New York probating the will of Victoria Cohen and the subsequent filing of the same and the probate thereof in the office of the recorder of deeds of St. Louis county, and the failure of the plaintiffs to ⁵⁵⁸ contest that will within five years after its recording in St. Louis county, conclusively established the title of Julia Cohen Herbert to the undivided one-half of the property in question, we deem it entirely unnecessary to decide the propositions so ably discussed by the

respective counsel. The judgment of the circuit court must be, and is, affirmed.

Fox, P. J., and Burgess, J., concur.

The Conclusiveness of the Probate of a foreign will has recently been under consideration in *Re Gertsen's Will*, 127 Wis. 602, 115 Am. St. Rep. 1060; *State v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, and note.

Am. St. Rep., Vol. 120—50

CASES
IN THE
SUPREME COURT
OF
OREGON.

MARSDEN v. HARLOCKER.

[48 Or. 90, 85 Pac. 328.]

ELECTIONS—Necessity of Notice.—In the case of general elections the statutory requirements for issuing proclamations or giving notice are treated as directory only, but in the case of special elections such requirements are considered mandatory. (p. 788.)

ELECTIONS—Order or Notice of Local Option Election.—As the right to vote under the Oregon statutes upon the question of prohibiting the sale of intoxicating liquors in any particular district is inaugurated by filing a petition the election held in pursuance thereof is special, and hence the making of an order therefor by the county court is mandatory and a condition precedent to a valid election. (p. 791.)

COURTS.—A Court Consists of Persons Officially Assembled under authority of law at the appropriate time and place for the administration of justice. (p. 791.)

COURTS.—The Law Makes a Distinction Between a Judge and a judicial tribunal. (p. 791.)

ELECTIONS—Irregularity of Court in Ordering Local Option Election.—Where the statutes confer on the county authority to order an election on the question of selling intoxicating liquors in a particular district, a memorandum signed by members of the court separately and at various times and places in the county is not an order signed by the court. (p. 791.)

ELECTIONS.—A Court of Equity will Enjoin the Canvass of a vote at a local option election, which election is invalid because not ordered as prescribed by law, if no provision for a contest is made by statute. (p. 792.)

The two cases of Marsden v. Harlocker and McPherson v. Harlocker were argued and submitted together. The first was a suit to enjoin the county commissioners to canvass the vote cast at a local option election. A demurrer to the complaint was sustained, and the plaintiff declining to plead further, the suit was dismissed and he appeals. The latter case is a writ of review to have the determination of the officers of

the county in the matter of the election reviewed and vacated. The writ was denied, and the petitioner appeals.

Coke & Seabrook and J. M. Upton, for the appellant.

George W. Brown, district attorney, Bronaugh & Bronaugh and George F. Martin, for the respondents.

⁹² MOORE, J. It is contended by plaintiff's counsel that the failure of the county court of Coos county, as confessed by the demurrer, to order an election as prayed for in the petition therefor, rendered all the proceedings attempted to be had in pursuance thereof invalid, and, this being so, the court erred in not enjoining the defendants from invading the property rights of their client in attempting to put into execution such void proceedings. The record shows that though the county court of Coos county did not convene in regular or special session ⁹³ within the time alleged in the complaint, the defendants, as members thereof, at different times and in various parts of the county, individually subscribed their names to a writing purporting to call an election to be held at the time and for the purpose specified in the petition, and this memorandum having been entered in the records of such court, it is maintained by defendants' counsel that the provisions of the local option act (Laws 1905, p. 41, c. 2) vest the county clerk of each county with judicial authority to determine the preliminary steps necessary to confer jurisdiction of the subject matter, and that when he has exercised this power, the calling of an election in pursuance thereof by the county court is a mere ministerial duty, requiring neither discretion nor judgment, and such order may properly be made as in the case at bar, and therefore no error was committed as alleged.

The defendants' counsel, in support of the decree rendered herein, invoke the rule announced by a majority of the court in *People v. Brenham*, 3 Cal. 477, where it was held that the time and place of an election having been prescribed by a city charter, the failure of the council to perform any duty required of them prior to an election should not defeat the choice of the electors when exercised in selecting officers for the municipality. We do not think the prevailing opinion in that case is founded in reason or supported by authority. The doctrine there promulgated has since been practically repudiated by the court making it. Thus, in *People v. Porter*,

6 Cal. 26, it was ruled that the proclamation of the governor, required by statute, was necessary to the validity of a special election. In *People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754. it was decided that an election to fill a vacancy was invalid unless held under and in pursuance of the governor's proclamation, which was mandatory and necessary to give notice to the electors that an election was to be held for such purpose. To the same effect are the cases of *People v. Rosborough*, 14 Cal. 180, and *Kenfield v. Irwin*, 52 Cal. 164, in which latter case, Mr. Chief Justice Wallace, speaking for the court, says: "The time of holding an election, whether general or ⁹⁴ special, must be authoritatively designated in advance, either by law or by some means which the law has prescribed; otherwise the election is held without authority, and is ineffectual for any purpose."

1. In all general elections, the time, place and manner of holding which are prescribed by law, the rule is well settled that electors must take notice thereof, and as a corollary to this legal principle any requirement for the issuing of proclamations or the giving of other notice in respect to such elections must be treated as directory only: *McCrary on Elections*, 4th ed., sec. 185; *Stephens v. People*, 89 Ill. 337. In the case of special elections, however, all the statutory requirements as to proclamations or other means of giving notice are considered as mandatory, and must be observed in order to render the vote of the electors participating therein valid: *People v. Kerwin*, 10 Colo. App. 472, 51 Pac. 530; *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376; *Morgan v. Gloucester City*, 44 N. J. L. 137; *McHan v. Connell* (Tex. App.), 15 S. W. 284. Thus, in *State v. Tucker*, 32 Mo. App. 620, it was ruled that an election under a local option liquor law, which could be held on the happening of certain conditions, was special, and that all the preliminary steps prescribed should have been taken in order to give validity to the election. To the same effect, in construing local option liquor acts, see *In re Sullivan*, 34 Misc. Rep. 598, 70 N. Y. Supp. 374; *In re Powers*, 34 Misc. Rep. 636, 70 N. Y. Supp. 590; *In re O'Hara*, 63 App. Div. 512, 71 N. Y. Supp. 613.

The reason for this rule rests upon the doctrine that suffrage is a valuable civil right, to the exercise of which each qualified person is entitled, and he must be given or charged with notice as to when, where and for what purpose

he is to vote. If, by operation of law, the election invariably occurs at stated intervals, without any superinducing cause, except the efflux of time, the election is general, in which case all qualified persons are presumed to have knowledge thereof, and hence the failure of any officer or person upon whom the duty devolves to give a prescribed notice does not invalidate the votes cast thereat. ⁹⁵ Where, however, some local project may be initiated by petition or other means, an election to determine whether such proposition shall be adopted is special, and the electors cannot be presumed to have knowledge of an application of the power which calls for the necessity of exercising the electoral franchise, in which instance a compliance with all the statutory requirements in respect to the performance of the conditions precedent is mandatory in order to validate the election.

The provisions of the local option act in this state (Laws 1905, p. 41, c. 2), so far as deemed involved herein, are as follows:

"Section 1. Whenever a petition therefor signed by not less than ten per cent of the registered voters of any county in the state . . . shall be filed with the county clerk of such county in the manner in this act prescribed, the county court of such county shall order an election to be held at the time mentioned in such petition, . . . to determine whether the sale of intoxicating liquors shall be prohibited in such county. . . . In determining whether any such petition contains the requisite percentage of legal voters, said percentage shall be based on the total vote in such county . . . for justice of the supreme court at the last preceding general election; provided, that in no event shall more than five hundred petitioners, who are legal voters, be necessary upon any petition to require an election as herein provided."

"Sec. 3. The petition therefor shall be filed with the county clerk not less than thirty nor more than ninety days before the day of election."

"Sec. 6. The county clerk shall, upon receipt of such petition, immediately file the same, and shall thereupon compare the signatures of the electors signing the same with their signatures on the registration books of the election then pending, or if nonpending, then with the signatures on the registration books and blanks on file in his office for the preceding general election. If the requisite number of qualified electors shall have signed the petition, and if not inconsistent with the pro-

visions of sections 1, 12 and 14 of this act, he shall thereupon see that it is entered in full in the records of the county court as required by section 1 of this act."

"Sec. 12. If at any time an election hereunder shall result in prohibition for any subdivisions of county as a whole, or any precinct of said county, no election hereunder shall be held ⁹⁶ within said prohibition territory except an election for the entire county before the first Monday in June of the second calendar year following, and not then unless petitioned therefor by the required number of legal voters and subject to the provisions in section 14 of this act."

"Sec. 14. When prohibition has been carried at an election held for the entire county, no election on the question of prohibition shall be thereafter held in any subdivision or precinct thereof until after prohibition has been defeated at a subsequent election for the same purpose, held for the entire county, in accordance with the provisions of this act."

2. It will appear from an examination of the excerpts quoted that the only duty specifically imposed on the county clerk of any county, so far as it relates to a prohibition petition, is to compare the names of the electors appended thereto with their signatures on the registration books or blanks, and if the application calls for an election for a subdivision of a county, he is required to see that the petition is entered in the records of the county court. Who is to determine whether or not the petition contains the requisite number of legal voters, and is otherwise sufficient, is not directly stated in the act under consideration. It would seem, however, that since the county court is required to order an election when a proper petition therefor has been filed, that, in the absence of any positive declaration on the subject, it must be incumbent upon such court to determine the preliminary questions involved as a condition precedent to making the order. As a petition is required to be filed not less than thirty nor more than ninety days prior to the day of election, ample time is thus given for making the application so as to secure an order at a regular session of the county court within the time prescribed.

We believe that a fair construction of the local option law, considered in its entirety, requires that after a county clerk has examined a petition for a prohibition election, compared the names subscribed thereto with the signatures of the qualified electors as they appear on the registration books or blanks, so as to identify the petitioners, it then becomes the duty of

the county court to inspect such petition, and to examine its records to ascertain whether or not the application complies⁹⁷ with sections 1, 12 and 14 of the act, and if the court concludes that these necessary requirements are fulfilled, it should order an election, which is tantamount to a proclamation authorizing the county clerk to issue notices thereof. As the right to vote upon the question of prohibiting the sale of intoxicating liquors is inaugurated by filing a petition, the election held in pursuance thereof is special, and hence the making of an order therefor by a county court, which in this particular respect at least requires an exercise of discretion and judgment, is mandatory, and becomes a condition precedent to the holding of a valid election.

3. "A court," say the editors of the American and English Encyclopedia of Law (volume 8, second edition, page 22), "may be defined as a body in the government, organized for the public administration of justice at the time and place prescribed by law." A court consists of persons officially assembled under authority of law at the appropriate time and place for the administration of justice: *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *In re Allison*, 13 Colo. 525, 16 Am. St. Rep. 224, 22 Pac. 820, 10 L. R. A. 790; *Board of Commissioners v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402. Our statute observes the distinction usually recognized between a judge and a judicial tribunal, and provides that this officer may exercise out of court such powers only as are expressly conferred upon him: B. & C. Comp., sec. 933. The county court of Coos county did not meet in regular or special session, nor assemble at the time or place prescribed by law, and the memorandum signed by the defendants, purporting to authorize an election to determine whether the sale of intoxicating liquors as a beverage should be prohibited in that county, was not an order within the accepted meaning of that term. No election ever having been ordered, the votes cast in Coos county, November 8, 1904, upon the question attempted to be submitted, were nullities, and, such being the case, it remains to be seen whether a court of equity will grant the relief prayed for in the complaint.

4. The remaining question is one of remedy. The alleged threat of the defendants to canvass the vote cast, to announce⁹⁸ the result thereof and to prohibit the sale of intoxicating liquors in Coos county is as though they were about to order prohibition in force therein without observing any of the

formalities prescribed by law as a means to that end. The rule is quite general that equity will not intervene when an adequate remedy is afforded at law, and hence in controversies involving the right to an office an injunction will not usually lie, because the parties have a complete remedy by statute to contest an election or by quo warranto to determine the right resulting therefrom. Where, however, an election relates to the adoption or rejection of some local question, and does not include an office, it has been held in some jurisdictions, in the absence of any statute authorizing such proceedings, that equity would intervene to determine a contested election because of the irregularities or fraud in the conduct thereof: 10 Am. & Eng. Ency. of Law, 2d ed., 816; High on Injunctions, 4th ed., sec. 1250. Thus, in *State v. Eggleston*, 34 Kan. 714, 10 Pac. 3, which was a suit to enjoin county commissioners from canvassing votes polled upon the proposition of the relocation of a county seat, it was held that the relief sought should have been granted. In deciding the case Mr. Chief Justice Horton, speaking for the court, says: "Counsel for the county board rely with a great deal of confidence upon the cases of *Moore v. Hoisington*, 31 Ill. 243, and *Dickey v. Reed*, 78 Ill. 261, to establish the doctrine that the canvass of election returns cannot be interfered with by an injunction. Both of these cases were proceedings for contesting elections. This is not a proceeding to contest an election, but to restrain the canvass of a vote upon the ground that the petition presented to the county board for the election was wholly insufficient because of the fact that certain names were by the signers requested to be withdrawn, and that some of the names signed were signatures of non-residents, or other unauthorized persons. The petition alleges, in substance, that no election ought to have been ordered upon the petition, and that no election could have been legally held upon the petition, under the provisions of the statute."

It is contended by defendants' counsel that in *McWhirter v. Brainard*, 5 Or. 426, a different rule was adopted in this state. In that case it was held that an injunction would not lie to restrain the removal of county offices to a county seat that had been relocated pursuant to a majority of the votes cast at an election held for the purpose, Shattuck, J., saying: "We think the matters of fact, which counsel claim should have been tried, do not constitute a cause of suit in

equity—do not present a case wherein relief can be had by injunction. There is no special statutory provision for contesting an election for location of county seat; but we think when the question, in such a case, is the qualification of the voter, the conduct of the judges or the legality of the canvass, the proper remedy is by mandamus and not by injunction in equity." In *Robinson v. Wingate*, 36 Tex. Civ. App. 65, 80 S. W. 1067, in a well-considered opinion, it was ruled by the court of civil appeals of Texas that equity had no jurisdiction to prevent by injunction the publication of the result of a local option election, on the ground of its invalidity or unfairness in conducting it, even at the suit of liquor dealers on allegation of irreparable injury to their property in case publication was made. In the case last cited, Mr. Justice Gill, referring to the Texas statute, which permits any qualified elector to contest a local option election (Tex. Rev. Stats. 1895, sec. 3397; *Norman v. Thompson*, 96 Tex. 250, 72 S. W. 62), says: "We think it follows logically and inevitably that a suit to contest the result of local option elections must be brought under the statute, and that a suit of this nature addressed to the general jurisdiction of the district court cannot be heard." It will thus be seen that the Texas court, observing the rule which prevails in all jurisdictions, denied injunctive relief, because the party alleging fear of injury from a proclamation of the result of a majority vote in favor of local option had an adequate remedy by statute for contesting the election. In *McWhirter v. Brainard*, 5 Or. 426, an injunction was denied because there was no special statutory provision for contesting an election for location of a county seat. We do not think the doctrine announced in that case can be predicated upon the reasons assigned, or that it is controlling ¹⁰⁰ in the case at bar, no election contest being permissible except in case of persons claiming an office: B. & C. Comp., sec. 2839 et seq. It would seem, therefore, that equity has jurisdiction to afford the relief prayed for in the *Marsden* case; but, however that may be, the same questions are presented in the review proceeding instituted by *McPherson*, and in any event are properly before the court for determination.

In view of the fact that the county court did not, as required by law, order the election in question, such election was invalid, and the judgment and decree of the court below are respectively reversed.

NECESSITY OF NOTICE OR PROCLAMATION OF ELECTION.**I. In Case of General Elections, 794.****II. In Case of Special Elections.****a. In General, 794.****b. Elections to Fill Vacancies, 795.****c. Bond Elections, 795.****d. Local Option Elections, 796.****I. In Case of General Elections.**

The courts are unanimously of the opinion that when the time and place of holding an election are fixed by the statutes or constitution, as in the case of general elections, this in itself is notice which all electors must heed, and hence the failure of any officer, charged by law with the duty of giving a notice or proclamation of the election, to give such notice or proclamation, will not invalidate the election. The special provision for notice is only a reminder to electors of what the law already has provided; and it is directory merely, and not mandatory: *Sheen v. Hughes*, 4 Ariz. 337, 40 Pac. 679; *In re Pulaski County Board of Equalization Cases*, 49 Ark. 518, 6 S. W. 1; *Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161; *State v. Burbridge*, 24 Fla. 112, 3 South, 869; *City of Lafayette v. State*, 69 Ind. 218; *Dishon v. Smith*, 10 Iowa, 212; *Jones v. Gridley*, 20 Kan. 584; *Morgan v. Pratt County*, 24 Kan. 71; *Berry v. McCullough*, 94 Ky. 247, 22 S. W. 78; *Augusta v. Marysville etc. R. R. Co.*, 97 Ky. 145, 30 S. W. 1; *Adsit v. Osmun*, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534; *State v. Govin*, 6 Nev. 276; *People v. O'Brien*, 38 N. Y. 193; *People v. Schiellein*, 95 N. Y. 124; *People v. Village of Wappingers Falls*, 9 Misc. Rep. 246, 30 N. Y. Supp. 265; *State v. Carroll*, 17 R. I. 591, 24 Atl. 835; *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059.

Since an entire failure to give the special notice does not vitiate a general election, it follows that an imperfect or defective notice, which does not mislead electors so that they lose the right to exercise their franchise, will not invalidate the election, for the authority to hold it is based upon the statutes or constitution, and not on the notice: *Commonwealth v. Smith*, 132 Mass. 289; *Brown v. Street Lighting District*, 70 N. J. L. 762, 58 Atl. 339; *State v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958; note to *Patton v. Watkins*, 90 Am. St. Rep. 71.

II. In Case of Special Elections.

a. In General.—Where the time and place of an election are not fixed by law, but the election is only to be called at the time and place to be fixed by some authority named in the statute, after the happening of some condition precedent, it is essential to the validity of such election that it be called, noticed, or proclaimed by the agency designated by the law. Hence, the general rule that in the case of special elections all statutory requirements as to proclamations or other means of notice are considered mandatory and neces-

sary to be observed in order to render the votes of electors participating therein valid: *Kenfield v. Irwin*, 52 Cal. 164; *Stephens v. People*, 89 Ill. 337; *Snowball v. People*, 147 Ill. 260, 35 N. E. 538; *Jones v. State*, 1 Kan. 273; *Wilson v. Brown*, 109 Ky. 229, 58 S. W. 595; *McPike v. Pen*, 51 Mo. 63; *McHaw v. Connell* (Tex. App.), 15 S. W. 284; *Field v. Hall*, 16 Tex. Civ. App. 233, 40 S. W. 749; *Hubbard v. Williamstown*, 61 Wis. 397, 21 N. W. 295.

b. **Elections to Fill Vacancies.**—The foregoing rule is frequently applied to special elections for the filling of vacancies in public office occasioned by death, removal or resignation: *People v. Porter*, 6 Cal. 26; *People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People v. Martin*, 12 Cal. 409; *People v. Rosborough*, 14 Cal. 180; *George v. Oxford Township*, 16 Kan. 72; *People v. Palmer*, 91 Mich. 283, 51 N. W. 999; *State v. Buck*, 13 Neb. 273, 13 N. W. 406; *Foster v. Scarff*, 15 Ohio St. 532; *State v. McKinney*, 25 Wis. 416. "In an election for an office for a regular term the not giving notice may not invalidate, for a contrary doctrine would put it in the power of a clerk through ignorance, carelessness or design, to set aside a regular annual election, the place and time of which is fixed by law; but where the election is to fill a vacancy, the time and place for holding which are to be fixed by the chief executive or some other power, the notice is essential not only as to fact of the vacancy and the object of the election, but the time and place for depositing the ballots. In the former case, the right to hold the election at the time and place fixed and between the hours designated is derived from the statute; in the latter, it proceeds not only from the law, but also by virtue of the proclamation and notice, all of which are necessary to constitute a legal election": *Morgan v. Gloucester City*, 44 N. J. L. 137.

However, when the law provides that vacancies shall be filled at the next general election, the failure to give the special notice prescribed by statute will not, according to the better rule, invalidate the election, if the great body of the voters in fact have notice. The question to be considered in such cases is whether the want of the statutory notice has resulted in depriving sufficient electors of the opportunity to exercise their franchise to change the result of the election; and the election will not be set aside when it is apparent that the result would not have been different had all the electors voted. In fact some authorities affirm that such an election cannot be defeated by showing that only a small portion of the voters were actually aware of the vacancy, or cast their votes to fill it: See the note to *Patton v. Watkins*, 90 Am. St. Rep. 69-71; *Colbert County v. Thurmond*, 116 Ala. 209, 22 South. 558; *Adsit v. Osmund*, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534.

c. **Bond Elections.**—A special election on the question of appropriating public funds or issuing bonds in aid of some project of a public nature must, to be valid, be preceded by a notice given in substantial compliance with the requirements of the law: *People v.*

Caruthers School District, 102 Cal. 184, 36 Pac. 396; Force v. Batavia, 61 Ill. 99; Demaree v. Johnson, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376; George v. Oxford Township, 16 Kan. 72; St. Louis etc. R. R. Co. v. Apperson, 97 Mo. 300, 10 S. W. 478. But where a city ordinance provides for the election and fixes the date therefor, the election will not necessarily be invalidated by a failure to give the usual notice: Board of Trustees of Augusta v. Maysville etc. R. R. Co., 97 Ky. 145, 30 S. W. 1.

d. Local Option Elections.—Elections under local option acts are special elections, the notice of which is essential to their validity. The supreme court of Oregon in the principal case so holds, and quite a number of courts in other jurisdictions have made similar holdings: State v. Tucker, 32 Mo. App. 620; Bean v. Barton County Court, 33 Mo. App. 635; Stallworth v. State, 18 Tex. App. 378; Ex parte Kramer, 19 Tex. App. 123; Smith v. State, 19 Tex. App. 444; Haddox v. Clarke County, 79 Va. 677. These decisions have generally involved the question of adopting a local law for prohibiting the sale of intoxicating liquors, but in State v. Martin, 83 Mo. App. 55, the local law concerned the construction of highways.

HIGINBOTHAM v. FROCK.

[48 Or. 129, 83 Pac. 536.]

VENDOR AND VENDEE—Forfeiture of Vendee's Rights.

Where a bond for a deed provides that in case of default in payments the vendor may declare the bond void and repossess himself of the premises, the mere default of the vendees does not work a forfeiture of their rights unless the vendor elects to insist on a strict performance, in which case he is required to give timely notice of his intention to cancel the contract. (p. 798.)

VENDOR AND VENDEE—Forfeiture of Vendee's Rights.

A vendor cannot, because of a default in payments, forfeit the rights of the vendees when he himself is not in a position to perform the contract of sale. (p. 798.)

VENDOR AND VENDEE—Forfeitures.—A Court of Equity

will not declare a forfeiture against a vendee, but will leave the vendor to his legal remedy. (p. 799.)

VENDOR AND VENDEE.—A Bond for a Deed Transfers to

the Vendee an equitable title. (p. 799.)

VENDOR AND VENDEE—Foreclosure of Vendee's Interest.

An application for strict foreclosure against a vendee under a bond for title is addressed to the discretion of the court, and will not be granted without giving him a reasonable time to comply with his contract. (p. 799.)

Cornelius Jackson Bright, for the appellant.

John Bassett Hosford, for the respondents.

¹³⁰ BEAN, C. J. This is a suit to cancel and annul a bond for a deed. On December 20, 1902, the defendant Henry Frock purchased of the plaintiffs one hundred and sixty acres of land in Sherman county for two thousand five hundred dollars. He paid twelve hundred dollars in cash, giving his three promissory notes for the balance, due the first day of October, 1903, 1904 and 1905, respectively. Each note bore interest at eight per cent, payable annually, and provided that, if the interest was not so paid, the whole sum, both principal and interest, should become immediately due and collectible at the option of the holder of the note. At the same time the plaintiffs executed and delivered to the defendant a bond for a deed, whereby they obligated themselves to convey the land to him in fee simple, by good and sufficient deed, clear of all encumbrances, except certain taxes, which bond contained a stipulation that the defendant should have immediate possession, and this further provision: "If he shall make default in any of the above deferred payments, or shall violate any of the agreements herein contained, the said obligors [the plaintiffs] may declare this bond void and may forthwith repossess themselves of said premises."

The defendant immediately went into possession. Soon thereafter the plaintiffs assigned and transferred the promissory notes for the deferred payments to Moore Bros. as collateral security. When the first note matured, the defendant offered to pay all the notes upon the delivery to him of a deed to the premises, as stipulated in the bond. Nothing definite was done at that time, however, and in November he paid one hundred and twenty-five dollars to Moore Bros. on the first note, and again requested a deed, offering at the same time to pay all the notes in full. In January, 1904, the plaintiffs redeemed the notes from Moore Bros., and on the 25th of February notified the defendant that they had elected to terminate the contract and to repossess themselves of the land because of his default in making the payments, at the same time offering to return the unpaid notes. The defendant refused to accept the notes or to relinquish his claim under the ¹³¹ bond. On March 7th he tendered to plaintiffs and offered to pay the entire amount due on the purchase price, and demanded from them a deed as stipulated in the contract. At the time of the attempted rescission by the plaintiffs the property was encumbered by mortgages to the amount of about three thousand six hundred dollars, and they were then in no

position to comply with their contract and convey the property to the defendant, free of all liens and encumbrances. Soon thereafter this suit was brought by the plaintiffs. In his answer the defendant pleads the tender made on March 7th, brings the amount thereof into court, and prays for a decree, requiring the plaintiffs to comply with their contract. The defendant had a decree in his favor, and plaintiffs appeal.

1. There are several reasons why the decree of the court below should be affirmed. In the first place, the mere failure of the defendant to make the deferred payments on the purchase price of the land did not, ipso facto, entail a forfeiture of his rights under the contract. The stipulation in the bond is that, if default is made in any of the deferred payments, the obligors (the plaintiffs) may declare the bond void and repossess themselves of the premises. This provision gave the plaintiffs power to put an end to the agreement if they elected to do so, but the mere default of the defendant did not terminate the contract or work a forfeiture of his rights, unless the plaintiffs should elect to insist upon a strict performance according to its terms, in which case they were required to give him timely and reasonable notice of their intention to cancel the contract, so he might have an opportunity to comply with its terms and make the payments: *Pomeroy on Contracts*, 2d ed., sec. 393; *O'Connor v. Hughes*, 35 Minn. 446, 29 N. W. 152. "Such notice," says Dickinson, J., in *O'Connor v. Hughes*, a case similar to the one at bar, "might have been given before the time named for payment, or, if not so made, notice might have been given after default, fixing a reasonable time within which payment would be required; but the rights of the purchaser under a contract not absolutely terminated cannot be extinguished by a summary declaration of forfeiture."

¹⁸² 2. Again, the plaintiffs could not declare a forfeiture at the time they attempted to do so, because they were not then in a position to comply with the contract on their part. The property was subject to mortgages for about three thousand six hundred dollars, and they could not convey it to the defendant in fee simple, free from all liens and encumbrances, as they had agreed to do. The rights of a vendee under a contract like the one under consideration cannot be forfeited by the vendor, although default has been made in the payments, unless he is in a position to perform his part of the agreement: 29 Am. & Eng. Ency. of Law, 2d ed., 683; 2 Warvelle on

Vendors, 2d ed., sec. 822; Wells v. Page, 48 Or. 74, 82 Pac. 856, 3 L. R. A., N. S., 103; Baker v. Bishop Hill Colony, 45 Ill. 264.

3. And, finally, this is a suit in equity, either to declare a forfeiture or to foreclose the defendant's equitable rights in the property. It is a familiar doctrine that a court of equity will not declare a forfeiture, but will leave a party entitled thereto to his legal remedy, if any: 1 Pomeroy on Equity, 3d ed., sec. 459. So that plaintiffs are not entitled to relief on that ground.

4. If, on the other hand, the suit is to be treated as one for the foreclosure of defendant's interest in the property, the plaintiffs are not entitled to the relief demanded; for, having invoked the aid of a court of equity, they are bound themselves to do equity. The bond for a deed transferred to the purchaser an equitable title: Burkhart v. Howard, 14 Or. 39, 12 Pac. 79; Sayre v. Mohny, 30 Or. 238, 47 Pac. 197; Security Sav. Co. v. Mackenzie, 33 Or. 209, 52 Pac. 1046; Sievers v. Brown, 34 Or. 454, 56 Pac. 171, 45 L. R. A. 642. By instituting this suit the plaintiffs recognized that defendant had some interest in the property which they desire to have forever barred and foreclosed. An application for a strict foreclosure is always addressed to the sound discretion of the court, and when enforced at all will not be done without giving the defendant a reasonable time to comply with his contract: Security Sav. Co. v. Mackenzie, 33 Or. 209, 52 Pac. 1046; Flanagan Estate v. Great Cent. Land Co., 45 Or. 335, 77 Pac. 485.

The decree of the court below is affirmed.

The Right of a Vendor to recover possession from his vendee in case of default is the subject of a note to Brixen v. Jorgensen, 107 Am. St. Rep. 722.

Relief in Equity from forfeitures is the subject of a note to South Penn. Oil Co. v. Edgell, 86 Am. St. Rep. 48.

AUSTIN v. VANDERBILT.

[48 Or. 206, 85 Pac. 519.]

TROVER—Sufficiency of Complaint.—In an action of trover it is sufficient to allege the conversion as a fact without stating the particular acts constituting the unauthorized assumption and exercise of the right of ownership. (p. 802.)

TROVER—Tender by Pledgor Before Suit.—Where property has been converted by the pledgee thereof, no tender of the debt by the pledgor is necessary before bringing an action for the conversion. (p. 803.)

TROVER—Measure of Damages—Evidence of Value.—The value of property at the time of its conversion is generally the measure of damages in an action of trover; but to ascertain that value, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible. (p. 804.)

A. K. Wilson and O. A. Neal, for the appellant.

A. C. Emmons, for the respondent.

206 MOORE, J. This is an action by Aimee Austin against Oscar Vanderbilt to recover damages for an alleged conversion of personal property. The complaint states that, October 30, 1902, at Los Angeles, California, the plaintiff was the owner and possessed of one pair of six-carat solitaire earrings, pure white, of the value of nine hundred dollars, and also of one horseshoe pin, set with eleven diamonds, of the value of two hundred and eighty-five dollars, which she then and there delivered to the defendant; that she thereafter demanded of him possession of such property, but he refused to comply therewith, and converted it to his own use, to her damage in the sum of eleven hundred and eighty-five dollars. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, an answer was filed denying the material allegations of the complaint, and averring that the diamonds were delivered to the defendant as security for a loan of two hundred dollars; that, plaintiff having failed to pay any part of that sum, he gave her a written notice, July 30, 1903, that in thirty days he would sell such property **207** to the highest bidder; that pursuant to such notice he sold the diamonds mentioned for two hundred and fifty-five dollars, which was the full value thereof, to A. McPhail of Chicago, Illinois; that defendant, retaining the amount of his debt, tendered to plaintiff, in writing, fifty-five dollars, which she refused to accept,

whereupon he deposited that sum in court for her. The reply denied the allegations of new matter in the answer, and the cause being tried, the jury found for the plaintiff, assessing her damage at seven hundred and twenty-six dollars, less two hundred dollars loaned to her by the defendant, and, judgment having been rendered on the verdict for five hundred and twenty-six dollars, the defendant appeals.

1. It is contended that the complaint should have alleged the substance of the contract, respecting the delivery of the diamonds, and averred wherein it had been violated by the defendant, but not having done so, the pleading assailed failed to state facts sufficient to constitute a cause of action, which defect was not waived by answering over. In *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506, it was held that an allegation of the facts now insisted upon was unnecessary in an action of trover, Mr. Chief Justice Bean saying: "The material averments in an action of this character are ownership and right to the possession in plaintiff, and that the defendant wrongfully took and converted the property in question to his own use, or that, being lawfully in possession thereof, he so converted it." The conclusion thus reached is amply supported by the adjudged cases (21 Ency. of Pl. & Pr. 1053), which hold that it is sufficient, in an action of trover, to allege in the complaint the conversion as a fact, without stating the particular acts constituting the unauthorized assumption and exercise of the right of ownership over the plaintiff's goods and personal chattels to the exclusion of his dominion over them; 21 Ency. of Pl. & Pr. 1077. Whether it is necessary to the maintenance of an action of this character ²⁰⁸ to allege a tender of the sum loaned, to secure the payment of which the property was pledged, will be considered in connection with the contention that the court erred in denying a motion for a nonsuit and also in refusing to instruct the jury to find for the defendant.

2. An examination of the plaintiff's pleadings would seem to show that her theory was that the delivery of the diamonds was a mere naked bailment; but, as the jury found that she owed the defendant two hundred dollars, we shall adopt his hypothesis, that the delivery of the jewels to him was a pledge to secure the payment of that sum. The bill of exceptions contains the following statement: "There was no evidence introduced at the trial of any demand to repay any loan, or of any tender of any money by plaintiff to defendant."

So that a consideration of questions of averments and of proof of tender become important. In *Halliday v. Holgate*, L. R. 3 Ex. 299, one Bentley borrowed of the defendant a sum of money, to secure the payment of which he deposited scrip certificates for certain shares of stock in a mining company. Bentley became a bankrupt and absconded, whereupon the defendant, without demand or notice, sold a part of the certificates. The plaintiff, as the bankrupt's assignee, not having tendered any of the debt, brought an action of trover against the defendant, to recover the value of the shares disposed of, and it was held, affirming the decision in *Donald v. Suckling*, L. R. 1 Q. B. 585, that, assuming the sale to be wrongful, as the immediate right to the possession of the shares of stock was not by the sale revested in the plaintiff, he could not maintain trover, either for the whole value of the shares or for nominal damages, thereby substantially overruling the decision in *Johnson v. Stear*, 15 Com. B., N. S., 330. In *Halliday v. Holgate*, Mr. Justice Willes, speaking for the court of exchequer chamber, in discussing the question, says: "It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other ²⁰⁰ than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for the right clearly is not in the plaintiff." The doctrine thus announced in England prevails in some of the states of the Union.

In *Cortelyou v. Lansing*, 2 Caines' Cas. 200, however, a different rule was adopted, where it was held that, if a pledgee sells the pledge before application is made to redeem it, he is answerable in damages for the value of the property converted and that it is not necessary in such case to make an actual

tender of the sum due, to secure the payment of which the property was delivered to the pledgee. In deciding that case Mr. Justice Kent, assigning a reason for the conclusion thus reached, observes: "But when one party has incapacitated himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, or to show himself in a capacity to pay, because it would be a nugatory act which the law will never require. If the one party discharges the other from a performance, by saying he will not perform on his part (and voluntarily and notoriously rendering himself unable to perform his part is equivalent to such discharge), it is well understood that it is not necessary for the other party to go forward." The rule established in that pioneer case is tersely stated by Mr. Milburn, as follows: "If the property has been converted by the pledgee, no tender of the debt secured need be made by the pledgor before bringing an action against the pledgee": 22 Am. & Eng. Ency. of Law, 2d ed., 874. Judge Story, in his work on Bailments (8th ed., ²¹⁰ sec. 349), in speaking of the recovery of compensation for injury sustained by reason of the conversion of a pledge, remarks: "But if an action is brought, the pledgee may recoup his debt in the damages." In addition to the cases cited by Mr. Milburn, as supporting the text quoted, see the following: Hallack L. & M. Co. v. Gray, 19 Colo. 149, 34 Pac. 1000; Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; Brush v. First Nat. Bank, 71 Fed. 102, 17 C. C. A. 627; Waring v. Gaskill, 95 Ga. 731, 22 S. E. 659; Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737; Feige v. Burt, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; Work v. Bennett, 70 Pa. 484.

The pledgee impliedly agrees faithfully to hold the pledge until the conditions have been performed upon the faith of which the choses in action, goods, or personal chattels have been delivered to him. If, in violation of his trust, he sells or disposes of the pledge, thereby putting it out of his power to return the property, it would be useless to impose upon the pledgor the burden of tendering to the pledgee the payment of the debt, or the performance of the duty before he could maintain an action against the pledgee for the damages sustained by reason of the conversion, when it would be impossible for the latter to discharge the obligation which he had undertaken. When a pledgee, by his overt act, violates the terms of his agreement, so that it cannot be specifically en-

forced, he necessarily severs the fiduciary relations he assumed toward the pledgor, whose remedy against him in this form of an action for the injury sustained, though treated as one for conversion, is in reality founded on the breach of the contract: *Glidden v. Mechanics' Nat. Bank*, 53 Ohio St. 588, 42 N. E. 985, 43 L. R. A. 737. The statement that the rules of law, which are founded in reason, do not require the performance of vain things, has been so often repeated as to become almost a general maxim, invoking which, we think, there was no necessity to allege in the complaint, or to prove ²¹¹ at the trial a tender of any sum by the plaintiff to the defendant as a condition precedent to this right to maintain this action.

3. A. Feldenheimer, who, as plaintiff's witness, testified that he had bought and sold diamonds for several years and knew the value thereof, was permitted, over objection and exception, to state the highest market value from October 30, 1902, to the time of trial, of two pure white flawless diamonds, one weighing a trifle less and the other a little more than three carats, and also to specify the rate of increase in the value of such jewels in the interim, and it is contended by defendant's counsel that an error was committed thereby. The value of property at the time of its conversion is generally the measure of damages in an action of trover. To ascertain that value, however, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible: *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Denton v. Smith*, 61 Mich. 431, 28 N. W. 160; *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999.

4. We think no error was committed as alleged, nor in permitting the witness to testify concerning the value of "flawless" diamonds; for the bill of exceptions does not disclose that the jewels which plaintiff delivered to the defendant were not of that quality.

These considerations necessitate an affirmance of the judgment, which is ordered.

Affirmed.

If a Pledgor has No Notice of a Conversion of the property by the pledgee and an application of the proceeds to the payment of the pledgor's debt until after the conversion, he may maintain an action for damages, without a tender of the amount due and without a demand for the return of the property: Gregg v. Bank of Columbia, 72 S. C. 458, 110 Am. St. Rep. 633.

The Measure of Liability for a Conversion is ordinarily the value of the chattel at the time and place of the conversion: *American Soda Fountain Co. v. Futrall*, 73 Ark. 464, 108 Am. St. Rep. 64. But see *Gregg v. Bank of Columbia*, 72 S. C. 458, 110 Am. St. Rep. 633.

STATE v. MULLER.

[48 Or. 252, 85 Pac. 855.]

CONSTITUTIONAL LAW.—The Right to Labor or Employ Labor, guaranteed by the fourteenth amendment, is subject to the power of the states to reasonably regulate callings affecting the public health and welfare. (p. 806.)

CONSTITUTIONAL LAW—Hours of Labor by Females.—A statute is constitutional which forbids the employment of females more than ten hours a day in any factory, laundry or mechanical establishment. (p. 809.)

W. D. Fenton and E. S. J. McAllister, for the appellant.

A. M. Crawford, attorney general, John Manning, district attorney, and B. E. Haney, for the state.

²⁵³ BEAN, C. J. In 1903 the legislature passed an act which, among other things, provided that "no female [shall] be employed in any mechanical establishment, or factory, or laundry, in this state, more than ten hours during any one day," and that "any employer who shall require any female to work in any of the places mentioned" more than the prohibited time "shall be guilty of a misdemeanor, and upon conviction thereof shall be" punished, etc.: *Laws 1903*, p. 148. The defendant was convicted for a violation of this act by requiring a female to work more than the prescribed time in a laundry. He appeals to this court on the ground that the law is unconstitutional and void, as violative of the fourteenth amendment to the constitution of the United States, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law," and of sections 1 and 20 of article 1 of the constitution of this state, as follows:

Section 1. "We declare that all men, when they form a social compact, are equal in rights."

And section 20: "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

1. The right to labor, or employ labor, on such terms and conditions as may be agreed upon by the interested parties, is

not only a liberty but a property right guaranteed to every citizen by the fourteenth amendment to the constitution of the United States, and cannot be arbitrarily interfered with by the legislature: *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937; *Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737, 9 L. R. A. 482; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 59 N. W. 362, 24 L. R. A. 702; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120. But the amendment was not designed or intended to limit the right of the state, under its police power, to prescribe such reasonable regulations as may be necessary to promote the welfare, peace, morals, education or good order of the people, and therefore the hours of work in employments which are detrimental to health may be regulated by the legislature: *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780.

The right to labor and to contract for labor, like all rights, is itself subject to such reasonable limitations as are essential to the peace, health, welfare and good order of the community, and, as said by the supreme court of the United States: "A large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests": *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, the court, referring to the limitations placed by a state upon the hours of workmen in underground mines, said: "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts." And in the subsequent case of *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725, the court uses this language: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in

their ²⁵⁵ nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference." The legislature may not, therefore, unduly interfere with the liberty of contract, or arbitrarily limit the right of a citizen to enter into such contracts as to him may seem expedient or desirable; but it may prescribe reasonable regulations in reference thereto and limitations thereon to promote the general welfare and guard the public health, and the power of the courts to review such regulations exists only "when that which the legislature has done comes within the rule that if a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is beyond all question a plain, palpable invasion of rights secured by the fundamental law": *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 25 Sup. Ct. Rep. 358, 49 L. ed. 643.

2. Now, the statute in question was plainly enacted, although not so declared therein, in order to conserve the public health and welfare by protecting the physical well-being of females who work in mechanical establishments, factories and laundries. Such legislation must be taken as expressing the belief of the legislature, and through it of the people, that the labor of females in such establishments in excess of ten hours in any one day is detrimental to health and injuriously affects the public welfare. The only question for the court is whether such a regulation or limitation has any real or substantial relation to the object sought to be accomplished, or whether it is "so utterly unreasonable and extravagant" as to amount to a mere arbitrary interference with the right to contract. On this question, we are not without authority. Legislation limiting the hours during which women may be employed is in force in several of the states of the Union, and, so far as we are advised, such legislation has everywhere been upheld, except in the state of Illinois. This particular class of legislation was first ²⁵⁶ enacted in Massachusetts, and came before the supreme court of that state in *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383. The law provided that "no minor under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm or corporation in any manufacturing establishment in this common-

wealth more than ten hours in any one day," except in certain cases, and that "in no case shall the hours of labor exceed sixty per week." This law was held valid, the court declaring that it was not in violation of any rights reserved to the individual citizen, because "it merely provides that in an employment which the legislature has evidently deemed to some extent dangerous to health no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions are unnecessary." And it was held that the law did not violate the right of the female employé to labor in accordance with her own judgment as to the number of hours she should work, because it merely prohibited her being employed continuously in the same service more than a certain number of hours during a day or week, leaving her free to work elsewhere as many hours as she might desire.

In 1899 the legislature of Nebraska (Laws 1899, p. 362, c. 107), enacted a law providing that "no female shall be employed in any manufacturing, mechanical or mercantile establishments, hotel or restaurant in this state more than sixty hours during any one week and that ten hours shall constitute a day's labor." This legislation was upheld by the court on the ground that it was a reasonable regulation to promote the public good and to protect the health and well-being of women engaged in labor in the establishments mentioned in the act, and therefore came within the police powers of the state: *Wenham v. State*, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825. The court said: "Women and children have always, to ²⁵⁷ a certain extent, been wards of the state. Women in recent years have been partly emancipated from their common-law disabilities. They now have a limited right to contract. They may own property, real and personal, in their own right, and may engage in business on their own account. But they have no voice in the enactment of the laws by which they are governed, and can take no part in municipal affairs. They are unable, by reason of their physical limitations, to endure the same hours of exhaustive labor as may be endured by adult males. Certain kinds of work, which may be performed by men without injury to their health, would wreck the constitutions and destroy the health of women, and render them

incapable of bearing their share of the burdens of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition; and the law in question, to that extent, conserves the public health and welfare."

In 1901 a similar statute was enacted in the state of Washington, and was held valid in the supreme court in *State v. Buchanan*, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 52, 59 L. R. A. 342, Mr. Justice Dunbar saying: "It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women, who are the mothers of succeeding generations, must necessarily affect the public welfare and the public morals. Law is, or ought to be a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government."

The case of *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79, is the only decision to which our attention has been called, or which we have been able to find, in which an act of the kind under consideration has been ²⁵⁸ held unconstitutional and void. The case is well considered and ably presented, but is, we think, borne down by the weight of authority and sound reason. We are of the opinion, therefore, that the act in question is not void because an arbitrary and unwarranted limitation of the right of contract, but is within the police power of the state.

Nor can we concur with counsel that it is an arbitrary and unwarrantable discrimination against persons engaged in the particular business or employments specified, because persons in other businesses or callings are not prohibited from requiring or permitting their female employes to work more than ten hours a day. Nearly all legislation is special in the objects sought to be obtained or in its application, and the general rule is that such legislation does not infringe the constitutional right to equal protection of the laws when all persons subject thereto are treated alike under like circumstances and conditions: *In re Oberg*, 21 Or. 406, 28 Pac. 130, 14 L. R. A. 577; *Ex parte Northrup*, 41 Or. 489, 69 Pac. 445.

"The discriminations which are open to objection," says Mr. Justice Field, in *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. ed. 1145, "are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

The judgment is affirmed.

The Principal Case was Affirmed by the supreme court of the United States: See *Muller v. State*, 00 U. S. 000, 28 Sup. Ct. Rep. 324, Mr. Justice Brewer delivering the opinion of the court therein as follows:

"On February 19, 1903, the legislature of the state of Oregon passed an act (Sess. Laws 1903, p. 148) the first section of which is in these words:

"Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day."

"Section 3 made a violation of the provisions of the prior sections a misdemeanor subject to a fine of not less than ten dollars nor more than twenty-five dollars. On September 18, 1905, an information was filed in the circuit court of the state for the county of Multnomah, charging that the defendant 'on the fourth day of September, A. D. 1905, in the county of Multnomah and state of Oregon, then and there being the owner of a laundry known as the Grand Laundry, in the city of Portland, and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent, and agent of said Curt Muller, in the said Grand Laundry, to require a female, to wit one Mrs. E. Gotcher to work more than ten hours in said laundry on said fourth day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon.'

"A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of ten dollars. The supreme court of the state affirmed the conviction (48 Or. 252, 85 Pac. 855), whereupon the case was brought here on writ of error.

"The single question is the constitutionality of the statute under which the defendant was convicted, so far as it affects the work of a female in a laundry. That it does not conflict with any provisions of the state constitution is settled by the decision of the su-

preme court of the state. The contentions of the defendant, now plaintiff in error, are thus stated in his brief:

"'1. Because the statute attempts to prevent persons *sui juris* from making their own contracts and thus violates the provisions of the fourteenth amendment, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"'2. Because the statute does not apply equally to all persons similarly situated, and is class legislation.

"'3. The statute is not a valid exercise of the police power. The kinds of work prescribed are not unlawful, nor are they declared to be immoral or dangerous to the public health; nor can such a law be sustained on the ground that it is designed to protect women on account of their sex. There is no necessary or reasonable connection between the limitation prescribed by the act and the public health, safety, or welfare.'

"It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. As said by Chief Justice Wolverton, in *First Nat. Bank v. Leonard*, 36 Or. 390, 59 Pac. 873, after a review of the various statutes of the state upon the subject:

"'We may therefore say with perfect confidence that, with these three sections upon the statute book, the wife can deal, not only with her separate property, acquired from whatever source, in the same manner as her husband can with property belonging to him, but that she may make contracts and incur liabilities, and the same may be enforced against her, the same as if she were a *feme sole*. There is now no residuum of civil disability resting upon her which is not recognized as existing against the husband. The current runs steadily and strongly in the direction of the emancipation of the wife, and the policy, as disclosed by all recent legislation upon the subject in this state, is to place her upon the same footing as if she were a *feme sole*, not only with respect to her separate property, but as it affects her right to make binding contracts; and the most natural corollary to the situation is that the remedies for the enforcement of liabilities incurred are made coextensive and coequal with such enlarged condition.'

"It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, that a law providing that no laborer shall be required or permitted to work in bakeries more than sixty hours in a week or

ten hours in a day was not as to men a legitimate exercise of the police power of the state, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the federal constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

"In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin.*

*"The following legislation of the states imposes restriction in some form or another upon the hours of labor that may be required of women: Massachusetts: 1874, Rev. Laws 1902, c. 106, sec. 24; Rhode Island: 1885, Acts and Resolves 1902, c. 994, p. 73; Louisiana: 1886, Rev. Laws 1904, col. 1, sec. 4, p. 989; Connecticut: 1887, Gen. Stats. Rev. 1902, sec. 4691; Maine: 1887, Rev. Stats. 1903, c. 40, sec. 48; New Hampshire: 1887, Laws 1907, c. 94, p. 95; Maryland: 1888, Pub. Gen. Laws 1903, art. 100, sec. 1; Virginia: 1890, Code 1904, tit. 51A, c. 178A, sec. 3657b; Pennsylvania: 1897, Laws 1905, No. 226, p. 352; New York: 1899, Laws 1907, c. 507, sec. 77, subd. 3, p. 1078; Nebraska: 1899, Comp. Stats. 1905, sec. 7955, p. 1986; Washington: Stats. 1901, c. 68, sec. 1, p. 118; Colorado: Acts 1903, c. 138, sec. 3, p. 310; New Jersey: 1892, Gen. Stats. 1895, p. 2350, secs. 66, 67; Oklahoma: 1890, Rev. Stats. 1903, c. 25, art. 58, sec. 729; North Dakota: 1877, Rev. Code 1905, sec. 9440; South Dakota: 1877, Rev. Code (Pen. Code, sec. 764), p. 1185; Wisconsin: 1867, Code 1898, sec. 1728; South Carolina: Acts 1907, No. 233.

"In foreign legislation Mr. Brandeis calls attention to these statutes: Great Britain, 1844: Law 1901, 1 Edw. VII, c. 22. France, 1848: Act Nov. 2, 1892, and March 30, 1900. Switzerland, Canton of Glarus, 1848: Federal Law 1877, art. 2, sec. 1. Austria, 1855: Acts 1897, art. 96a, secs. 1-3. Holland, 1889: Art. 5, sec. 1. Italy, June 19, 1902, art. 7. Germany: Laws 1891.

"Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories both in this country and in Europe to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger. It would, of course, take too much space to give these reports in detail. Following them are extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question. In many of these reports individual instances are given tending to support the general conclusion. Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: 'The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home—are all so important and so far-reaching that the need for such reduction need hardly be discussed.'"

"While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Wenham v. State*, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825; *State v. Buchanan*, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 52, 59 L. R. A. 342; *Commonwealth v. Beatty*, 15 Pa. Super. Ct. 5, 17; against them is the case of *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79.

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure and the functions she performs in consequence thereof justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution, that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

"It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the fourteenth amendment to the federal constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the fourteenth amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a state may act in this respect, we refer to the following cases in which the question has been considered: *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937.

"That woman's physical structure and the performance of material functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school-room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

"We have not referred in this discussion to the denial of the elective franchise in the state of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not

of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

"For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the federal constitution, so far as it respects the work of a female in a laundry, and the judgment of the supreme court of Oregon is affirmed."

RESER v. UMATILLA COUNTY.

[48 Or. 326, 86 Pac. 595.]

ANIMALS.—The Keeping and Pasturing of Livestock are subject to police regulation. (pp. 817, 818.)

TAXATION—Distinction Between Tax and License.—The distinction between a tax upon a business or property and a license is that the former is exacted by reason of the fact that the business is carried on or the property is within the jurisdiction of the taxing power, while the latter is required as a condition precedent to the right to carry on such business or have such property within the jurisdiction. (pp. 818, 819.)

TAXATION of Sheep of Nonresident Owners.—A statute imposing a tax of a certain sum upon each sheep brought into the state by nonresident owners, which does not confer any special privilege on such owners nor make the payment of the tax a condition precedent to the right to bring sheep into the state, is essentially a revenue law, and unconstitutional because not uniform and equal in its operation. (p. 819.)

A. M. Crawford, attorney general, and G. W. Phelps, district attorney, for the appellant.

Oscar Cain and H. C. Bryson, for the respondent.

326 BEAN, C. J. In 1905 the legislature passed an act "to tax all foreign sheep coming into the state of Oregon for the purpose of pasturage, or being driven through the state," which act is as follows:

"Sec. 1. That all sheep, whose owner or owners residing outside of the State of Oregon, shall bring or cause to be brought into the State of Oregon, any such sheep, for the purpose of pasturage, or for the purpose of driving such sheep through the State of Oregon, such sheep shall be liable for, and the owner thereof shall pay, the following tax upon each and every head of sheep: 20 cents per head for the purpose of pasturage by the year, or any fractional part of a year, and

when any such sheep shall be driven from the state or any county of the state, such sheep shall be taxed, and the owners thereof made to pay, 5 cents per head for each and every county through which such sheep shall be driven; and taxes herein specified shall be a preferred lien against any sheep liable to such tax, and the stock inspectors of the several counties of this state may take into their possession any of said sheep and keep and retain such possession until such taxes are paid; provided, that if such tax ³²⁷ so due is not paid within thirty days after the same has been assessed, any inspector of stock having any such sheep shall sell the same, by giving ten days' published notice in the nearest newspaper to where said sheep is held, of the time and place of such sale. And the sale, as herein provided for, shall convey an absolute title to any and all sheep so sold; provided, that the owner of any sheep so sold may, within ten days thereafter, redeem such sheep, by paying all charges incurred in the keeping and sale thereof, together with the tax due thereon, and 10 per cent interest and damages thereon on the whole amount of taxes and charges.

"Sec. 2. The stock inspectors of the several counties of this State are hereby empowered to collect the taxes mentioned in Section 1 of this act; and it shall be the duty of such inspectors to collect all taxes and fines hereunder, and to keep careful watch that all foreign sheep shall pay all the taxes and fines herein provided for; and when any such sheep shall come or be driven into any county of this State, it shall be the duty of the stock inspector to such county to immediately take such sheep into his possession and to keep and retain possession of the same until the taxes and fines due thereon are paid, or until the sale thereof, as herein provided for, has been made; and all taxes and fines collected under this act shall be paid into the general fund of the county where collected. The stock inspector shall be allowed \$3.00 per day for each and every day actually employed, and said wages to be paid by the county for which such services are rendered; provided, that when the inspector of any county has to take any stock in charge and sell the same, in order to collect the taxes and fines due thereon, then such per diem charge of \$3.00 per day shall be a charge against any sheep so held and sold for taxes and fines, as herein provided for.

"Sec. 3. When any tax shall be paid by the owner or owners of any sheep, the stock inspector, to whom such tax is paid,

shall issue a tax certificate to the party so paying, which receipt or certificate shall state for what purpose the same was issued, whether for pasturage or driving; provided, that under no condition shall any stock inspector issue any certificate, permit, or receipt, whether for pasturage or driving, for any diseased or unhealthy sheep, but shall immediately cause all diseased or unhealthy sheep to be taken beyond the limits of the State at the point where the same sheep entered the state. The owner or owners of any sheep who shall fail or refuse to immediately remove any diseased or unhealthy sheep (when ³²⁸ brought into this State) when ordered to do so by any stock inspector, shall be fined \$25 for each and every day that such stock is kept within the State after having been notified to remove the same by the stock inspector of the county wherein such stock is located.

"Sec. 4. The provision of this act shall not apply to any of the hereinbefore mentioned stock that shall be brought into the State for the purpose of being fed through the winter months, of November, December, January and February, of each year, or to any stock being shipped to market": Laws 1905, p. 268, c. 156.

The plaintiff, W. P. Reser, is a resident of Washington and the owner of one hundred head of sheep, which were driven into Umatilla county, in this state, for the purpose of pasturage in the spring of 1905. In July of that year, the stock inspector threatened to take possession of the sheep and sell them as provided in the act referred to, unless the tax of twenty cents a head was paid thereon. In order to avoid such seizure and sale, the plaintiff paid the tax under protest, and the same was converted into the general fund of the county. The plaintiff thereafter brought this action to recover the amount so paid, on the ground that the law under which it was exacted was unconstitutional and void, because not in accord with section 1, article 9, of the constitution of Oregon, which provides that the rate of assessment and taxation shall be equal and uniform. The plaintiff had judgment in the court below, and the defendant appeals.

1. It is conceded by the defendant county that if the law in question is a revenue measure, and the sum required to be paid by the owners of foreign sheep a tax, it is void, because the tax is not uniform or levied according to value. But the contention ³²⁹ is that the law was designed simply to regulate and control the pasturage of foreign sheep, and comes within the police power. There is no doubt that the keeping of livestock

within the state is under police regulation. The state may prohibit the running at large of such animals, and compel their owners to keep them within their own inclosures, and it has been held that it may prohibit their grazing or being herded within certain prescribed territory: 2 Tiedeman on State and Federal Control, 838; Sifers v. Johnson, 7 Idaho, 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 785; Sweet v. Ballentyne, 8 Idaho, 431, 69 Pac. 995; Spencer v. Morgan, 10 Idaho, 542, 79 Pac. 459.

2. And, as an incident to the power to regulate and control, it may be that the state can exact a charge or fee for the privilege of allowing stock to run at large. But we do not think the law under consideration is of that character.

3. It is sometimes difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the government or for some specific purpose authorized by it. Its object is to raise revenue: Bouvier's Law Dictionary. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expenses incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law imposing a burden or tax upon persons or property from the operation of the constitutional provision relative to taxation, it must have for its primary object the granting of some privilege or the imposing of some restraint. A license is essentially a grant of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by the class of citizens to which the licensee belongs; Home Ins. Co. v. City Council of Augusta, 50 Ga. 530. "The object of a license," says Mr. Justice Manning, "is to confer a right that does not exist without a license": *Chilvers v. People*, 11 Mich. 43. And Judge Deady says that it is "a permission to do what was ³³⁰ unlawful at common law, or is made so by some statute or ordinance, including the one authorizing or requiring the license": *The Laundry License Case* (D. C.), 22 Fed. 701. And Mr. Justice Cooley says that the popular, as well as the legal, understanding of the "word 'license' undoubtedly is a permission to do something which without the license would not be allowable": *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654. The distinction between a tax upon a business or property and a license may be

said to be that the former is exacted by reason of the fact that the business is carried on or the property is within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business or have such property within the jurisdiction.

4. Within these definitions a mere tax on sheep of non-resident owners cannot be said to be a license unless the payment of such tax confers some right or privilege upon such owners which otherwise would not exist. We do not understand that such is the case here. The law is entitled, "An Act to Tax All Foreign Sheep Coming into the State of Oregon," etc., and simply provides the amount of such tax and the manner of its collection. No special privileges are granted to the nonresident owner by reason of the payment of the tax, nor is the payment of such tax made a condition precedent to the right to bring sheep into the state, if, indeed, such legislation would be valid: 21 Am. & Eng. Ency. of Law, 2d ed., 799; *Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380. Nor does the failure to pay the required tax render the pasturing of sheep in the state illegal, any more than the failure of a man to pay the taxes upon his farm renders the occupation of farming illegal. The law does not pretend to impose any restraint upon the sheep industry and no privilege is granted by its terms. The burden imposed is upon the property, and not upon the business, and applies alike to the man who brings his sheep into the state to pasture them on land of his own or that of the government and the man who brings his sheep into the state to pasture them upon the land of the state. We are therefore forced to the conclusion ³³¹ that it is essentially a revenue law and void, within the rule announced in *Ellis v. Frazier*, 38 Or. 462, 63 Pac. 642, 53 L. R. A. 454, because the tax is not uniform and equal, nor levied with reference to the value of the property.

And such is the conclusion reached by other courts upon substantially the same character of legislation. Thus an act of the legislature of Colorado providing that nonresidents grazing cattle in any county of the state should pay a certain fixed sum per head in lieu of all taxes was held void, because in violation of the constitutional provision that all taxes shall be uniform upon the same class of subjects: *Kiowa County v. Dunn*, 21 Colo. 185, 40 Pac. 357. So, also, a law providing for a special tax of a stated amount for the benefit of public roads upon all road wagons and other vehicles, irrespective of

their value, was declared invalid by the supreme court of Alabama: *Smith v. Court of County Commissioners*, 117 Ala. 196, 23 South. 141. Likewise an act requiring every corporation or company operating a railroad or any part of a railroad within the state to pay a fee of one dollar a mile for each mile of track was held to contravene the provisions of the Ohio constitution, requiring equal and uniform taxation: *Pittsburgh etc. R. R. Co. v. State*, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380. And in Georgia a municipal ordinance imposing a specific tax of one dollar a head on each horse or mule sold by drovers in the city was declared void, because in violation of the provision of the state constitution that taxation shall be ad valorem and uniform on all property of the same class: *Livingston v. City Council of Albany*, 41 Ga. 21. So, also, an ordinance imposing on bicycles and other wheel vehicles a tax to be used for the improvement of the streets was declared to be within the inhibition of the state constitution of Illinois against double taxation, and void because unequal and not uniform: *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907, 49 L. R. A. 408. Minnesota has a constitutional provision similar to ours, and in *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970, it was held that a law providing for a system of taxation on mining property and products by the payment of a fixed sum per ton for all ore ³²² mined or shipped was void, the court saying: "It would be difficult to conceive of a system of taxation more obnoxious to the constitution." Under a similar constitution the supreme court of Louisiana held that the legislature could not levy a tax upon cotton by the pound: *Sims v. Parish of Jackson*, 22 La. Ann. 440.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

Mr. Justice Hailey, having been of counsel, took no part in this decision.

Taxation must be Equal and Uniform upon all persons and property within the state or municipality levying the tax: *Mauldin v. City Council*, 42 S. C. 293, 46 Am. St. Rep. 723; *Matter of Fell*, 171 N. Y. 48, 89 Am. St. Rep. 791; *Detroit etc. Ry. Co. v. Common Council*, 125 Mich. 673, 84 Am. St. Rep. 589; *State v. Chicago etc. R. R. Co.*, 195 Mo. 228, 113 Am. St. Rep. 661. This rule does not ordinarily apply, however, to license taxes or taxes imposed upon privileges and occupations: *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459; *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143; *Denver City Ry. Co. v. Denver*, 21 Colo. 350, 52 Am. St. Rep. 239.

KATZ v. OBENCHAIN.

[48 Or. 352, 85 Pac. 617.]

ATTACHMENT—Nature of Proceeding—Lien.—A proceeding by attachment is in the nature of a proceeding in rem. The attaching creditor acquires a specific lien upon the attached property, which ripens into a judgment against the res when the order of sale is made. Such a proceeding is in effect a finding that the property attached is an indebted thing, and a virtual condemnation of it to pay the owner's debt. (p. 824.)

ATTACHMENT LIEN—Necessity of Entry of Judgment.—The validity or continuation of an attachment lien is not dependent upon the entry of the judgment in the judgment lien docket. (p. 824.)

MERGER OF ESTATES—When does not Take Place.—When a lesser and higher estate meet and coincide in the same person, they will be kept separate when equity and justice require it, unless there is an expressed intention to the contrary. (p. 825.)

MERGER OF ESTATES.—A Mortgage is not Extinguished, as against a subsequent attachment lien, by a conveyance of the legal title to the mortgagee, when there is no express intention therefor. (p. 826.)

LIMITATIONS—Suit to Quiet Title.—Where a mortgagee obtains a conveyance of the legal title and takes possession of the premises, a suit by him to enjoin a sale under an attachment levied prior to the conveyance is in the nature of a suit to quiet title, rather than to foreclose a mortgage, within the meaning of the statute of limitations. (p. 826.)

EQUITY PLEADING—Relief Under General Prayer.—A complaint that sets up the facts out of which equities in favor of the plaintiff arise, and a general prayer for relief, is sufficient to enable the court to award such a decree as the law and facts afford. (p. 826.)

F. H. Mills and A. L. Leavitt, for the appellant.

J. C. Rutenic, for the respondent.

353 BEAN, C. J. This is a suit for an injunction and general equitable relief by Israel Katz against Silas Obenchain, as sheriff, and others.

On December 8, 1892, Quincy A. Brooks and wife mortgaged blocks 71, 72, 73, 86 and 87, in Klamath Falls, to the plaintiff to secure the payment of a promissory note for twelve hundred and fifty dollars due one year after date, and bearing interest at ten per cent per annum, and such mortgage was duly recorded on December 16, 1892. Brooks and wife were at the time, and continued thereafter to be, nonresidents of the state. On July 21, 1894, one Meyer commenced an action at law against them in the circuit court for Klamath county to recover money, and caused the property included in the plaintiff's mortgage, together with a large

amount of other real property belonging to them in that county, to be attached to satisfy any judgment he might recover. Thereafter service was had by publication upon Brooks and wife, and on November 20, 1894, Meyer recovered a judgment against them for five thousand seven hundred and twenty-seven dollars and seventy-five cents and costs, and an order adjudging and directing the sale of the attached property to satisfy the same. This judgment was immediately entered in what was used as the judgment lien docket, but was insufficient to create a lien because it did not show the time when docketed: *Hutchinson v. Gorham*, 37 Or. 347, 61 Pac. 431; *Western Sav. Co. v. Currey*, 39 Or. 407, 87 Am. St. Rep. 660, 65 Pac. 360. Soon after the rendition of the judgment an appeal was taken to this court, pending which Brooks and wife conveyed the mortgaged property to one E. C. Brooks. The Meyer judgment was subsequently affirmed, except in so far as it was a personal one against Brooks and wife: 29 Or. 203. The mandate was entered in the court below on November 18, 1896, and the judgment again entered in the pretended judgment lien docket. On April 12, 1897, an execution and order of sale were issued thereon and all the attached property sold thereunder except that included within the plaintiff's mortgage. On May 30, 1898, E. C. Brooks and wife, in consideration of the payment to them of ~~854~~ five hundred dollars in money by the plaintiff, and the release by him of Quincy A. Brooks and wife from any liability on their note and mortgage, conveyed the mortgaged property to the plaintiff and he is now, and has ever since been, the owner thereof.

On February 1, 1905, an alias execution was issued on the Meyer judgment, and the property conveyed by E. C. Brooks and wife to plaintiff seized and advertised for sale, when this suit was commenced by plaintiff to enjoin such sale. In his complaint he sets out in detail the giving of the mortgage to him by Brooks and wife and the recording of the same, alleges that no part of the principal or interest has been paid, and that on May 30, 1898, he demanded payment thereof, and thereupon E. C. Brooks and wife conveyed the mortgaged property to him in consideration of the payment to them of five hundred dollars and the release of Quincy A. Brooks and wife from further liability on such note and mortgage, and that such conveyance was recorded on October 30, 1900; that at the time of such conveyance E. C. Brooks was the owner in

fee of the property, and that plaintiff accepted the conveyance from him and paid the consideration therefor in good faith, without knowledge of any lien or encumbrance on the property, and has ever since been in the peaceable and quiet possession thereof, paying taxes thereon, and has either by himself or through his tenants made valuable improvements to the extent of more than three thousand dollars; that the defendant sheriff has seized and advertised the property for sale under the Meyer judgment, and that neither Meyer nor anyone else has a valid and subsisting lien or claim on such property. The prayer is for an injunction restraining the sale of such property, and for such other and further relief as in equity may seem just.

The defendants answered jointly, admitting and denying the allegations of the complaint, and for an affirmative defense plead the Meyer judgment and the issuance of an execution thereon and that plaintiff's mortgage is barred by the statute of limitations. The reply puts in issue the averments of the answer, and affirmatively alleges that the lien of the attachment ³⁵⁵ and judgment in the action of Meyer against Brooks, so far as it affected the property now in controversy, was abandoned at the time the execution was issued on the judgment in 1897, because the attorney for Meyer then directed the sheriff not to sell such property for the reason that it was of less value than the amount due the plaintiff on his mortgage. A decree was rendered in favor of the plaintiff as prayed for in the complaint, and the defendants appeal.

The important questions on this appeal are (1) whether the attachment lien in the action of Meyer v. Brooks, 29 Or. 203, 54 Am. St. Rep. 790, 44 Pac. 281, was waived or lost by the failure to make a proper entry of the judgment in the judgment lien docket; and, if not, (2) whether the plaintiff's rights under his mortgage were, as against the subsequent lien of Meyer's attachment, merged in the legal title acquired by him through E. C. Brooks.

1. The statute provides that the sheriff's certificate of the attachment of real property shall be by such officer delivered to the county clerk of the county in which the attached property is situate (B. & C. Comp., sec. 301), and that such clerk shall immediately file the same in his office and record it in a book to be kept for that purpose, and thereupon "the lien in favor of the plaintiff shall immediately attach to such real property" described therein (B. & C. Comp., sec. 303), and

that if judgment be recovered by the plaintiff, the court shall order and adjudge the attached property to be sold to satisfy plaintiff's demand: B. & C. Comp., sec. 309. The proceeding by attachment is, therefore, in the nature of a proceeding in rem. It is against the particular property. The attaching creditor thereby acquires a specific lien upon the attached property which ripens into a judgment against the res when the order of sale is made. Such ^{also} a proceeding is, in effect, a finding that the property attached is an indebted thing, and a virtual condemnation of it to pay the owner's debt. The statute does not provide the length of time an attachment lien shall continue after the rendition of the judgment, and it must therefore necessarily continue until the debt is paid, or sale is had under execution issued on the judgment, or until the judgment is satisfied, or the attachment discharged or vacated in some manner provided by law. The validity or continuation of an attachment lien is not made dependent upon the entry of the judgment in the judgment lien docket.

2. A levy and sale under an execution issued on a judgment may be made without the judgment being docketed at all.

3. A judgment itself, however, is no lien upon real property until docketed, but the lien acquired by an attachment remains and may be enforced, and the sheriff's certificate filed with the county clerk and recorded by him informs parties dealing with the debtor of the attaching creditor's claim upon the property as effectually as does the docketing of a judgment in the lien docket. It is optional with the creditor whether a judgment is docketed at all. If it is not properly entered in the judgment lien docket, the creditor has no general lien on the real property of the defendant, and the rights of bona fide purchasers and lien creditors subsequent to the judgment and prior to the seizure of property under execution issued thereon are in no way affected by the judgment. But the failure to docket the judgment does not waive or suspend the lien acquired by the previous attachment and order of sale.

4. In the case under consideration, there could have been no benefit to Meyer in entering the judgment in the judgment lien docket. The action brought by him was against a non-resident. There was, therefore, no personal judgment against the defendants, and it would not have become a general lien if it had been docketed. The only remedy of Meyer was against the specific property. His lien thereon was acquired

by the attachment, and, in the absence of a statute to the contrary, ³⁵⁷ continued during the period an execution could issue on the judgment: *Bank of California v. Cowan* (C. C.), 61 Fed. 871; *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686; *Floyd v. Sellers*, 7 Colo. App. 498, 44 Pac. 373; affirmed, 24 Colo. 484, 52 Pac. 674.

5. But it is argued that Meyer waived and abandoned his specific lien upon the property in controversy because his attorney directed the sheriff not to sell it under a previous execution. The plaintiff had no knowledge of this fact at the time he purchased the property, and therefore could not invoke the doctrine of estoppel as against Meyer. Besides, there is no proof that the attorney had authority to waive the lien, or that he intended to do so. The evidence is that he directed the property not to be sold at that time because in his opinion it was not then worth as much as the amount of plaintiff's mortgage, and the costs and expenses of the sale could not have been realized out of it. We think, therefore, that Meyer's attachment and judgment are still a valid and subsisting lien upon the property, and may be enforced by execution.

6. The remaining question is whether such attachment and judgment take precedence over the prior mortgage of plaintiff or rather whether such mortgage was merged in the legal title acquired by him from E. C. Brooks, and was thereby satisfied. Mergers are not favored in equity. When a lesser and a higher estate meet and coincide in the same person they will be kept separate when equity and justice require it, 'unless there is an expressed intention to the contrary. "It is only in those cases," says Mr. Justice Lord, in *Watson v. Dundee Mtg. & T. I. Co.*, 12 Or. 474, 8 Pac. 548, "where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist, that in equity the term is merged. But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. . . . In the absence, then, of an express intention to the contrary, the intention to keep the two estates separate will be implied and presumed, when it is for the interest of the party that they should be kept separate. It will not do, then, ³⁵⁸ as was said by Elliott, J., to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although

all the essential elements of a technical merger combine in the particular case." It is consequently said by Mr. Pomeroy that "where a mortgagee takes a conveyance of the land from the mortgagor or from the grantee of the mortgagor, if the transaction is fair, the presumption of an intention to keep the security alive is very strong. It is generally for the interests of the party in this position that the mortgage should not merge, but should be preserved to retain a priority over other encumbrances. As the mortgagee acquiring the land is not the debtor party bound to pay off either the mortgage or the other encumbrances on the land, there is nothing to prevent equity from carrying out his presumed intent, by decreeing against a merger": 2 Pomeroy's Equity, 3d ed., sec. 793.

Now, the mortgage of the plaintiff was prior in time and right to the lien of Meyer's attachment, and it was therefore manifestly to the interest of the plaintiff that it should not be extinguished as against any subsequent lien by the conveyance to him of the legal title to the mortgaged property, and as there was no express intention of a merger, a court of equity will, in order to prevent an injury to him, keep the two estates separate and distinct: *Watson v. Dundee Mtg. & T. I. Co.*, 12 Or. 474, 8 Pac. 548, and *Floyd v. Sellers*, 7 Colo. App. 498, 44 Pac. 373, 24 Colo. 484, 52 Pac. 674.

7. But it is said the mortgage is now barred by the statute of limitation and cannot be foreclosed. This, however, is not strictly a proceeding to foreclose a mortgage, but rather a suit by the owner in fee of real property, who is in possession thereof, against one who is claiming or asserting some adverse claim or lien thereon, to have such right or claim determined, and is therefore not barred by the statute of limitation: *Meier v. Kelly*, 22 Or. 136, 29 Pac. 265.

8. Again, it is said that the plaintiff does not, by the prayer of his complaint, ask to have his mortgage restored as against ³⁵⁹ the Meyer judgment. The complaint sets up the facts out of which the equities in favor of the plaintiff arise and contains a general prayer for relief. This is sufficient to enable the court to award such a decree as the law and the facts afford: *Rutenic v. Hamaker*, 40 Or. 444, 67 Pac. 196.

The decree of the court below will, therefore, be reversed, and one entered here directing the sale of the property in controversy and the distribution of the proceeds among the several parties interested therein according to their rights as set out in this opinion.

The Docketing of Judgments as a condition precedent to the creation of a lien is discussed in the note to Western Savings Co. v. Currey, 87 Am. St. Rep. 665.

The Merger of Estates is the subject of a note to Forthman v. Deters, 99 Am. St. Rep. 152.

MORTON v. OREGON SHORT LINE RAILWAY COMPANY.

[48 Or. 444, 87 Pac. 151, 1046.]

WATERCOURSE—Defense Against Swollen Stream.—The swollen current of a river during floods is a part of the stream, and not surface water against which a land proprietor may combat as he would oppose a common enemy to the injury of other proprietors. (p. 831.)

WATERCOURSE—The Terms "Dam," "Jetty," "Dike," and "Embankment" Defined and Distinguished.—An embankment or dike is a structure of earth or other material usually placed upon the bank of a stream or near the shore of a lake or bay and extending across low land to higher ground, forming a continuous bulwark or obstruction to water, and designed to keep it without the inclosure thus formed. A dam is a structure erected in and usually extending across the entire channel at right angles to a stream, and intended to retard the flow of water. A jetty is a kind of dam intended to deflect the current, so as to deepen the channel or to form an eddy below the obstruction in which sediment may be deposited, thereby extending and protecting the bank. (p. 832.)

WATERCOURSE—The "Channel" of a Stream is the passage-way between the banks through which the water flows; it may include the flow of water between an island and a bank of the stream. (p. 833.)

WATERCOURSE—Courts Take Judicial Notice of the laws of nature governing the effect on riparian lands of deflecting the waters of a swollen stream by the construction of a jetty. (p. 834.)

WATERCOURSE—The construction of a jetty in a river by a railroad company to protect its property in times of high water, which jetty, by deflecting the current of the stream or shoaling its waters, injures a lower proprietor, is unlawful and will be enjoined. (pp. 832, 834.)

W. R. King and W. H. Brooke, for the appellant.

P. L. Williams, S. F. Dietrich and A. N. Soliss, for the respondent.

⁴⁴⁴ **MOORE, J.** This is a suit by J. A. Morton against the Oregon Short Line Railway Company, a corporation, to enjoin the maintenance of obstructions to the flow of water in a stream. The complaint states, in substance, that the plaintiff is the owner of certain ⁴⁴⁵ real property in section

28, township 18 south, of range 47 east, in Malheur county, which land lies west of and borders on the Snake river; that in 1904 the defendant built above such premises in the west channel of the stream certain dams which deflected the water, depositing sediment in the channel, and shoaling it so as to prevent the operation of plaintiff's private ferry-boat from his land to an island in the river, and also depriving his arid land of water from the river for subirrigation; that these obstructions caused another channel to form in such a direction as to force a current directly against the bank of his land, cutting away a wide margin thereof, and, if such encroachment is permitted to continue, it will force a channel through a depression in his premises, making an island of a part thereof to his irreparable injury, to redress which he has no plain, speedy or adequate remedy at law. The answer denied the material allegations of the complaint, and averred, in effect, that in 1883 the defendant built its railroad through Malheur county on the right of way now occupied thereby and thereafter maintained its roadbed and track, operating trains thereon for the benefit of the public; that at the time the railroad was constructed the water of Snake river, during each freshet, flowed through a swale situated between the roadbed and the west channel of the river, and the floods in that stream have cut and are cutting away the bank near the track, thereby endangering the roadbed to such an extent that the defendant was compelled to build the obstructions complained of, to prevent its property from being destroyed; and that the swale is the so-called channel referred to in the complaint as the west channel of the river, but that such swale is, and at the time the railroad was constructed was, at least three hundred feet west of the west channel of Snake river. The reply having put in issue the allegations of new matter in the answer, the cause was referred, and from the testimony taken the court made certain findings and dismissed the suit, from which decree the plaintiff appeals.

⁴⁴⁶ The transcript shows that the plaintiff is the owner of the real property mentioned, and that his land borders on the west bank of the Snake river. The township referred to was surveyed in 1874, and the field-notes thereof, a copy of which was offered in evidence, show that the left bank of the river, as meandered, then intersected the south boundary of section 33 at a point sixty-eight and thirty-five hundredths

chains west of the southwest corner of that section, and extended northwesterly by a curved line to a point west, but near the center, of section 33; thence, by a similar line northeasterly, to a point east of the northeast corner of that section; thence westerly and northerly by a curved line to a point west of, but near the center of, section 28; and thence northeasterly to a point two and eighty hundredths chains east of the northeast corner of the latter section. A sketch of the margin of the river as indicated will disclose that when the government survey was made, the stream flowed around a peninsula over which the boundary between sections 28 and 33 extended. The defendant, in 1883, constructed its railroad from Huntington, Oregon, southerly through the premises hereinbefore described, and also through adjoining land on the south, now owned by H. M. Plummer. The defendant offered in evidence a blue-print of the locus in quo, reduced to a scale of four hundred feet to the inch, which indicates the original course of the river as meandered, the line of the railway as constructed, and other data. It appears from this plat that the railroad was built about fourteen rods west of the meander line at the bend near the center of section 28, and about fifty-two rods west thereof at the curve near the middle of section 33. An extraordinary freshet in Snake river in 1894, cut across the base of the peninsula a new channel, which extends northeasterly over what theretofore had been a meadow. Prior to such change, a large part of the river below the peninsula flowed in a channel that separated plaintiff's land from Datey Island, east of his ⁴⁴⁷ premises; but, after such flood, the greater volume of water flowed east of that island. Immediately north of section 33, but south of Datey Island, the change in the channel of Snake river formed a large sandbar, constituting an island, the surface of which was above the ordinary stage of water. The bar is separated from the left bank of the river by a narrow channel which extends northerly, and is also severed from Datey Island by a broader channel that extends northwesterly, the waters of which unite and flow by plaintiff's premises.

The freshet adverted to and the annual floods in the river have washed away the left bank of the stream in sections 28 and 33, nearly to the east line of the right of way of the railroad, and, to prevent further injury therefrom, the defendant placed several hundred carloads of rock along the margin

of the river; and in 1903, with Plummer's consent, it built, where the swale had been, five jetties that extend from the bank down stream at an acute angle with the thread thereof. These obstructions were made by driving parallel rows of piling about twelve feet apart, and filling the intervening space with brush and rock. The lower jetty is about two hundred and fifteen feet long, and extends nearly across the channel west of the sandbar at the head thereof. The other jetties are from fifty to seventy-five feet in length. Another extraordinary freshet in 1904 caused the bank of plaintiff's land, for a distance of about half a mile, to be washed away to the depth of one hundred feet or more, whereupon he instituted this suit, and, at the trial, offered testimony tending to show that the lower jetty prevented the water from flowing in the channel west of the sandbar, thereby permitting the current in the channel between the bar and Datey Island to flow nearly at right angles against his bank, damaging it; that the closing of the channel west of the sandbar caused sediment to be deposited, shoaling the channel east of his land, and preventing him from operating, by force of the current, a ferry-boat which he maintained for his own use from his premises to Datey Island, a part of which he held by lease from year to year, and another part thereof was claimed by his son as a homestead where cattle were pastured in which he had an interest; and that if the lower ⁴⁴⁸ jetty be maintained, the diminution of water in the channel will prevent the subirrigation of his land, which is arid, and will also prevent the water in the channel north of the sandbar to cut into a swale on his premises, thereby forming a new course through his land and creating an island.

The testimony relating to the injury which it is claimed will result to plaintiff's land by the maintenance of the lower jetty, though given by persons living in the vicinity of his premises, who are acquainted therewith, know the character of the soil, and the effect thereon of freshets in the river, consists of the opinions of several witnesses, and it is possible that the disastrous consequences which they predict may not eventuate. It was stipulated that three civil engineers who were employed by the defendant would, if present, testify that in the early spring of 1905, they made accurate measurements of the left bank of the river through the plaintiff's premises, setting stakes along the margin of the stream, and that returning to his land in the latter part of July,

after the annual freshet had subsided, they found that no part of the bank had been washed away during that season, but that the water in the river in 1905 was not as high as it was the preceding year. The foregoing is deemed a fair statement of the material facts involved, and, based thereon, the question to be determined is whether or not the jetties can legally be maintained where they are built. The defendant's counsel insist that the river having suddenly changed its channel in 1904, thereby endangering the railroad track, their client, to protect its property, was authorized to restore the flow of the stream to its original bed, and hence the decree should be affirmed.

1. It has been held that the person across whose land a freshet in a natural stream suddenly causes a new channel to be formed may, within a reasonable time, restore the flow of water to its original bed: *Farnham on Waters*, sec. 491; *Mathewson v. Hoffman*, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349.

2. It will be remembered that the defendant built the jetties into the river from the bank of Plummer's land with his consent, and, as he is a riparian proprietor on the new channel, the ⁴⁴⁹ railway company, as his licensee, secured such right to change the flow of the current as he possessed: *Slater v. Fox*, 5 Hun, 544.

3. An examination of the blue-print referred to shows that the upper jetty is built nearly half a mile below the original meander line of the river where it commenced to cut the new channel, and as the barriers complained of do not force the water around the peninsula, they were evidently constructed to prevent injury to the railroad grade by deflecting the current. Instead, therefore, of attempting to restore the stream to its ancient channel, the defendant, by building the jetties, has in fact recognized the new way as the true watercourse, and tried to confine it to the bed as at first made. The swollen current of Snake river during floods is nevertheless a part of that stream at the place where the jetties are built, and not surface water, within the accepted meaning of that term, against which a land proprietor may combat as he would oppose a common enemy, though he thereby injures the real property of others: *Price v. Oregon R. R. Co.*, 47 Or. 350, 83 Pac. 843.

The defendant's counsel, in support of the decree rendered, cite the case of *Gulf C. & S. Ry. Co. v. Clark*, 101 Fed. 678,

41 C. C. A. 597, upon the authority of which the trial court evidently relied. In that case a railroad company, to protect its roadbed, a part of which had been washed away by the gradual change of the channel of a river, built dikes some distance from the bank of the stream on what was formerly solid ground, to restore the current to its original channel. These dikes encroached upon the channel as it existed when they were built, and deflecting the current a subsequent freshet in the river washed away part of the land of a riparian proprietor, who, in an action to recover the damages sustained, secured a judgment, in reversing which the circuit court of appeals says: "A riparian owner may construct necessary embankments, dikes or other structures to maintain his bank of the stream in its original condition, or to restore it to that condition, and to bring the stream back to its natural course; and, if it does no more, other riparian owners upon the opposite or upon the same side of the ⁴⁵⁰ stream can recover no damages for the injury his action causes them." In that case, as the means adopted to prevent the roadbed from injury from encroachments of the channel consisted of dikes, the term "other structures" referred to in the opinion quoted evidently means similar formations, and not jetties placed in a stream to deflect its course. The conclusion reached in the case adverted to is at variance with the rule announced in *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165, where it was held that though a riparian proprietor was authorized to protect the bank of his land from injury from the encroachment of a natural stream, he could not, without incurring liability, erect any structure for that purpose which would injure the property of others. These cases illustrate the conflict that exists in respect to this important subject. Which rule is founded on the better reason, or supported by the greater weight of judicial utterance, is not necessary to a decision herein.

The words "embankment" and "dike," when used to represent the means employed to prevent the inundation of land, are synonymous, and mean a structure of earth or other material usually placed upon the bank of a stream or near the shore of a lake, bay, etc., the ends of which extend across low land to higher ground, forming a continuous bulwark or obstruction to water, and designed to keep it without the inclosure thus formed. A "dam," however, is a structure, composed of wood, earth or other material, erected

in and usually extending across the entire channel at right angles to the thread of the stream, and intended to retard the flow of water by the barrier or to retain it within the obstruction. A "jetty" is a kind of a dam, usually built in the manner hereinbefore described, and intended to deflect the current so as to deepen the channel or to form an eddy below the obstruction in which sediment may be deposited, thereby extending and protecting the bank.

4. Assuming, without deciding, that an embankment may be built by a riparian proprietor to prevent his land from being submerged in extraordinary freshets, we think a jetty cannot be classed as "other structures," specified in the case relied upon, and that when they, by deflecting the current or by shoaling ⁴⁵¹ the water, injure a lower riparian proprietor, the author of the obstructions violates the maxim, "*Sic utere tuo, ut alienum non laedas.*" One of the issues to be tried is the identity of the watercourse west of the sandbar at the head of which the long jetty is built. "The channel," says a distinguished text-writer, "is the passageway between the banks through which the water of the stream flows": Farnham on Waters, sec. 417. This definition was undoubtedly intended to apply only to the entire uninterrupted space occupied by water flowing between well-defined banks. The description of a channel, as given by the learned author, is broad enough, however, to include the flow of water between an island and a bank of a stream, and hence the exact meaning of the word embraces the passageway that was obstructed by the defendant's lower jetty. As the blue-print shows this to be a watercourse which is indicated by the explanatory words "Very swift and shallow," and shows the passageway to be the most westerly route, we have no doubt that it is, as alleged in the complaint, the west channel of the Snake river.

5. It appears from the transcript that the lower jetty was intended to close this entire channel, but that the water, deflected by the angle of the barrier, washed the sand from the outer end of the obstruction, permitting a part of the current to continue in the bed of the stream west of the sandbar, but causing the greater volume to flow east thereof. As a jetty is a species of dam, and the lower obstruction deprives a riparian proprietor of the accustomed flow of water in the channel of the stream, is the deprivation of the right which is incident to the estate such an injury as will authorize the

granting of the relief sought? The plaintiff and his witnesses express the opinion that if the water is permitted to flow in the west channel, it will continue its course along the bank of his land and diverge the current, which otherwise strikes his premises at nearly right angles. This consensus of opinion is not based on observations as to the effect of the water at the line of injury to plaintiff's land during the flood of 1904, but the consequences assumed, though speculative, seem so reasonable and dependent upon the ⁴⁵² laws of nature, of which a court will take judicial notice, that we are forced to the determination that injury must necessarily result to plaintiff's premises, and to his property rights incident thereto, if another freshet should occur in the river. The conclusion thus reached makes such a case as entitles the plaintiff to equitable intervention, but, as the lower jetty is the only one of which he seriously complains, that obstruction only will be ordered abated.

6. The defendant's objections to the plaintiff's right to institute this suit and to prosecute this appeal not being deemed important, the decree is reversed, and one will be entered here requiring the defendant, within three months from the entry of a mandate herein in the lower court, to remove the long or lower jetty; the plaintiff to recover his costs and disbursements in both courts.

ON MOTION TO MODIFY DECREE.

MOORE, J. 7. After the opinion was announced in this case the defendant's counsel moved to modify the decree rendered in this court so as not to require the entire demolition of the long jetty, insisting that the retention of a part thereof will not injure the plaintiff's premises, and will afford some protection to the railroad embankment from erosion from the water. It is impossible to determine from the evidence before us whether or not the motion interposed should be allowed, and, this being so, the cause, upon the payment by the defendant of the costs and disbursements taxed, will be remanded, with directions to take testimony upon this question, and, if it shall appear therefrom to the trial court that any part of the long jetty can be allowed to remain without injury to the plaintiff's premises, to enter a supplemental decree to that effect, but if this cannot be done, to deny the motion.

Reversed.

The Right of a Land Owner to Accelerate or diminish the flow of water to or from the lands of another is the subject of a note to *Mizell v. McGowan*, 85 Am. St. Rep. 707. If a levee is built in or across a stream, whereby its waters are diverted from their usual course and made to flow against and upon the land of a lower proprietor, he is entitled to recover for resulting injuries: *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237.

The Overflow Waters of a Stream at times of ordinary flood do not cease to be a part of the stream and become surface water, unless so separated from the stream that it will not return hereto: *Uhl v. Ohio River R. R. Co.*, 56 W. Va. 495, 107 Am. St. Rep. 968; *Fordham v. Northern Pac. Ry. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729.

HAINES v. CONNELL.

[48 Or. 469, 87 Pac. 265, 8 Pac. 872.]

ATTACHMENT—Priority Over Unrecorded Deed.—An attachment levied in good faith upon land previously conveyed by an unrecorded deed takes precedence, under the Oregon statutes, over the conveyance. (p. 837.)

ATTACHMENT—Unrecorded Deed—Burden to Show Good Faith.—When, in a suit involving the priority of an attachment over a prior unrecorded deed, the attaching creditors, by the allegations of their answer, assume the burden which the law casts on them of showing their good faith and want of notice in levying the attachment, a failure to deny such allegations in the reply is an admission of their truth. (p. 838.)

ATTACHMENT—Caption to Certificate.—It is not necessary that a certificate of attachment should have a caption stating the title of the cause and the names of the parties, if such matters are stated in the body of the certificate. (p. 839.)

W. M. Langley & Son, for the appellants.

W. H. Hollis and S. B. Huston, for the appellee.

⁴⁷⁰ **BEAN, C. J.** This is a suit by E. W. Haines against J. W. Connell, sheriff, and J. F. Schoch to remove a cloud from a title, and comes here on an appeal from a decree in favor of the plaintiff. ⁴⁷¹ On April 22, 1902, F. T. Kane was the owner of the southeast quarter of section 11, township 2 north, range 5 west. On that day he attempted to convey the same by warranty deed to the plaintiff, but, by mistake, the land was described as being in range 4 instead of 5. The deed was not recorded until July 11, 1904, and about that time plaintiff discovered the mistake in the description, and, after having it corrected, had the deed re-recorded on July 19th. The land was and is wild land, and not in the possession of anyone. On July 1, 1904, before the deed to Haines had been recorded, the defendant Connell's

predecessor in office, as sheriff of Washington county, levied, or attempted to levy, upon the property under a writ of attachment issued in an action brought against Kane by J. F. Schoch, by making and filing in the proper office a certificate of attachment as follows:

"State of Oregon,
County of Washington—ss.

"I, J. W. Sewell, Sheriff of Washington County, Oregon, do hereby certify that by virtue of a writ of attachment issued out of the Circuit Court of the State of Oregon for the County of Washington, upon the 30th day of June, A. D. 1904, in a cause therein pending, wherein J. F. Schoch is plaintiff and F. T. Kane is defendant, said writ being in favor of said plaintiff and against the property of said defendant, and directed to me, the Sheriff of Washington County, I did on the 1st day of July, 1904, at the instance of the above-named plaintiff, attach the following described real property of the within named F. T. Kane, to wit: Lot 1, block 31, Forest Grove; lot 9, block 1, West Portland Heights; southeast quarter of section 11, township 2 north, range 5 west of Willamette Meridian, all said property being in Washington County, Oregon.

"In Witness Whereof I have hereunto set my hand this 1st day of July, A. D. 1904, at 10 o'clock a. m.

"J. W. SEWELL,
"Sheriff of Washington County, Oregon."

The plaintiff thereafter, and before the action of Schoch v. Kane had passed to judgment, commenced this suit to enjoin and restrain the defendants from further proceeding under the attachment, and for a decree canceling the same, on the ground that it tended to cloud his title. The complaint alleges that the ⁴⁷² defendants had notice of the plaintiff's interest at the time of the levy of the attachment. This averment is denied by the answer. For an affirmative defense the answer sets up the attachment proceeding in detail, and alleges that the attachment was caused to be levied by Schoch, the attaching creditor, in good faith, and without notice that the property had been transferred to the plaintiff, or to any other person, or that plaintiff claimed any interest or title, legal or equitable, therein. This allegation is not denied by the reply, and there was no evidence given on the trial by either party concerning a knowledge or want of knowledge of

plaintiff's interest in the property by the attaching creditor at the time of the attachment. Plaintiff had decree in the court below, and the defendants appeal.

It is contended by defendants that the deed from Kane to the plaintiff was intended as a mortgage to secure the payment of money, and therefore conveyed no interest or title in the property to Haines, and hence will not support a suit to remove a cloud from title; and also that this suit was prematurely brought because the action of Schoch v. Kane, in which the writ of attachment issued, had not passed to judgment at the time it was commenced. In view of the conclusion we have reached as to the merits of the controversy, it is not necessary to examine these questions, although they are important.

1. The deed from Kane to the plaintiff had not been recorded at the time of the levy of the attachment issued in the action of Schoch v. Kane, and more than five days had elapsed since the date of its execution, and, therefore, the attachment, if valid, will take precedence over such deed, if such attachment was made in good faith and without notice of plaintiff's rights: ⁴⁷³Boehreinger v. Creighton, 10 Or. 42; Riddle v. Miller, 19 Or. 460, 23 Pac. 807; Meier v. Hess, 23 Or. 599, 32 Pac. 755; Dimmick v. Rosenfeld, 34 Or. 101, 55 Pac. 100; Osgood v. Osgood, 35 Or. 1, 56 Pac. 1017; Security S. & Trust Co. v. Loewenberg, 38 Or. 159, 62 Pac. 647.

2. It is claimed, however, that the attachment is void, because the certificate of the sheriff, as filed with the county clerk, did not contain as a caption thereto the title of the cause or the names of the parties. The statute provides: "Real property shall be attached as follows: The sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff; and deliver the same to the county clerk of the county in which the attached real estate is situated": B. & C. Comp., sec. 301.

The certificate in question admittedly contains in the body thereof all the essential requirements of the statute. It states the title of the case by giving the name of the court in which the action was pending, the names of the parties, a description of the property attached, and states that it was attached at the instance (which is equivalent to suit) of the plaintiff, and is, therefore, in our opinion, sufficient. There is no requirement in the statute that the title of the cause and the names

of the parties shall be stated as a heading or caption to the certificate, as required by section 67 in the case of a complaint. The statute provides that a complaint shall contain (1) the title of the cause, specifying the name of the court and the names of the parties plaintiff and defendant; (2) a plain and concise statement of the facts constituting the cause of action; and (3) the relief demanded; which would seem to contemplate that these requisites should be stated in the order named, notwithstanding which it has been held that the stating of the names of the court and of the parties in the caption of a complaint is a formal, and not a jurisdictional matter: *Adams v. Kelly*, 44 Or. 66, 74 Pac. 399; *Smith v. Watson*, 28 Iowa, 218; *Hill v. Thaxter*, 3 How. Pr. 407; *Van Namee v. Peoble*, 9 How. Pr. 198. The statute regulating the attachment of real ⁴⁷⁴ property provides what the certificate shall contain, but does not require that the essential matters shall be set out in any particular order, and it seems to us that a certificate is clearly sufficient which states such matters in the body thereof without giving to it the formality of a heading or caption.

3. When a certificate of attachment attempts to state the title of the cause and the names of the parties in a caption, it must state them correctly, and an error therein is not cured by a subsequent recital in the body of the certificate: *McDowell v. Parry*, 45 Or. 99, 76 Pac. 1081. But where no caption is used, it is enough if the essential facts required to be stated appear in the body of the certificate.

4. It is next contended that the burden was on the defendants to show that the attachment was levied in good faith, and without notice or knowledge of plaintiff's interest in the property, and this seems to be the logical effect of the former decisions of this court: *Rhodes v. McGarry*, 19 Or. 222, 23 Pac. 971; *Laurent v. Lanning*, 32 Or. 11, 51 Pac. 80.

5. But here the defendants have assumed such burden by stating in their answer facts necessary to make them purchasers in good faith, and these allegations are not denied by the reply. The want of such denial is an admission of their truth, and no proof was required. It is said that because the complaint alleges that the defendants had notice of the plaintiff's claim to the property at the time the attachment was levied, and this averment is denied by the answer, the question of defendants' good faith was thus made an issue in the cause, and it was not necessary for plaintiff to deny the

affirmative plea of a bona fide purchaser set up by the answer. The denial of the averments of the complaint did not entitle defendants to make the defense of a bona fide purchaser. That was an affirmative matter which they were required to plead in their answer, notwithstanding the allegations of the complaint: *Rhodes v. McGarry*, 19 Or. 222, 23 Pac. 971. And since they were required to plead facts constituting them bona fide purchasers, it would necessarily follow that such facts must be regarded as true, unless denied by ⁴⁷⁵ the plaintiff, and an averment of the complaint cannot be treated as such a denial.

It follows from these views that defendants' attachment takes precedence over the rights acquired by the plaintiff by his deed from Kane, and the complaint must be dismissed.

Reversed.

ON MOTION FOR REHEARING.

BEAN, C. J. 6. Counsel is in error in supposing that the court held that the requirement of the statute that a certificate of attachment should contain the title of the cause is a nullity. The holding is that such a certificate, if without a caption, is sufficient if it contains in the body thereof "the title of the cause and the names of the parties," and otherwise complies with the statute. In short, that it is not necessary that the certificate should have a caption stating the title of the cause and the names of the parties, but it is enough if it contains in the body thereof all the essential requirements of the statute. Nor does the decision conflict with *McDowell v. Parry*, 45 Or. 99, 76 Pac. 1081. In the *McDowell* case it was held that, where a certificate of attachment purports to state the title of the cause and the names of the parties in a caption, it must state them correctly; and a failure to do so is fatal to the attachment. This case holds that, where no caption is used, the certificate is sufficient if the essential facts required by the statute appear in the body thereof.

The petition for rehearing is denied.

The Lien of an Attachment or judgment does not, as a rule, extend beyond the actual interest of the debtor at the time of the levy of the attachment or the rendition of the judgment. It is therefore subject to prior unrecorded transfers of the property. The creditor is not a bona fide purchaser, for he has parted with nothing for his security: *Burke v. Johnson*, 37 Kan. 337, 1 Am. St. Rep. 252; *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 66; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 938; note to *Flint v. Chaloupka*, 117 Am. St.

Rep. 777. In Oregon, however, the statutes provide: "From the date of the attachment until it is discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached": 1 Bellinger & Cotton's Codes, 302.

WILMOT v. OREGON RAILROAD COMPANY.

[48 Or. 494, 87 Pac. 528.]

RAILROADS—Duty to Fence Track—Station Grounds.—The statutory duty of a railroad company to fence its tracks does not extend to depot grounds, because the purposes for which they are used and the public convenience are inconsistent with the obligation to fence at that point. (p. 842.)

RAILROADS—Duty to Fence Depot Grounds.—Whether it is the duty of a railway company to fence its right of way at its depot grounds is a question of law for the court. (p. 843.)

RAILROADS—Unfenced Depot—Killing of Stock.—Where the law requires railroad companies to fence their tracks except at depot grounds, the question whether unfenced land where animals killed by a moving train entered the right of way is a part of such grounds is for the jury, when the evidence is conflicting and such that different inferences may be drawn therefrom. (p. 843.)

RAILROAD—Depot Grounds Defined.—The depot or station grounds of a railway company is the place where passengers get on and off the trains and freight is loaded and unloaded, including all grounds reasonably necessary or convenient to that purpose, together with necessary tracks, switches, and turnouts for handling and making up trains, storing cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station. (p. 843.)

RAILROADS—Station Grounds—Evidence of What are.—Where grounds have been appropriated, surveyed and set apart by a railway company for station or depot purposes, it affords strong, if not conclusive, evidence that their boundaries and extent are such as and no more than are necessary and proper, and their limits should not be curtailed or extended by the court or jury unless in a very clear case. (pp. 843, 844.)

RAILROADS—Killing of Stock—Contributory Negligence.—In an action against a railroad company for killing horses, the question whether their owner was guilty of contributory negligence in turning them out to graze upon uninclosed land near the depot is for the jury. (p. 844.)

G. W. P. Joseph and T. M. Dill, for the appellants.

W. W. Cotton and A. C. Spencer, for the respondent.

495 BEAN, C. J. This is an action to recover the value of four horses killed by the moving trains of the defendant on an unfenced portion of its track, but which the plaintiffs claim and allege should have been fenced.

The complaint states a cause of action for common-law negligence, and also under the statute making a railway company ⁴⁹⁶ liable for stock killed on an unfenced track. The court below, in accordance with the doctrine approved in *Harvey v. Southern Pac. Co.*, 46 Or. 505, 80 Pac. 1061, required plaintiffs to elect upon which cause of action they would proceed, and they elected to rely upon the statutory liability. The defense is that the animals entered upon the track at the depot grounds of the defendant, and that plaintiffs were guilty of such contributory negligence in suffering and permitting them to run at large at the place where they were killed as will bar a recovery. The defendant owns and operates a railroad from Portland to the eastern boundary of the state. Bridal Veil is a station between Portland and The Dalles, used principally for the shipment of lumber. It consists of station grounds, a depot building, sidetracks, switches and turnouts necessary and proper for the handling of the business at that point. A switch or sidetrack used by it in the transaction of its business leaves the main track at a point two hundred or three hundred feet east of the depot building, and, passing south of such building, intersects the main track again about eighteen hundred feet west thereof. Along this sidetrack are situated the planing-mill, lumber-yards, sheds and other buildings of the lumber company. In 1902 the defendant constructed on the north side of the main track a passing track three thousand feet long, which commences about seven hundred or eight hundred feet west of the depot building and opposite the lumber platform of the lumber company and extends about two thousand two hundred feet east of the depot. About one hundred feet east of this passing track the defendant constructed a cattle-guard, with fences connected therewith on either side. From this point east the track is fenced, but it is not inclosed between the cattle-guard and the west end of the depot grounds. The plaintiffs live and are in business at Bridal Veil. On the evening of April 11, 1904, they turned their horses out to graze on the uninclosed lands south of the depot, as they had been accustomed to do for some time. During the night the horses strayed onto the track of the defendant, and were killed by its moving trains. The evidence tended to show that the horses entered upon the track west of the east end of the passing track, but were run down and killed east of the cattle-guard. The court below directed a nonsuit on

⁴⁹⁷ the ground that the place of entry was within the depot grounds of the defendant and at a place it was not required to fence.

1. The statute makes a railroad company liable for the value of stock killed by its moving trains, engines or cars, upon or near an unfenced track (B. & C. Comp., sec. 5139), and is broad enough to include animals killed at the depot grounds. It has, however, been held that the statute did not extend to depot grounds because the purposes for which they are used and the right of public convenience are inconsistent with the obligation to fence at that point: *Moses v. Southern Pacific Co.*, 18 Or. 385, 23 Pac. 498, 8 L. R. A. 135; *Sullivan v. Oregon Ry. & Nav. Co.*, 19 Or. 319, 24 Pac. 408.

2. The question for decision upon the trial, therefore, was whether the place where the animals of the plaintiffs entered upon the track of the defendant was within or without the depot grounds. If within the depot grounds, the plaintiffs cannot recover in this action; but if not, defendant is liable under the statute unless the plaintiffs were guilty of contributory negligence. The parties differ radically as to whether the question thus presented is one of law or of fact. The plaintiffs claim that it was a question of fact, and should have been submitted to the jury, while the defendant insists that it was a matter of law for the court. The rule is, we take it, that whether a railway company shall fence its track at its depot grounds is a question of law, and, if the testimony shows that animals entering upon such grounds are injured or killed by moving trains, the owner cannot recover under the statute, and the liability of the company is for the court: *Moses v. Southern Pac. Co.*, 18 Or. 385, 23 Pac. 498, 8 L. R. A. 135; *Eaton v. Oregon Ry. & Nav. Co.*, 19 Or. 371, 24 Pac. 413; *Eaton v. McNeill*, 31 Or. 128, 49 Pac. 875; *Harvey v. Southern Pac. Co.*, 46 Or. 505, 80 Pac. 1061. But it is often a disputed question as to whether a certain point constitutes a part of the depot grounds, and if the evidence is conflicting or different inferences may be drawn from it, the question is for the jury, and not the court. Mr. Elliott says: "While it is purely a question of law whether or not a railway company shall fence ⁴⁹⁸ at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is a question of fact whether a certain point constitutes part of the depot grounds or whether the erection of a fence at any particular

place would interfere with the company's employes in the performance of their duties": 3 Elliott on Railroads, sec. 1202.

In *Grosse v. Chicago & N. W. R. Co.*, 91 Wis. 482, 65 N. W. 185, the unfenced portion of the right of way was half a mile in length, and extended north beyond a switch, which was fourteen hundred feet from the depot building. At a highway crossing a short distance south of the switch it was customary to load and unload freight. Between such crossing and the switch, plaintiff's colts came upon the right of way and were killed, and it was held that it was a question for the jury whether the place of entry was a part of the depot grounds. In *Rhines v. Chicago & N. W. R. Co.*, 75 Iowa, 597, 39 N. W. 912, it was held that whether that part of the company's ground which was not the ordinary place of receiving or delivering freight, but where freight of a single shipper was handled, should be left unfenced, was a question of fact for the jury. And in *Dinwoodie v. Chicago, M. & St. P. Ry. Co.*, 70 Wis. 160, 35 N. W. 296, it was likewise held to be a question of fact whether the defendant's right of way at a point sixty rods from the station building where there was a sidetrack in addition to the main track was necessary and convenient and actually used for loading and unloading freight so as to make it a part of the depot grounds, thus relieving the company from the duty of fencing it. And in *Bean v. St. Louis, I. M. & S. Ry. Co.*, 20 Mo. App. 641, it was ruled that where a cow was killed adjacent to a railroad station and at a place used by the railroad for switching purposes in connection with its station grounds, the court could not declare as a matter of law that the company was not bound to fence its track at that point: See, also, *Indiana Ry. Co. v. Hale*, 93 Ind. 79; *Chicago & E. I. Ry. Co. v. Modesitt*, 124 Ind. 212, 24 N. E. 986; *McDonough v. Milwaukee & N. Ry. Co.*, 73 Wis. 223, 40 N. W. 806.

3. The depot or station grounds of a railway company is the place where passengers get on and off the trains and where ⁴⁹⁹ freight is loaded and unloaded, and includes all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches and turnouts thereon or adjacent thereto for handling and making up trains, storage of cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station: 3 Words and Phrases, 2005 et

seq.; 9 Am. & Eng. Ency. of Law, 2d ed., 367; *Grosse v. Chicago & N. W. Ry.*, 91 Wis. 482, 65 N. W. 185; *Grondin v. Duluth S. S. & Atl. Ry. Co.*, 100 Mich. 598, 59 N. W. 229.

4. And where grounds have been appropriated, surveyed and set apart by the railway company for station or depot purposes, it affords very strong, if not conclusive, evidence that their boundaries and extent are such as, and no more, than are necessary and proper, and their limits should not be curtailed or extended by the court or jury unless in a very clear case: 3 Elliott on Railroads, sec. 1194; *Chicago & G. T. Ry. Co. v. Campbell*, 47 Mich. 265, 11 N. W. 152; *McGrath v. Detroit, M. & M. Ry. Co.*, 57 Mich. 555, 24 N. W. 854; *Rabidon v. Chicago & West. M. Ry. Co.*, 115 Mich. 390, 73 N. W. 386, 39 L. R. A. 405.

Now, there was no evidence in this case that the place where the plaintiffs' horses entered upon defendant's track was within the limits of the station grounds as set aside and designated by the defendant, or within such grounds as hereinbefore defined, and therefore the court could not declare, as a matter of law, that defendant was not required to fence its track at such point. The north track constructed by the defendant in 1902, so far as the evidence shows, was intended to be used for the passing of trains, and was in no way connected with, or necessary to, the use of the depot grounds; nor indeed, that it was on such grounds. We think, therefore, that the question whether the point where the horses entered was within the depot grounds was a question for the jury, and should have been submitted to them.

5. A claim is made that plaintiffs were guilty of contributory negligence in turning their horses out to graze upon the unclosed ⁵⁰⁰ lands near the depot, but whether this was such contributory negligence under the circumstances as will defeat a recovery was for the jury: *Moses v. Southern Pac. Co.*, 18 Or. 385, 23 Pac. 498, 8 L. R. A. 135; 2 Thompson on Negligence, sec. 2004.

Judgment reversed and new trial ordered.

The Obligation of a Railroad Company to Fence its track as required by statute is absolute, save where there is some exception by implication based upon public policy, necessity, or convenience: Marengo v. Great Northern Ry. Co., 84 Minn. 397, 87 Am. St. Rep. 369; *Terre Haute etc. Ry. Co. v. Williams*, 172 Ill. 379, 46 Am. St. Rep. 44.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PITTSBURG'S PETITION.

[217 Pa. 227, 66 Atl. 348.]

CONSTITUTIONAL LAW—Extra Session of Legislature—Proclamation.—If, after the governor has issued a proclamation convening the General Assembly in extra session to meet on a day specified to consider legislation upon certain designated subjects, it occurs to him that other subjects than those specified should be passed upon by the legislature, he may lawfully issue another proclamation fixing the same time for the meeting of the General Assembly as was fixed in the first, and designate other subjects for its consideration. (p. 848.)

CONSTITUTIONAL LAW—Extra Session of Legislature—Subject Within Proclamation.—A statute enabling cities in close proximity to be united, providing for the consequences of the consolidation, the temporary government of the consolidated city, and the payment of the debts of such united cities is within the scope of the proclamation of the governor calling an extra session of the legislature for the purpose of considering legislation to enable cities in close proximity to be united in one municipality. (p. 848.)

CONSTITUTIONAL LAW—Consolidation of Cities—Special Legislation.—It is purely a legislative matter to determine what cities may be consolidated, and a statute making contiguity or close proximity a condition of the right to consolidate does not attempt to regulate the affairs of any special city and is not unconstitutional as special legislation. (pp. 849, 850.)

CONSTITUTIONAL LAW—Consolidation of Cities—Special Legislation.—A statute enabling cities that are contiguous or in close proximity to consolidate, if general in form and substance, is not unconstitutional as special legislation or arbitrary classification, although at the time of its passage there are only two cities in the state to which it can apply. (p. 853.)

CONSTITUTIONAL LAW—Consolidation of Cities—Due Process of Law.—A statute enabling contiguous cities to consolidate is not contrary to the national constitution guaranteeing due process of law, in that it permits the qualified electors of the larger city to overpower or outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of its qualified voters or electors. (p. 853.)

CONSTITUTIONAL LAW—Consolidation of Cities—Extending Term of Office.—A statute enabling cities to consolidate, and which will have the effect of extending the term of councilmen in one of them, is not invalid as violating a constitutional provision that “no law shall extend the term of any public officer.” (p. 856.)

W. A. Stone, H. Henderson, W. C. Gill and E. Rogers, for the appellants.

D. T. Watson, W. B. Rodgers, J. M. Freeman and J. R. McCreery, for the appellee.

²²⁸ BROWN, J. On November 11, 1905, the governor of the state called the general assembly into extraordinary session, to meet January ²²⁹ 15, 1906, for the consideration of legislation upon seven subjects mentioned in his proclamation. The first was “To enable contiguous cities in the same counties to be united in one municipality in order that the people may avoid the unnecessary burdens of maintaining separate city governments.” On January 9, 1906, he issued what he regarded as a second proclamation, for he entitles it a “proclamation.” In it, after calling attention to the approaching extraordinary session, he designates additional subjects for the consideration of the General Assembly at said session, one of them being “To enable cities that are now or may hereafter be contiguous or in close proximity, including any intervening land, to be united in one municipality, in order that the people may avoid the unnecessary burdens of maintaining separate municipal governments. This fourth subject is a modification of the first subject in the original call, and is added in order that legislation may be enacted under either of them, as may be deemed wise.”

The extraordinary session was held, and at it there was passed, among other bills, the one now under consideration, approved February 7, 1906 (Pub. Laws, 7). It is entitled, “An act to enable cities that are now, or may hereafter be, contiguous or in close proximity, to be united, with any intervening land other than boroughs, in one municipality; providing for the consequences of such consolidation, the temporary government of the consolidated city, payment of the indebtedness of each of the united territories, and the enforcement of debts and claims due to or from each.” The first section is as follows: “That wherever in this commonwealth, now or hereafter, two cities shall be contiguous or in close proximity to each other, the two, with any intervening land

other than boroughs, may be united and become one by annexing and consolidating the lesser city, and the intervening land other than boroughs, if any, with the greater city, and thus making one consolidated city, if at an election, to be held as hereinafter provided, there shall be a majority of all the votes cast in favor of such union." The question of the consolidation of the cities of Pittsburg and Allegheny was submitted to their lawful voters at an election held in pursuance of the provisions of the act, the result being a majority of twenty thousand one hundred and fifty-four in favor of consolidation out of a total vote in the two cities of fifty-five thousand five hundred and fifty-four.²³⁰ Following this election the court of quarter sessions of Allegheny county, on June 16, 1906, "ordered, adjudged and decreed that the city of Allegheny, the lesser city, be annexed to and consolidated with the city of Pittsburg, the greater or larger city, so that they form but one city and in the name of the city of Pittsburg." From this decree an appeal was taken to the superior court. The court affirmed it (Pittsburg's Petition, 32 Pa. Sup. Ct. 210), and from the decree of the superior court we have this appeal, raising the question of the constitutionality of the act of 1906.

One of the objections of the appellants to the constitutionality of the act is that it is not legislation upon a subject designated in the proclamation of the governor calling the special session. This objection is based upon article 3, section 25 of the constitution, which provides that "When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session."

In the original proclamation the legislation to be considered by the General Assembly on the subject of the consolidation of cities was confined to contiguous cities in the same county, and it may be well contended that, as the mandate of the constitution is imperative that the legislature, at the special session, shall pass no law upon any subject not designated in the call, the act is technically without it. The act is not for the consolidation of two contiguous cities, situated in the same county, but for that of any two, contiguous or in close proximity, wherever situated. They may be in different counties. We need not, however, pass upon the sufficiency of the first proclamation to sustain the act as being one of the subjects of legislation designated in it.

Whether the General Assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called and what notice of the call is to be given are also for him alone. The constitution is silent as to these matters, and wisely so, for emergencies may arise, such as riots, insurrections, widespread epidemics, or general calamities of any kind, requiring the instant convening of the legislature, and, in the power given to the governor to call it, no time for the notice is too short, if it can reach the members²⁸¹ of the General Assembly; and with telephones and telegraphs the uttermost portions of the commonwealth can at any time be reached between the rising and setting of the sun. In this connection it may be noted as significant that the governor is not even required by article 4, section 12, empowering him to call the General Assembly together in extraordinary session, to do so by a proclamation, though the same section does provide that in calling the Senate in extra session for the transaction of executive business he must do so by proclamation. A proclamation, however, is the proper mode of calling the legislature together, and the constitution seems to so contemplate, for section 25, article 3, speaks of "the proclamation." But no form of proclamation is to be followed, and if, after one has been issued, it occurs to the executive that other subjects than those designated in it should be passed upon by the legislature, he can unquestionably issue another, fixing the same time for the meeting of the General Assembly as was fixed in the first, and designate other subjects for its consideration. This is, perhaps, what ought to be done when other subjects than those designated in the proclamation are to be brought to the attention of the legislature in special session, and if it had been done in the present case, the objection of the appellants now under consideration would hardly have been raised. This, however, is not for the judiciary, but for the governor alone. The proclamation of January 9th is in effect a second proclamation. In it the governor adopts his original call for the purpose of fixing the time of the meeting of the General Assembly, and then proceeds to designate the additional subjects of legislation. With every presumption in favor of compliance by the executive with the constitutional requirements relating to his calling the General Assembly together in extraordinary session, it would be judicial hypercriticism to declare his second notice or proclamation

insufficient to authorize the legislature to pass the act under consideration.

The objection most strenuously urged against the act is that it violates article 3, section 7 of the constitution, which prohibits the legislature from passing any local or special law regulating the affairs of cities. Is the act local or special, or is it general in its provisions? It provides for the consolidation of two cities of no particular class, but of any two cities belonging to ²³² the same or different classes, wherever situated and whether in the same or in different counties. Whether two cities ought to be consolidated is purely a legislative question, and the general act providing for their consolidation is not forbidden legislation. The power of the legislature to provide for the annexation of cities is not limited by the constitution. What it may not now do is to regulate, by a local or special law, the affairs of cities. In providing for the annexation of any two cities of the commonwealth there is no regulation of the affairs of any two particular cities. The provision is simply for such annexation, if certain natural, and what may be regarded as necessary, conditions exist. The legislature might, without transgressing the constitution, have provided for the consolidation of cities without regard to the distance between them, absorbing in their consolidation all the intervening space, whether occupied by boroughs or townships. But such legislation is not conceivable, for the common sense of the people would not tolerate it. In providing for annexation in the act of 1906 the legislature restrained its power to authorize consolidation in declaring that certain natural, reasonable and necessary conditions must exist, if two cities are to be united. No arbitrary, unnecessary conditions are prescribed; only reasonable ones are required. The legislature might have limited the right to consolidate to contiguous cities, but it extended this right to those in close proximity. While it is purely a legislative matter to determine what cities may be consolidated, it is clear that only those ought to be which are contiguous or in close proximity; and, in making contiguity or close proximity a condition of the right to consolidate, the affairs of no special city are regulated.

By the act any two cities contiguous or in close proximity may become one. No two contiguous cities are excluded from its provisions, and any two in close proximity may be united, provided that by their union they do not absorb and swallow up an intervening borough. The act does not prevent the

consolidation of cities in close proximity between which there may be a borough, if that borough does not embrace all the land between them, or does not extend as a wedge throughout the entire length of the same. If a borough occupies all the land between two cities, they cannot be united without ²³³ absorbing such borough. They touch at no point, are not contiguous, and are not in close proximity within the meaning of the act. But if the land between two cities in close proximity is not wholly occupied by a borough, or a borough does not extend throughout the entire length as a wedge in such intervening land, and there is township land connecting the cities at any point or points, they can be consolidated under the act, the township land becoming a part of the new city and the borough retaining its municipal existence. The act is, therefore, one, and must be so read, permitting the consolidation of any two cities, contiguous or in close proximity, of whatever class and wherever situated, provided only that in such consolidation the separate existence of an intervening borough shall not be destroyed. If a borough occupies all of the space between them, they are not contiguous, and, though in close proximity, they cannot physically unite without wiping out the borough. But if a borough should not be all of the intervening land, they can unite by absorbing that land which the borough does not occupy—the intervening land beyond the borough limits—leaving it to continue its independent municipal life. At this point it may be well to call attention to the clear line of demarcation between this act and that of April 20, 1905 (Pub. Laws, 221), known as the Cook law, and declared to be unconstitutional in *Sample v. Pittsburg*, 212 Pa. 533, 62 Atl. 201. It provided for the annexation of a smaller to a larger city when the two were contiguous and situated in the same county, and, for the purposes of the act, it was declared that “cities separated by a stream, river or highway shall be included under the term ‘contiguous.’ ” So clearly was it bald, special local legislation that it might well have been labeled an act for the consolidation of the cities of Pittsburg and Allegheny. In forceful language our Brother Mestrezat demonstrated the act to be local and special, and we quote at length from his opinion, for the converse of what he says of it is true of the act of 1906: “The title of the act clearly indicates the subject of the enacting part and discloses the local and special features of the statute. It shows that the act was not intended to apply to any two cities of

the state so as to make it general in its operation, but conditions are imposed which restrict its application to certain cities, thereby depriving ²³⁴ the other cities of the state of the benefit of its provisions. The statute is operative 'where two cities are contiguous and in the same county.' Its provisions can be invoked to annex only two cities and when they are thus situated. Two cities of this description may be annexed to each other and all others are excluded from the operation of the statute. As we take judicial cognizance of the municipal divisions of the state as well as of their location, we know, as averred in the bill and not denied in the answer, that the cities of Allegheny and Pittsburg in Allegheny county are the only two contiguous cities in the state, and that there are no two contiguous cities in any other county in the state. The act, therefore, is limited in its operation to these two cities, and the effect or result of the legislation is the same, and the act as clearly special, as if the names of the two cities had been written in the statute instead of the paraphrase used in the description of the cities subject to its operation.

"The identification of the two cities intended to be affected by the act is also aided by the provisions of the statute that 'for purposes of this act, cities separated by a stream, river or highway shall be included under the term "contiguous." ' ' Aside from the contention that the act applies only to cities separated by a stream, river or highway, this clause of the act clearly suggests the two Allegheny county cities as the cities subject to its operation. We judicially know that Pittsburg and Allegheny are the only two cities in the commonwealth separated by a stream or highway, and the fear that that fact would render those cities not contiguous within the meaning of the statute moved the promoters of this legislation to further identify them by inserting this clause in the act. This feature should not, and cannot be, ignored when the court is called upon to test the constitutionality of the statute, as it clearly earmarks the legislation as local and special.

"There is no merit in the contention that at some time in the future there may be two other cities which may become contiguous, and, in that event, can be consolidated under the provisions of the act. With a knowledge of the facts, known to the legislature as well as to the court, this is not within the range of probability, but a possibility so remote that it must be excluded from consideration in determining the constitutionality ²³⁵ of the statute. It could only occur if a commun-

ity adjacent to any of the cities of the state should become sufficiently populous to enable it to become a city, and should take the necessary legal steps to make itself a city and subject to the operation of the act, or if the boroughs lying between and connecting certain cities of the state should, by the requisite legal proceedings, be annexed to those cities or form themselves into a city and thereby connect two existing cities so as to make the act operative. These are simply contingencies within the realm of speculation, and entirely too remote to support legislation otherwise repugnant to the constitutional mandate.

"The statute requires any two cities desirous of availing themselves of its provisions to be located in the same county. This confines the act in its operation to cities within certain territorial limits and brings it within the domain of special legislation, prohibited by the constitution. The act does not attempt to classify cities on any basis whatever. It provides simply that it shall operate upon two cities situated in the same county. It therefore excludes from its provisions and denies its privileges to all cities separated by a county line, or which are not wholly within the same county, although occupying contiguous territory. All cities whose boundaries are coterminous with the county line are perpetually excluded from the operation of the statute, although other cities may adjoin them at different parts of their boundaries. This distinction made in the act between the cities of the commonwealth is not based upon necessity nor upon any grounds which the law recognizes as justifying classification. Its effect is to restrict the operation of the statute to two cities located in the same territorial division of the state; and when considered in the light of the conceded facts, it fixes with unmistakable certainty the two cities to be consolidated under its provisions. A clearer or more palpable attempt to evade the constitutional prohibition against special and local legislation is not disclosed in any of the numerous bills introduced in the General Assembly since the adoption of the present constitution, not excepting the statute, which Mr. Justice Paxson in *Commonwealth v. Patton*, 88 Pa. 258, very properly characterized as 'classification run mad.' "

²³⁶ But what of this act? Its operation is not confined "to cities within certain territorial limits." It is general in its terms and refers to no classes of cities, but to all cities. It does not provide that it shall operate only "upon two cities

situated in the same county." It does not exclude "from its provisions and deny its privileges to all cities separated by a county line, or which are not wholly within the same county," but extends them to any two cities within the commonwealth having natural, reasonable and necessary conditions of consolidation.

Counsel on both sides of this controversy have cited many cases on the classification of cities. By the appellant we are referred to them as requiring us to declare the act local and special, regulating the affairs of cities, and, for the appellee, they are cited to sustain it; but as classification is not involved in the act, we need not consider the cases on that subject. That it applies now, and for the present can apply, only to the cities of Pittsburg and Allegheny, and that it was passed for them, can make no difference if the legislation is general in form and substance, and is not within the prohibition of the constitution: *Wheeler v. Philadelphia*, 77 Pa. 338. Individual needs and requirements are responsible for much legislation which now must be general, and, when it is so, the causes that lead to it, or the particular purposes it is to serve at the time of its enactment, have nothing to do with its constitutionality. It may meet at the time of its passage the wants of but one community, but if in the future it will meet these same wants in all other communities, the legislation is as general as if at the time of its passage there had been no special reason calling for it.

The method of consolidation is said to be unconstitutional, because it is not by "due process of law," "in that it permits qualified electors of the larger city to overpower or outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified voters or electors of the lesser city." This is completely answered in the following extract from the opinion of the learned judge speaking for the superior court: "In determining whether this act is contrary to that 'due process of law' guaranteed by the federal constitution, in providing that the electors of the consolidated ²³⁷ territory shall determine the question of annexation of the lesser city instead of permitting the majority of the electors of the lesser city to decide it, we have many adjudicated cases which warrant the action taken by the legislature. The words 'due process of law,' as taken from *Magna Charta* and incorporated in the constitution, 'were intended to secure the individual from the arbitrary exercise of the powers

of government, unrestrained by the established principle of private rights and distributive justice.' In each particular case the words mean 'such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs': Cooley's Constitutional Limitations, 434. The people of the municipalities do not define for themselves their own rights and privileges and powers, nor is there any common law which draws a definite line of distinction between the powers which may be exercised by the state and those which must be left to the local governments: 2 Kent's Commentaries, 278, 279. The general principle is that when the state is acting in the sovereign capacity, it acts for the whole commonwealth, and private rights and interests must yield to this paramount object. Private rights may be, and very frequently are, interfered with by either the legislature, executive or judicial departments of the government, and the creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the state of that general control over their citizens which they before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, and overrule their legislative action whenever it is deemed unwise, impolitic or unjust, and even abolish them altogether in the legislative discretion and substitute those which are different: Cooley's Constitutional Limitations, 228. Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people ²³⁸ must be looked to, to right through the ballot-box all these wrongs: Ervine's Appeal, 16 Pa. 256, 55 Am. Dec. 499; Cooley's Constitutional Limitations, 228-230. The act in question has been passed with all the forms and ceremonies requisite to make it a valid statute. The legislature was properly convened and kept well within its powers in regulating the affairs of cities by a general law in accord with the requirements of the constitution.

"It follows under the law of the land that neither the municipality as such or any of the persons residing therein have

any vested rights in the municipal powers, as against the state which created the municipality. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency—subject to legislative control ‘which may destroy its very existence with the mere breath of arbitrary decision’: *Philadelphia v. Fox*, 64 Pa. 169.”

Authorities everywhere support the foregoing. In our own cases may be found the following: “The city of Philadelphia is beyond all question a municipal corporation—that is, a public corporation created by the government for political purposes, and having subordinate and local powers of legislation: 2 Kent’s Commentaries, 275; an incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government: Glover on Municipal Corporations, 1. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency, having no vested right to any of its powers or franchises; the charter or act of erection being in no sense a contract with the state, and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. *Sic volo, sic jubeo*; that is all the sovereign authority need say. This much is undeniable, and has not been denied. . . . The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change”: Sharswood, J., in *Philadelphia v. Fox*, 64 Pa. 169. “Municipal corporations are agents ²³⁹ of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed and the extent of their powers determined by the legislature, and subject to change, repeal or total abolition at its will. They have no vested rights in their office, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania. . . . The fact that the action of the state toward its municipal agents may be unwise, unjust, oppressive, or violative of the natural or politi-

cal rights of their citizens, is not one which can be made the basis of action by the judiciary": *Commonwealth v. Moir*, 199 Pa. 534, 85 Am. St. Rep. 801, 49 Atl. 351, 53 L. R. A. 837.

Finally, in a supplemental brief, counsel for appellant contend that section 10 of the act, which will have the effect of extending the term of councilmen in the city of Allegheny, violates article 3, section 13 of the constitution, which provides that "no law shall extend the term of any public officer." This objection does not seem to be very seriously pressed, and as to it we need only repeat what was said in *Commonwealth v. Moir*, 199 Pa. 534, 85 Am. St. Rep. 801, 49 Atl. 351, 53 L. R. A. 837: "The substitution of a new system for one under which government has been previously carried on is always accompanied with some shifting of offices and duties, and some inconvenience. To reduce this to a minimum by temporary adjustment of the changes is the province of a schedule. In well-considered legislation which involves such changes a schedule of temporary expedients is usually and properly added, and the expedients provided would need to be very clearly unconstitutional to justify a court in overturning them. In *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199, it is said: 'In an exchange of offices there may naturally be some overlapping of terms and duties, and if, in the legislative view, the need for a controller was immediate, but the existing terms of the auditors prevented his present assumption of all the duties that would finally pertain to his office, it would not have been unwise, certainly not unconstitutional, to meet the case by a temporary expedient.' "

The assignments of error are all dismissed and the decree of the superior court is affirmed at appellants' costs.

The Principal Case was Carried by Writ of Error to the supreme court of the United States, and is reported under the title of *Hunter v. City of Pittsburgh*, 28 Sup. Ct. Rep. 40. The judgment of the state supreme court was affirmed, Mr. Justice Moody delivering the opinion as follows:

"The plaintiffs in error seek a reversal of the judgment of the supreme court of Pennsylvania, which affirmed a decree of a lower court, directing the consolidation of the cities of Pittsburgh and Allegheny. This decree was entered by authority of an act of the General Assembly of that state, after proceedings taken in conformity with its requirements. The act authorized the consolidation of two cities, situated with reference to each other as Pittsburgh and Allegheny are, if, upon an election, the majority of the votes cast in

the territory comprised within the limits of both cities favor the consolidation, even though, as happened in this instance, a majority of the votes cast in one of the cities oppose it. The procedure prescribed by the act is that after a petition filed by one of the cities in the court of quarter sessions, and a hearing upon that petition, that court, if the petition and proceedings are found to be regular and in conformity with the act, shall order an election. If the election shows a majority of the votes cast to be in favor of the consolidation, the court 'shall enter a decree annexing and consolidating the lesser city . . . with the greater city.' The act provides, in considerable detail, for the effect of the consolidation upon the debts, obligations, claims and property of the constituent cities; grants rights of citizenship to the citizens of those cities in the consolidated city; enacts that 'except as herein otherwise provided, all the property . . . and rights and privileges . . . vested in or belonging to either of said cities . . . prior to and at the time of the annexation shall be vested in and owned by the consolidated or united city,' and establishes the form of government of the new city. This procedure was followed by the filing of a petition by the city of Pittsburgh; by an election, in which the majority of all the votes cast were in the affirmative, although the majority of all the votes cast by the voters of Allegheny were in the negative; and by a decree of the court uniting the two cities.

"Prior to the hearing upon the petition the plaintiffs in error, who were citizens, voters, owners of property, and taxpayers in Allegheny, filed twenty-two exceptions to the petition. These exceptions were disposed of adversely to the exceptants by the court of quarter sessions, and the action of that court was successively affirmed by the superior and supreme courts of the state. The case is here upon writ of error, and the assignment of errors alleges that eight errors were committed by the supreme court of the state. This assignment of errors is founded upon the dispositions by the state courts of the questions duly raised by the filing of the exceptions under the provisions of the act of the assembly.

"The defendant in error moved to dismiss the case because no federal question was raised in the court below or by the assignment of errors, or, if any federal question was raised, because it was frivolous. This motion must be overruled. The plaintiffs in error claimed that the act of assembly was in violation of the constitution of the United States, and specially set up and claimed in the court below rights under several sections of that constitution, and all their claims were denied by that court. These rights were claimed in the clearest possible words, and the sections of the constitution relied upon were specifically named. The questions raised by the denial of these claims are not so unsubstantial and devoid of all color of merit that we are warranted in dismissing the case without consideration of their merits.

"Some part of the assignments of error and of the arguments in support of them may be quickly disposed of by the application of well-settled principles. We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the state has intrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the constitution of the state and the conformity of the enactment of the assembly to that constitution; those questions are for the consideration of the courts of the state, and their decision of them is final. The fifth amendment to the constitution of the United States is not restrictive of state, but only of national action.

"After thus eliminating all questions with which we have no lawful concern, there remain two questions which are within our jurisdiction. There were two claims of rights under the constitution of the United States which were clearly made in the court below and as clearly denied. They appear in the second and fourth assignments of error. Briefly stated, the assertion in the second assignment of error is that the act of assembly impairs the obligation of a contract existing between the city of Allegheny and the plaintiffs in error, that the latter are to be taxed only for the governmental purposes of that city, and that the legislative attempt to subject them to the taxes of the enlarged city violates article 1, section 9, paragraph 10 of the constitution of the United States. This assignment does not rest upon the theory that the charter of the city is a contract with the state, a proposition frequently denied by this and other courts. It rests upon the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated. It is not said that the city of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it is not true. No authority or reason in support of it has been offered to us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits. This assignment of error is overruled.

"Briefly stated, the assertion in the fourth assignment of error is that the act of assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. The manner in which the right of due process of law has been violated, as set forth in the first assignment of error and insisted upon in argument, is that the method of voting on the consolidation prescribed in the act has permitted the voters of the larger city to

overpower the voters of the smaller city, and compel the union without their consent and against their protest. The precise question thus presented has not been determined by this court. It is important and, as we have said, not so devoid of merit as to be denied consideration, although its solution by principles long settled and constantly acted upon is not difficult. This court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors: *Maryland v. Baltimore & O. R. Co.*, 3 How. 534, 11 L. ed. 714; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. ed. 518; *United States v. Baltimore & O. R. Co.*, 17 Wall. 322, 21 L. ed. 597; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552; *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Jefferson City Gaslight Co. v. Clark*, 95 U. S. 644, 24 L. ed. 521; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 659; *Forsyth v. Hammond*, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41 L. ed. 1095; *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. Rep. 617, 42 L. ed. 1047; *Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. Rep. 383, 43 L. ed. 679; *Worcester v. Worcester Consol. Street R. Co.*, 196 U. S. 539, 25 Sup. Ct. Rep. 327, 49 L. ed. 591; *Attorney General v. Lowrey*, 199 U. S. 233, 26 Sup. Ct. Rep. 27, 50 L. ed. 167. It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained

by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

"Applying these principles to the case at bar, it follows irresistibly that this assignment of error, so far as it relates to the citizens who are plaintiffs in error, must be overruled.

"It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold, and do hold, property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (*Dillon on Municipal Corporations*, 4th ed., secs. 66-66a inclusive; cases cited in note to *State v. Williams*, 48 L. E. A. 465), and it has been held that, as to the latter class of property, the legislature is not omnipotent. If the distinction is recognized, it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based have several times been noticed: *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Meriweather v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Essex Public Board v. Shinkle*, 140 U. S. 334, 11 Sup. Ct. Rep. 790, 35 L. ed. 446; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. Rep. 142, 35 L. ed. 943; *Covington v. Kentucky*, 173 U. S. 231, 19 Sup. Ct. Rep. 383, 43 L. ed. 679; *Worcester v. Worcester Consol. Street R. Co.*, 196 U. S. 539, 25 Sup. Ct. Rep. 327, 49 L. ed. 591; *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. Rep. 245, 50 L. ed. 464. Counsel for plaintiffs in error assert that the city of Allegheny was the owner of property held in its private and proprietary capacity, and insist that the effect of the proceedings under this act was to take its property without compensation and vest it in another corporation, and that thereby the city was deprived of its property without due process of law, in violation of the fourteenth amendment. But no such question is presented by the record, and there is but a vague suggestion of facts upon which it might have been founded. In the sixth exception there is a recital of facts with a purpose of showing

how the taxes of the citizens of Allegheny would be increased by annexation to Pittsburgh. In that connection it is alleged that while Pittsburgh intends to spend large sums of money in the purchase of the water plant of a private company and for the construction of an electric light plant, Allegheny 'has improved its streets, established its own system of electric lighting, and established a satisfactory water supply.' This is the only reference in the record to the property rights of Allegheny, and it falls far short of a statement that the city holds any property in its private and proprietary capacity. Nor was there any allegation that Allegheny had been deprived of its property without due process of law. The only allegation of this kind is that the taxpayers, plaintiffs in error, were deprived of their property without due process of law because of the increased taxation which would result from the annexation—an entirely different proposition. Nor is the situation varied by the fact that, in the superior court, Allegheny was 'permitted to intervene and become one of the appellants. The city made no new allegations and raised no new questions, but was content to rest upon the record as it was made up. Moreover, no question of the effect of the act upon private property rights of the city of Allegheny was considered in the opinions in the state courts or suggested by assignment of errors in this court. The question is entirely outside of the record, and has no connection with any question which is raised in the record. For these reasons we are without jurisdiction to consider it (*Dewey v. Des Moines*, 196 U. S. 78, 25 Sup. Ct. Rep. 176, 49 L. ed. 394), and neither express nor intimate any opinion upon it.

"The judgment is affirmed."

COMMONWEALTH v. DEITRICK.

[218 Pa. 36, 66 Atl. 1007.]

HOMICIDE—Accidental Killing.—Under the plea of not guilty a person accused of murder may show that the killing was accidental, and if the testimony satisfies the jury that the killing was the result of an accident, it should return a verdict of not guilty. (p. 862.)

HOMICIDE—Accidental Killing.—Burden of Proof in homicide cases where the defense of accidental killing is set up does not shift, but rests on the prosecution to show that the killing was willful or intentional. (p. 863.)

CRIMINAL LAW—Affirmative Defense—Amount of Proof.—In criminal cases in which the burden of proof is on the defendant to sustain an affirmative defense set up, it is only necessary to establish it by a preponderance of the evidence, and it is not required that it should be proven beyond a reasonable doubt. (p. 863.)

CRIMINAL LAW—Erroneous Instructions.—If clear error appears in the instructions to the jury upon the vital and controlling defense set up in a criminal case the appellate court cannot say that no harm was done the defendant, and therefore no reversible error was committed. (p. 864.)

F. Ikeler and W. K. West, for the appellant.

H. M. Hinckley and C. P. Gearhart, district attorney, for the appellee.

³⁷ **ELKIN, J.** At the trial in the court below on an indictment charging murder, under the plea of not guilty, the defendant relied upon the defense of accidental killing. The learned trial judge charged the jury as follows: "We further say to you that the burden is upon the defendant Deitrick to convince you beyond a reasonable doubt that the killing of Jones was purely accidental before he should be acquitted upon that ground," and this instruction has been assigned for error.

Under the plea of not guilty the defendant may show that the killing was accidental, and if the testimony satisfies the jury that the killing was the result of an accident, they should return a verdict of not guilty. We are not familiar with any authority which holds that when such a defense is set up the burden rests upon the defendant to show that the killing was accidental beyond a reasonable doubt. Such a rule would shift the burden of proof from the commonwealth, whose duty it is to establish the guilt of the defendant in all cases beyond a reasonable doubt. The defense of accidental killing is clearly distinguishable from that of an alibi or insanity, in which ³⁸ cases it has been held that the burden of proving such defenses is on the defendant. No Pennsylvania cases have been called to our attention in which the exact question raised by this appeal has been decided, but the rule recognized by many text-writers and established in some jurisdictions is that the burden in homicide cases where the defense of accidental killing is set up does not shift, but rests on the commonwealth to show that the killing was willful and intentional.

In *State v. McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384, the court said: "But we do not think that a defense that the homicide was accidental was in any sense an affirmative defense. It is distinguishable from self-defense as a plea which admits an intentional killing and sets up as a justification a necessity to kill in order to save the accused

from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional." In *State v. Cross*, 42 W. Va. 253, 24 S. E. 996, the rule was laid down in the following language: "Accidental killing is not such matter of defense as throws on the accused the burden of proving it by a preponderance of evidence. It is the duty of the state to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. But when the evidence taken as a whole raises a reasonable doubt in the minds of the jury as to whether the killing was accidental or intentional, they must acquit the accused, for the reason that the state has failed to sustain its case."

This, it seems to us, is the correct rule when such a defense is set up. The burden is always on the commonwealth to prove beyond a reasonable doubt all of the facts necessary to constitute the crime of murder. It is not sufficient to prove the killing alone, or that it was done with a deadly weapon, but such facts must be shown as will warrant a jury in finding that it was intentional or willful. If the killing was accidental, although done with a deadly weapon, it could not be said to be either intentional or willful, and if neither intentional nor willful, the crime of murder is not made out. But even if this should be held not to be the correct rule, the instruction of the learned trial judge cannot be sustained because it is in plain violation of a rule of law in another respect. It is settled law that even in those cases in which the burden of proof is on the defendant to sustain an affirmative defense set up, as, ³⁹ for instance, insanity or an alibi, it is only necessary to establish it by a preponderance of the evidence, and it is not required that it should be proven beyond a reasonable doubt: *Meyers v. Commonwealth*, 83 Pa. 131. In that case the defense was insanity, and the learned court below instructed the jury that they must be satisfied beyond a reasonable doubt that the prisoner was insane at the time the act was committed. This court held that the instruction was too stringent, and threw upon the prisoner a degree of proof beyond the legal measure of his defense, which only required that he must satisfy the jury that he was insane, and that this result flows from the preponderance of the evidence.

The instruction of the learned trial judge relating to the accidental killing was clearly erroneous, and this seems to be conceded, but it is contended that this error was cured by other parts of the charge wherein the jury was instructed

generally that it was the duty of the commonwealth to establish the guilt of the prisoner beyond a reasonable doubt. While we agree with the suggestion of the learned counsel for the commonwealth made at the argument that courts will not be astute to sustain technical objections in the trial of such cases when substantial justice has been accorded the defendant, it, however, has never been held that where clear error appears in the instructions to the jury upon the vital and controlling defense set up, the appellate court can judicially say no harm was done the defendant, and therefore no reversible error was committed.

Judgment reversed and a venire facias de novo awarded.

If Accidental Killing is set up as a defense to murder, it is said not to be an affirmative defense, and the prosecution is required to overcome such plea by a preponderance of evidence and beyond a reasonable doubt: State v. McDaniel, 68 S. C. 304, 102 Am. St. Rep. 661.

FRECH v. LEWIS.

[218 Pa. 141, 67 Atl. 45.]

SALES FOR CASH—Delivery—Passing of Title.—If a contract of sale provides for payment of the purchase price on delivery of the articles sold, and the seller delivers the goods but the buyer fails to pay, the right of property does not pass to the buyer, but remains with the seller, who may, at his option, reclaim the goods. He must exercise such option as promptly as the situation of the parties will allow. Otherwise he must be held to have waived his right, and can only thereafter look to the buyer for the price. (p. 865.)

SALES FOR CASH—Delivery Without Payment—Subsequent Promise to Pay.—In a case of a sale for cash where delivery is made without payment, reliance upon a subsequent promise to pay that leads the seller to refrain from asserting his right to retake the property, is, in itself, a waiver of the right, and makes absolute a delivery which in the first instance was conditional. He cannot thereafter retake the goods, and can look to the buyer only for their price. (p. 867.)

SALES FOR CASH—Delivery Without Payment—Fraud and Artifice practiced by a buyer in a sale for cash, where delivery is made without payment, may excuse delay in attempting to retake the property after delivery, but will not excuse mistaken confidence reposed in the buyer's promises to pay. (p. 868.)

J. H. Morrison, T. J. Grayson and W. McGeorge, Jr., for the appellant.

J. F. Tatem and J. S. Williams, for the appellee.

¹⁴² STEWART, J. The settled doctrine of our cases is to the effect that where the contract of sale provides for payment of the purchase price on delivery of the articles sold, and the seller delivers the goods but the buyer fails to pay, the right of property does not pass to the buyer with the possession, but remains with the seller, who may at his option reclaim the goods. In some jurisdictions the right of property is held to pass with the delivery, unless at the time the right to retake is expressly declared by the seller. We have not gone so far. Our cases proceed on the theory that until payment has been made, or waived, the contract remains executory, and that delivery in such case is not a completion of the contract, except as an intention to so regard it is expressly declared or can fairly be inferred from the circumstances attending. Possession, however, having passed, and the buyer by the act of the seller having been invested with the indicia of ownership, the policy of our law requires that this situation—the possession in one and the right of property in another—shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right in such case to reclaim his goods, but he must do so promptly, otherwise he will be held to have waived his right, and can only thereafter look to the buyer for the price. The only question the present case suggests is, When does this inference of waiver arise? Our authorities admit of but one answer: except when delayed by trick or artifice, the assertion of the right to reclaim the property must follow immediately upon the buyer's default. This ¹⁴³ does not mean that the seller must eo instanti begin legal proceedings to recover the goods; but it does mean that the seller when he discovers that his delivery is not followed by payment as he had the right to expect, is at once put to his election whether he will waive the condition as to payment and allow the delivery to become absolute, or retake property, and that he is to allow no unnecessary delay in making his choice. The object of the law is not to multiply his remedies because of his disappointment. He may not continue to hold his right to the goods, and at the same time hold the buyer as his creditor; one or the other he must relinquish, and do it promptly, or the law will forfeit his right to elect. Continued acquiescence in the buyer's possession of the goods will be taken as a choice on his part to regard the delivery as absolute, notwithstanding the buyer's default. The policy of the law, in requiring promptitude in the asser-

tion of continued ownership of the goods, could easily be vindicated were it necessary. It answers every purpose here to show that the law requires it. In *Leedom v. Phillips*, 1 Yeates, 527, it is said: "When the parties specially agree, it is obvious that the vendor may, by his contract, renounce the benefit of the conditions stipulated, and trust to the good faith of the vendee for a future performance on his part. If one sells goods for cash, and the vendee takes them away without payment of the money, the vendor should immediately reclaim them by pursuing the party, and he may justify the retaking of them by force." This was quoted approvingly in *Bowen v. Burk*, 13 Pa. 146; and it was there added that "where he [the seller] lies by, and makes no complaint in a reasonable time, he consents to the absolute transfer of the property, and the contract is consequently complete against all the world." In *Backentoss v. Speicher*, 31 Pa. 324, reference is made to the case last above cited; what we have quoted from it was there approved, and the necessity for the immediate reclamation of the goods was emphasized. It is there said: "This is the principle that is decisive against the present plaintiff. A sale of goods for cash is, strictly speaking, a sale on condition. The contract is *do ut des*. The condition is more imperative than such as was in this case, but for that reason less easily waived; and yet if the vendor acquiesced in a possession obtained in disregard of the condition, he waives ¹⁴⁴ it; and though he may recover the price by action, he cannot recover the goods in specie. . . . When the plaintiff found his condition disregarded, he should have promptly reclaimed the goods." *Mackanness v. Long*, 85 Pa. 158, is another recognition of the same doctrine, that unless reclamation of the property be made immediately, the title passes to the buyer. These cases and others that might be cited, following the lead of *Leedom v. Phillips*, 1 Yeates, 527, all hold that the duty is upon the seller if he would retain his right to the property to proceed promptly, and we know of no case in which a contrary doctrine is asserted. In some cases the expression "within a reasonable time" is used where the right to reclaim is referred to; but this expression suggests no departure from the rule as declared in *Leedom v. Phillips*, 1 Yeates, 527. By reasonable time is to be understood such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay, or in a delay occasioned by the vain hope and fruitless effort to obtain the

money from the defaulting buyer. When the delay is to be accounted for by the latter consideration, it is accepted as an acquiescence in the delivery and the acceptance of the buyer as a debtor.

Now, for the facts of this case. The contract was that plaintiff was to furnish defendant with two carriages to be paid for on delivery. The first carriage was delivered September 4, 1903, through plaintiff's son, who immediately demanded of the defendant payment for the same. Defendant's response was: "I will be over in a day or two to see your father, and if I do not, I will send him a check in the course of a day or two." He failed to keep his promise; he neither went to see plaintiff, nor did he send the check. Nevertheless, three days after this the other wagon was delivered to him at the same place, while he was absent from home. A week or ten days thereafter the plaintiff demanded payment, and repeated the demand both personally and by letter time and time again, with no better result than to get a note from the defendant which he accepted conditionally, but which he returned because he was unable to get it discounted. Meanwhile defendant was using the carriages, as plaintiff must have known, since he repaired one of them which had been injured in the using. While plaintiff was diligent and persistent in demanding payment, ¹⁴⁵ at no time did he demand a return of the carriages, or in any way assert his right to property in them. His effort was, as he himself testified, to coax the defendant into paying the price. Two months and a half elapsed before he began this action of replevin, which was his first assertion of continued ownership of the property. It was not only too late, but his conduct shows that during all this time he was dealing with the defendant as though the latter was his debtor. His own explanation is that he delayed trusting to the promises of the defendant from time to time to pay the price of the carriages. The title to a chattel passes as fully after a conditional delivery, where possession is allowed to be retained, in consideration of a new promise to pay, as where delivery is preceded by actual payment. The plaintiff was not tricked into delivering the carriages to the defendant; nor was his delay in asserting claim to the property in consequence of any fraud practiced. He reposed confidence in the promise of the defendant, and was disappointed. His disappointment does not restore to him the right of property with which he parted. The court below submitted it to the jury to determine

whether plaintiff by his conduct had waived his right to retake the carriages. The jury found he had not, and gave the plaintiff a verdict for the property. On appeal to the superior court the judgment of the lower court was affirmed. The ground on which the affirmance rested is thus stated by the learned judge who delivered the opinion: "It cannot be said as matter of law that the plaintiff's conduct amounted to a waiver of his right. In view of the repeated promises of the defendant, the plaintiff might well have been misled and induced to postpone proceedings for the recovery of his property. His delay is evidence of a waiver, but it is not conclusive in view of the conduct of the defendant." In this we cannot concur. The reasons for our dissent fully appear in what we have already said. Reliance upon a subsequent promise to pay that leads the seller to refrain from asserting his right to retake the property is in itself a waiver of the right, and makes absolute a delivery which in the first instance was conditional. The right of plaintiff to recover back his property after he had delivered it resulted from the buyer's failure to keep his first promise; his failure to keep subsequent promises to pay could neither prolong ¹⁴⁶ nor revive that right. What defendant did or did not do is a matter that has no place in the inquiry; what the plaintiff did or failed to do is the determining consideration. Fraud and artifice practiced by defendant may excuse delay in attempting a recovery of property after delivery, but not mistaken confidence reposed in defendant's promises.

Judgment is reversed.

**SALES AND DELIVERY, WHEN DO NOT PASS THE TITLE,
THOUGH THE SALE IS NOT EXPRESSLY CONDITIONAL.**

I. Scope of Note, 868.

II. General Principle Controlling, 869.

III. Illustrations.

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I. Scope of Note.

The discussion in this note is restricted to the question of how title to personal property is affected under a sale for cash or cash on delivery, where the vendor parts with the possession without receiving the price. Those questions which arise under that class of conditional sales made on the installment plan and generally by virtue of a written contract, where title to the chattels is expressly reserved in the vendor until the full purchase price has been paid,

will be found treated in the monographic note attached to *Andrews & Co. v. Colorado Savings Bank*, 46 Am. St. Rep. 295.

II. General Principle Controlling.

It may be stated as a general rule, fully established by the cases, that, if goods are sold on condition to be performed immediately, and the vendor makes an actual delivery upon the faith that the condition will be immediately performed, and demands such performance with reasonable speed, and it is refused, no property in the goods passes to the purchaser, but that he simply holds them in trust for the vendor until such payment is made or waived. This rule is clearly stated in the leading case of *Harding v. Metz*, 1 Tenn. Ch. 610, where, after an exhaustive review of the English and American authorities, the court said: "If personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer." And in *Copeland v. Bosquet*, 4 Wash. C. C. 588, Fed. Cas. No. 3212, Washington, Judge, said: "If the sale be for money to be immediately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust the personal credit of the vendee." These two cases, as well as an unbroken line of similar decisions, but sustain the rule laid down in *Benjamin on Sales*, second edition, page 236:

"Where the buyer is by contract bound to do anything, as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods be actually delivered into the possession of the vendee." But while this general rule is universally supported, it is often difficult of application, for the reason that it rests entirely for its support upon the intention of the parties to the agreement.

Mr. Justice Strong, in the *Elgee Cotton Cases*, 89 U. S. 180, 22 L. ed. 163, quoted the general rule above stated with approval, but added: "It must be admitted there is often great difficulty in determining whether a contract is itself a sale of personal property so as to pass the ownership to the vendee, or whether it is a sale on condition to take effect or be consummated only when the condition shall be performed, or whether it is a mere agreement to sell. It is doubtless true that, whether the property passes or not is dependent upon the intention of the parties to the contract."

In determining, therefore, what is the intention of the parties to a sale under a contract for goods to be paid for on delivery, when delivery is made without payment, we must look to the conduct of the vendor in the matter of demanding a fulfillment of the con-

dition of performance, for any action on his part which would show an intention to rely on the personal credit of the buyer would operate as a waiver of the security, and he cannot recover the goods in specie. This is obviously true, for the reason that the law tolerates no such absurdity as allowing one who had parted with the possession of chattels under an agreement of sale to claim title in the goods and at the same time hold the buyer responsible for the price.

The authorities are all agreed that, if an absolute unconditional delivery is made, without exacting performance of the condition, the title passes to the buyer. "When there is a condition precedent attached to a contract for sale and delivery, the title does not vest in the vendee on delivery until he performs the condition, or the seller waives it. An absolute and unconditional delivery is regarded as a waiver of the condition. . . . The vendor, to avoid a waiver of the condition of the sale, must either refuse to deliver the goods, without a performance of the condition, or he must make the delivery at the time qualified and conditional": *Smith v. Lynes*, 5 N. Y. 41. There are no cases announcing a contrary doctrine, but it seems that no express declaration by the vendor of an intent to insist upon performance of the condition is necessary, but that the intention with which the delivery was made is to be inferred from the circumstances and is a question of fact for the jury; for, as was said in *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368: "We do not think, after a conditional bargain has been made and a delivery immediately takes place, upon the expectation that the contemplated security shall be produced, without an express declaration that the delivery is also conditional, that the sale, ipso facto, becomes absolute, because there is an implied understanding that the vendee," etc., "will furnish the security," etc., "as soon as he shall have an opportunity to secure it." And, again, in *Parker v. Baxter*, 86 N. Y. 586, it is stated that "when goods sold to be paid for in cash or notes on delivery are delivered to the purchaser without the cash or notes being demanded at the time, the presumption is that the condition is waived, and that a complete title vests in the purchaser, but that this presumption may be rebutted by proof of such declarations or acts of the parties, connected with the circumstances of the case, as show an intention that the delivery should not be considered complete until performance of the condition, and that the question with what intention the delivery is made, where any doubt arises, is one of fact. An express declaration of an intent to insist upon the performance of the condition is not necessary, but such intention may be inferred from the acts of the parties and the circumstances of the case." To the same effect is *Osborne v. Gantz*, 60 N. Y. 540.

There is another point upon which the authorities are unanimous, namely: that in order for a vendor to avail himself of his lien on chattels sold to be paid for on delivery, he must act with promptitude in demanding a fulfillment of the condition. The language is

some of these cases would seem to require that this demand should be made at the time of the delivery: *Moffatt v. Green*, 9 Ind. 198; *Hudson Trust and Sav. Inst. v. Carr-Curran etc. Co.*, 58 N. J. Eq. 59, 43 Atl. 418; *Smith v. Lynes*, 5 N. Y. 41; *Osborne v. Gantz*, 60 N. Y. 540; *Parker v. Baxter*, 86 N. Y. 586; *Backentoss v. Speicher*, 81 Pa. 324. But these cases admit that the vendor's failure to make such immediate demand is only presumptive evidence that the sale is absolute, and the intention of the parties is a question of fact to be determined from the circumstances, and the fact that such contemporaneous demand did not thereby make the sale *ipso facto* absolute was recognized by Mr. Justice Depue in *Cole v. Berry*, 42 N. J. L. 308: "Payment of the contract price is one of the most usual conditions on which the transfer of title depends. It is generally a condition to be performed simultaneously with delivery. If such be the contract, a waiver of the condition may be presumed from an unconditional delivery, without exacting payment, and in the absence of explanatory proof the property will vest in the purchaser." But while, therefore, these cases cannot be said to change the general rule above stated that the vendor is only required to act with "reasonable speed," they do clearly emphasize the fact that the law will not tolerate any laches on the part of a vendor in demanding a fulfillment of the condition upon which he parted with his possession of goods under an agreement for payment on delivery. It is also an established rule that if a vendor shows an intention to acquiesce in a promise of the purchaser in disregard of the conditions under which the goods were delivered, that he thereby waives the security and the title vests absolutely in the latter: *Neal v. Boggan*, 97 Ala. 611, 11 South. 809; *Martin v. Wirts*, 11 Ill. App. 567; *Frech v. Lewis*, 218 Pa. 141, ante, p. 864, 67 Atl. 45, 11 L. R. A., N. S., 948.

As all of the general principles hereinabove announced depend upon the circumstances which may develop in each particular case, the application of these principles can best be shown by the following illustrations and pertinent comments of the court on the principles involved.

III. Illustrations.

a. When Condition has been Waived by Vendor.—In *Neal v. Boggan*, 97 Ala. 611, 11 South. 809, there was a sale of a number of pieces of cloth to a merchant tailor to be paid for on delivery. The goods were shipped from Boston to Birmingham, Alabama, in separate lots, from September 4th to October 5th, each shipment being accompanied by a bill therefor stating the terms of sale as above. No other demand for payment was made and no claim of title in the goods was asserted by the vendors, though they knew that the goods when delivered were to be used in the purchaser's stock as a merchant tailor. After the last lot of the cloth had been received by the purchaser he asked for more time and offered, if the same was extended, to give security for payment. The seller waited

fifteen days before giving an answer, and then agreed to extend the time and accept secured paper for the price of the cloth. In holding that the title to the goods vested in the buyer the court said: "There can, in our opinion, be no serious doubt on these facts that the actual delivery to the buyer was unconditional as to each assignment, for it is clear, we think, that the cash payment stipulated for was due on each lot as received, and the failure of the sellers, with their knowledge that the goods were to be at once put in trade, to then insist upon payment, or, payment not being presently made, to reclaim the goods, was a waiver of their right to ever do so. But even if this be not true as to the assignments severally, they were certainly remiss after the final assignment, and this, too, with actual information that the goods were being sold by their vendees. What their purposes in the premises were it is not material to inquire further than they were declared at the time, or may be inferred from what they did. 'It is not the secret purpose,' said Colt, J., in *Wigton v. Bowley*, 130 Mass. 352, 'but the intention disclosed by the vendor's acts and declarations at the time which governs.' After knowledge of the disposition being made of the goods by the buyers, and after being assured that the cash payment could not, and would not, be made, it would seem in all reason that, if they had any intention to reclaim the property for condition broken, if they had not consciously waived the right to do so, they would then have taken steps to that end; but instead of this they waited fifteen days, without doing or saying anything, and then wrote, accepting the buyer's offer to secure the purchase money by paper indorsed by certain named persons. From all this there can be no other conclusion than . . . that the seller's original right of reclamation for nonpayment on delivery was effectually waived."

In *Crawford v. Spraggins*, 109 Ala. 353, 19 South. 372, a bill of goods amounting to about six hundred dollars was sold to a merchant July 14th to be paid for one-half cash on delivery, balance in notes. No part of the cash payment was made on delivery and no demand made therefor until September 16th, when one of the vendor's firm, being in the town where the purchaser lived, called on him to arrange the matter and was paid one hundred dollars. On the day before this visit the buyer had sent two hundred dollars to the vendors, and had previously paid a small sum on account to one of the vendors' traveling salesmen. The vendors' right to reclaim the goods for nonpayment of the cash installment of the purchase price was denied, because of their delay in its assertion.

In *Martin v. Wirts*, 11 Ill. App. 567, goods were sold for cash, but were delivered without being paid for. The day after delivery the vendor sent a bill for the purchase price to the buyer, and three days later sent another bill, and six days afterward verbally requested payment of the buyer, which the latter promised to make immediately. In a subsequent suit to replevin the goods it was held that the circumstances showed an intention on the part of the vendor to treat

the purchaser as his debtor, and that the condition of payment in the original agreement was waived, and the absolute title was in the purchaser.

In *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630, a lot of lumber was sold to be paid for on delivery in cash or notes, the lumber to be shipped from Louiseville, Canada, to Portland, Maine. Not more than three days were required to send the bills of lading, and receive the cash or notes from the buyer. Some of the bills of lading were sent by the vendor on November 17th and others on the twenty-fifth and twenty-sixth of the same month. The buyers failed December 7th and an assignment of their property was made on December 10th, at which time the vendors had taken no steps to demand payment. Held, they had waived their right to reclaim the lumber.

In *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368, goods were sold upon the express condition that the buyer should give an indorsed note for the price upon delivery. The goods were delivered without any express reference to the condition, and remained in possession of the vendee for eight days, when they were attached by a creditor of the vendee, and thereupon the vendor brought suit. During this time no claim was made by the vendor for the goods or the note. In deciding that the vendor had waived the condition and lost his right to reclaim the goods, Parker, C. J., said: "The vendor certainly had a right the day after to insist upon his indorsed note or to rescind the bargain, and reclaim the goods. If so, why not two or three days? And if so, the time which elapses is a mere fact from which the jury may infer the intention. Circumstances of business and engagement may account for the delay, and if they do, the right to security or to reclaim the goods, unless sold, as before mentioned, is not impaired. . . . But in the case before us eight days passed between the delivery of the goods and any call for the indorsed note, nor was any intimation made of the security to be given when the goods were delivered by the clerk, who does not appear to have been informed by the vendor of the terms of sale. The latter, however, must have been presumed to know the next day that they had been delivered, and yet he did not send for the note, or give any manner of notice that it was required, until the attachment took place eight days after the sale. We are apprehensive that to establish the right to reclaim under such circumstances would widen the door for fraudulent contrivances, and that afterthoughts respecting conditions will spring up to intercept attaching creditors, when the sale was really unconditional, or at least when the vendor has thought his condition of so little importance as to be willing to abandon it and trust to the credit of the purchaser."

A case similar to the one last cited is that of *Leatherbury v. Connor*, 54 N. J. L. 172, 39 Am. St. Rep. 672, 23 Atl. 684. Here an engine and fittings were sold to a corporation to be paid for by a note on the date of sale and a chattel mortgage to be given on date of delivery. The note was given as agreed and the president of the corporation

stated that the directors of the company would meet the following Monday, at which time he wished the engine delivered, and the mortgage would be executed. The engine was delivered on that day but the mortgage was not executed, and its execution was put off by divers excuses from time to time for upward of a month, when the company became insolvent and was placed in the hands of a receiver, by whom the engine was sold. The vendors began an action of replevin against the purchaser for the engine, but had made no demand for the chattels from the receiver. It was held that the vendor had waived his right to reclaim. "There can be no question under the contract," said the court, "as it was entered into," etc., "between the parties, that the delivery of the chattels sold and the payment for them in the manner specified were intended to be concurrent conditions. The subsequent parol understanding appears to have been rather an arrangement of the details of the execution of the agreement than a modification of it. The agreement did not contemplate an absolute sale without condition; it considered that the vendor would act honestly and presently furnish the mortgage which was the condition of the sale. The delivery did not make the sale absolute, but as an indicia of title raised a presumption that it was absolute, and when the mortgage was not forthcoming, it became the duty of the vendors to pursue their right to recover possession of the chattels with all the reasonable diligence that the circumstances surrounding them would permit, following the buyer at once and without suffering their vigilance to abate. Failure to thus pursue their right while others bought their chattels as the property of the corporation which they had clothed with apparent title constituted a waiver of the concurrent condition that they should have the mortgage, and of any right they had to take the property in the hands of an innocent third person." Whether the vendor's delay in this case would have been a waiver, in an action to reclaim the goods, if they had still been in the hands of the original purchaser, is not decided, but it would seem that it would not.

In *Heller v. Elliott*, 44 N. J. L. 467, the terms of sale were cash on delivery. The buyer failed to pay and resold the goods. The vendor sued out an attachment and had it levied on property of the vendee, and was thereby held to have waived his right to reclaim the goods, for the evident reason that he had elected to hold the buyer personally responsible.

The following three cases, while not denouncing the general principles heretofore stated in this note, go far in sustaining the title of a vendor to whom voluntary possession of chattels has been given upon a conditional promise to pay on delivery, which promise has been broken. Thus, in *Barker v. Baxter*, 86 N. Y. 586, the vendors through a broker sold a quantity of corn to A, B & Co., payment to be cash on delivery. The corn was delivered in boats designated by A, B & Co., and ship's receipts were given to the seller, who refused to deliver them to A, B & Co., without positive

assurance of prompt payment the next day. Upon such assurance the vendor delivered the receipts, together with bills for the corn headed with the condition that the goods billed should not be deemed delivered nor the title passed till paid for, but no reference was made at the time of delivery to this condition. It was held that the delivery of the receipts on the buyer's promise to pay was presumptive evidence of an absolute delivery and giving credit for the price, and the referee's holding that the condition of cash payment had been waived was sustained.

In *Leedom v. Philips*, 1 Yeates (Pa.), 527, sugar was sold to E., cash on delivery. The vendor's porter was directed to place the boxes on the pavement before the store of E., and give notice when he was about to deliver the last box. The sugar was delivered about 9 o'clock in the morning, one of the vendors going with the last load to receive payment. E. was absent when the last load was delivered and the sugar was left on the pavement before his store. About 3 o'clock of the same day E. sold the sugar and it was removed to the store of his vendee. It was held that the vendor could not reclaim the sugar. Said the court: "It appears the boxes were placed before Edwards' door and remained there six hours before they were removed. If the delivery on the pavement was intended as merely conditional, and to depend on an actual payment of the money, the porter should have been informed of it, and he or some one else should have retained the custody, that Edwards might thereby be informed of the only terms on which he could receive possession. This would have qualified and restrained the legal operation of the delivery, and no inconvenience could arise to a fair purchaser who had paid his money for property in the visible possession of Edwards. . . . When the parties specially agree it is obvious that the vendor may, by his contract, renounce the benefit of the condition stipulated and trust to the good faith of the vendee for a future performance on his part. If one sells goods for cash and the vendee takes them away without payment of the money, the vendor should immediately reclaim them by pursuing the party."

In the very recent case of *Frech v. Lewis*, 218 Pa. 141, ante, p. 864, 67 Atl. 45, 11 L. R. A. 948, plaintiff delivered defendant two carriages to be paid for on delivery. One was delivered September 4th and payment immediately demanded. Defendant promised to pay in a day or so but failed to do so. Three days thereafter the second carriage was delivered while the buyer was absent from home. A week or ten days after, the seller demanded payment and repeated this demand, both personally and by letter thereafter, and finally accepted the buyer's note conditionally, but returned it because unable to get it discounted. Plaintiff was diligent and persistent in demanding payment, but never demanded a return of the carriages or asserted any right of property in them except by the commencement of his suit in replevin some two months after the delivery. It was held that the title had vested absolutely in the

vendee, the court being seemingly of the opinion that the condition of sale had been waived both by acceptance of a new promise from the buyer and by the vendor's delay in reclaiming the goods. An action to recover "except when delayed by trick or artifice must follow immediately upon the buyer's default. This does not mean that the seller must so instanti begin legal proceedings to recover the goods; but it does mean that the seller, when he discovers that his delivery is not followed by payment, as he had the right to expect, is at once put to his election whether he will waive the condition as to payment and allow the delivery to become absolute, or retake the property, and that he is to allow no unnecessary delay in making his choice. The object of the law is not to multiply his remedies because of his disappointment. He must not continue to hold his right to the goods, and at the same time hold the buyer as his creditor. One or the other he must relinquish, and do it promptly, or the law will forfeit his right to elect. . . . The title to a chattel passes as fully after a conditional delivery, when possession is allowed to be retained, as when delivery is preceded by actual payment."

b. When Condition has not been Waived.—In *Daugherty v. Fowler*, 44 Kan. 628, 25 Pac. 40, 10 L. R. A. 314, a merchant at Kansas City shipped goods to a merchant at Fort Scott to be paid for "cash on arrival." The goods were received by the buyer November 27th and the freight paid by him. On December 1st he wrote the seller that he was unable to pay for the goods and that they belonged to the seller, and that he placed them in the hands of a responsible party, who would hold them until he could hear from the seller. On the same day the goods were attached by a creditor of the buyer, but it was held that he had acquired no title and the vendor could reclaim in replevin.

In *Stone v. Perry*, 60 Me. 48, goods sold for cash were delivered without payment being made. Three days thereafter the purchasers failed and the vendors began action in replevin to recover the goods. Held, no title vested in the buyer, because it was shown that it was a custom to wait ten days after delivery before demanding payment.

In *Tyler v. Freeman*, 3 Oush. (Mass.) 261, goods were sold on the 11th, to be paid for by a note, but were delivered to the buyer before the terms of sale were complied with. Demand for the note was made three days after delivery, when the purchaser said he would see the vendors and make it satisfactory. Three days after the demand the goods were attached by a creditor of the buyer, but it was held that the vendor had not lost his right to the property and could recover in replevin.

In *Armour v. Pecker*, 123 Mass. 143, A sold goods in Cincinnati to B, who did business in Boston. By the terms of the agreement B was to give his note to A in payment of the goods upon receipt of the goods in Boston; the note, however, to be as of the date the

goods were delivered on the cars in Cincinnati. A sent the note with the goods to B, but B failed to sign it but pledged the goods to C for a valuable consideration, and failed in business, and two days thereafter sent a note to A dated at Boston. Held, B acquired no title and A could replevin the goods. A similar case is that of *Solomon v. Hathaway*, 126 Mass. 482.

In *Strauss v. Hirsch*, 63 Mo. App. 95, the vendors sold thirteen barrels of whisky to Rieger & Co., liquor dealers of Kansas City, for cash on delivery. The whisky was sent from St. Louis with a carload for Furst Brothers, and consigned to a transfer company in Kansas City, and received on the 6th. The transfer company was directed by Furst Brothers to deliver the whisky to Rieger & Co., which was done, and the purchase money was not paid. On the day after delivery Rieger & Co., executed a mortgage on the whisky, the mortgagees taking possession. The vendors sued out writ of replevin and it was held no title had passed to the purchasers. Said the court: "The vesting of title to the goods in the purchaser may be made to depend upon his performance of some condition. And if that be the nature of the transaction, a transfer of the possession, before the performance of the condition, does not pass the title. The condition precedent which the purchaser is required to perform before acquiring the title is the payment of the price. When the condition is expressed, the title does not pass before the payment of the price, although possession is given the purchaser." This case is quoted with approval and followed in *Strother v. McMillan Lumber Co.*, 200 Mo. 647, 98 S. W. 34. In fact this case goes very far in holding that no title passes to the buyer until the condition is performed, even though the vendor agreed that the title should vest in the buyer upon delivery. Here a manufacturer of lumber agreed to sell the output of his mill during a year, title to vest in the buyer immediately upon delivery, but after being graded and measured by the purchaser it should be paid for every fifteen days according to the schedule of prices. The agreement was afterward changed by the parties so that payments could be made every thirty days. On or about September 1st, after the delivery of the thirty days had become complete, the vendor made a demand for payment for the lumber that had been delivered. Payment was refused and the vendor began action in replevin. It was held that title did not vest in the buyer until the payment was made as agreed.

In *Hudson Trust etc. Inst. v. Carr-Curran etc. Co.*, 58 N. J. Eq. 59, 43 Atl. 418, certain machinery was sold a paper-mill company, to be paid for on delivery, one-half in cash and balance in a note. Only a portion of the cash payment agreed upon was paid when the machinery was delivered, but failing to collect the balance after repeated efforts, the vendors accepted a chattel mortgage on the machinery for the balance due. The purchasers had previously given a mortgage on their mill. In a contest between the holders of the prior mortgage and the chattel mortgage given for the purchase

money, it was held that the latter was superior, for the reason that title to the machinery never vested in the paper-mill company, because of its failure to pay the full amount of cash it had agreed to pay when delivery was made.

In *Dows v. Dennistown*, 28 Barb. (N. Y.) 393, certain flour had been sold for cash with an understanding between the parties that payment ten days after delivery would be acceptable to the vendor. Upon failure by the purchaser to pay within the ten days it was held that no title had vested in him. Said the court: "The very terms and import of the arrangement are that there was to be a qualified delivery which was to precede the payment; and it is apparent from the facts in this case that the possession of the goods was intrusted to the vendee for the purpose of enabling him to realize upon them, and thus provide means for the payment of the price. Such an understanding, arrangement or custom cannot, we think, be construed into an absolute transfer of the title of the property, as between the original parties to it, or those who have no greater equity than the original parties."

In *Freeman v. McKean*, 25 Barb. (N. Y.) 474, the sale was for cash on delivery. The goods were delivered December 30th and payment not demanded till January 2d following, when it was refused. It having been shown that it was a custom not to demand payment when goods were sold in this way for two or three days after delivery, it was held that the vendor had not waived the condition by the delay.

In *Schmidt v. Kattenhorn*, 2 Hilt. (N. Y.) 157, goods were sold for cash and delivered without payment being made. Bills for the goods were sent to the buyer the same day they were delivered and followed up by the vendors calling the next day for the money. Not finding the vendees at their place of business, a demand was made of their bookkeeper. Failing to get the money, the vendors sent their clerk, who was told by the vendees to come again in a couple of days, and they would pay. After this, and about five or six days after delivery, the vendors again called and demanded the cash or the goods and both were refused, but payment was offered in two protested bills of exchange drawn by the vendors, with a small sum additional in cash to make up the purchase price. The vendors declined to accept the payment proffered and began suit for damages for wrongful conversion of the goods. It was held there had been no waiver of the condition by the vendors.

A similar ruling to the case just mentioned is found in *Leven v. Smith*, 1 Denio (N. Y.), 571, the vendee having agreed to pay for the goods cash on delivery, but upon demand tendered as payment a note of the vendor with enough cash to cover balance of the purchase, and refusal of the vendor to accept was held not to divest him of his right to recover the goods.

In *Palmer v. Hand*, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392, plaintiff sold defendant a quantity of planking and scantling, to be

paid for when delivered on defendant's dock. The lumber was taken to defendant's dock on a raft by plaintiff about sunrise and he then informed defendant's employes that he had sold it to the defendant. The men began piling the lumber on defendant's dock. Plaintiff left and returned about 4 o'clock in the afternoon, at which time most of the lumber had been piled on the dock. He then forbade the men to pile any more of the lumber, saying that the defendant had absconded. Held, that defendant acquired no title to any of the lumber.

In *Hammett v. Linneman*, 48 N. Y. 399, plaintiff sold coal to defendant to be paid for in cash on delivery, credit having been refused. The coal was delivered and payment demanded three days thereafter and refused. Held, that payment of the price was a condition precedent to vesting title, and that such condition had not been waived by plaintiff.

In *Hill v. McKenzie*, 1 Hun (N. Y.), 110, a quantity of tea was sold to W. & Co. for cash on delivery. W. & Co. refused to receive the teas because they were found to require "cooperage." It was then agreed that the teas should be delivered at W. & Co.'s store, and the vendors would have the cooperage done there. The teas were delivered and the vendor's cooper went to do the cooperage but was prevented by W. & Co. from doing it. On demand for the purchase price, it was refused upon the ground that the cooperage was not done, but it was held that the vendor had not waived the condition as to payment, and that W. & Co. had acquired no title to the goods.

And it has been held that if the vendor uses all possible diligence in demanding payment, that a mere delay in enforcing the demand by suit to reclaim the goods will not operate as a waiver of the condition. Thus in *Paulson v. Lyon*, 26 Utah, 438, 73 Pac. 310, a contract for the sale of chattels was made on September 10th, the goods to be paid for on delivery. They were delivered on November 26th and immediate demand for payment was made, which was repeated on several occasions for a month thereafter, but payment was refused on the ground that a readjustment of the bill was necessary. On December 28th the vendors, having been paid only thirty-seven dollars and fifty cents on a bill amounting to nine hundred dollars, began an action in replevin to recover the goods, and it was held that the delay in beginning the action was not a waiver of the condition, there being no intention of the parties that the title should pass to the purchaser. But compare this case with *Leatherbury v. Connor*, 54 N. J. L. 172, 39 Am. St. Rep. 672, 23 Atl. 684, where delay of a month in bringing suit to reclaim was held a waiver, although all reasonable diligence to secure payment had been made. In this case, however, the rights of third parties were concerned, and the two cases will serve to show the distinctions drawn by the courts on the topic under consideration as dependent upon whether the vendee has parted with the possession.

**REESE v. PHILADELPHIA TRUST, SAFE DEPOSIT
AND INSURANCE COMPANY.**

[218 Pa. 150, 67 Atl. 124.]

GIFTS INTER VIVOS.—To Constitute a gift inter vivos two essential elements must combine: An intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as divests the donor of all dominion over the subject and invests the donee therewith. (p. 882.)

GIFTS INTER VIVOS—Delivery—Intention.—If a woman takes her safe deposit box containing her securities from the vault of a trust company, and calling in one of its officers, declares to him her intent to give such securities to her nephew who is present, and then executes blank transfers and hands the securities to her nephew, who places them in his safe deposit box, while hers is surrendered, and the nephew, who is about to go on a long journey, appoints his aunt his deputy, to have access to his box, there is a valid gift of the securities, although the aunt thereafter sells some of them, collects interest and dividends from others, and deposits the sums collected to her own account. (p. 883.)

GIFTS INTER VIVOS—Impeachment.—A donor is not permitted to impeach his own gift. What is said or done by him, unassociated with and unassented to by, his donee is wholly irrelevant to the issue as to the validity of the gift, and cannot be considered. (p. 883.)

W. W. Porter and J. G. Johnson, for the appellant.

H. Budd, P. Boyd, H. B. Hodge and R. L. Ashhurst, for the appellee.

154 STEWART, J. If the legal effect and consequence of the transaction between Mrs. Pomeroy and her nephew, William K. Reese, the appellant, are at all obscure, it is not because the transaction itself in any of its features is uncertain or equivocal. It is claimed that what subsequently occurred between the parties shows a purpose in the mind of Mrs. Pomeroy the very opposite of that indicated by the transaction, and a corresponding understanding by the nephew. The learned judge before whom the case was heard derived from the transaction a valid and effective gift of the securities in question. He was overruled in this by the court in bank, and this appeal results. The facts are undisputed, and may be briefly stated.

Mrs. Anna K. Pomeroy was a widow of advanced age and childless. Her nearest kindred were the appellant, a nephew, and his three sisters, two of whom are among the appellees. For the appellant, who had resided with her from childhood,

she entertained special affection, treating him as a son. On August 1, 1904, the aunt and nephew together went to the Philadelphia Trust, Safe Deposit and Insurance Company, where the former had a rented safe or box in which she kept certain securities. While they were together in the room of the directors of the company she took out the box, and having placed it on a table called into the room Mr. Scholey, an officer of the company. She told Mr. Scholey that she was giving to her nephew the box and contents, and that she wished him to witness the gift. She was then seated at the table where the ¹⁵⁵ box was; some of the securities were still in the box, while others were out upon the table. Mr. Scholey examined the securities sufficiently to see their general character, and told Mrs. Pomeroy that inasmuch as some were registered and some were coupon bonds, something more was necessary to complete the gift, and inquired whether he should send someone in to prepare powers of attorney for her to execute. He accordingly sent into the room Mr. Pierce, a clerk in the bank, with blank powers of attorney, which were there signed by Mrs. Pomeroy and witnessed by Pierce. Among the securities were the certificates and bonds which are the subject of the present controversy. These were (1) two stock certificates issued by the Pennsylvania Railroad Company, one for twenty and one for three shares; (2) three stock certificates issued by the Lehigh Coal and Navigation Company, one for three, one for four and one for thirty-one shares; and (3) five mortgaged bonds of the Philadelphia and Reading Railroad Company, each of the denomination of one thousand dollars. Assignments of these several securities in blank with like blank powers of attorney empowering the attorney to sell, assign and transfer the same for assignee's use, were then and there signed by Mrs. Pomeroy and duly attested. These assignments were in the usual form, and had the effect to make the securities marketable without anything further. This being done, the box from which the securities had been produced, being Mrs. Pomeroy's, was surrendered, and the securities were placed in a box or safe that had been that day rented by the nephew. The latter, being about to return to California, as part of the same transaction constituted in writing on the records of the trust company Mrs. Pomeroy as his deputy, with authority expressed as follows: "To have access to my safe at all times, with the same powers that I could have if personally present." This ended the transaction. None of the securities were trans-

ferred on the books of the company, but with the powers of attorney executed as above Reese was in a position to have this done at any time before the death of Mrs. Pomeroy, which occurred August 25, 1905. After Mrs. Pomeroy's death, appellant presented the above-mentioned securities, with the powers of attorney attached, to the several companies that had issued them, and requested transfers to be made. This was declined because ¹⁵⁶ of Mrs. Pomeroy's death. He then demanded of the executors that they execute new transfers. This demand being refused, he filed the bill in the present proceeding to require the executors to make the necessary transfers. The proceeding resulted in the dismissal of plaintiff's bill. This brief statement discloses the one question in the case, Can a valid, effective, irrevocable gift of these particular securities to the nephew be derived from what took place between Mrs. Pomeroy and the appellant on the occasion referred to?

To constitute a valid gift inter vivos two essential elements must combine: an intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as divests the donor of all dominion over the subject, and invests the donee therewith. We do not understand that the sufficiency of the delivery of these securities to the donee, if an immediate and irrevocable gift was intended, is questioned. They were placed, if not by the hands of the donor, by one she directed, in the box of the donee, which, notwithstanding the donor thereafter had access to it, was the donee's own exclusive property for the time being, which neither the donor nor anyone else could interfere with except as allowed by him. This delivery was quite as unequivocal and pronounced as it would have been had the securities been placed in the donee's hand or pocket, and therefore just as effective. With respect to the donor's intention as to the kind and measure of the gift she intended to make, if regard be had to her previous expression of purpose, to what passed between the parties, and what occurred at the time of the making of the gift, and to those alone, there can be but one conclusion. What was there done, whatever its effect, was in fulfillment of a purpose the donor had previously expressed to several of her intimate friends. She had again and again avowed her purpose to turn over to her nephew the securities in her box. Her purpose as expressed to Mr. Scholey, whom she called in to witness the transaction, was to make a gift to her nephew

of the contents of the box. The testimony of this witness was: "She said she was going to give Mr. Reese the box and its contents, and would like me to act as a witness to the gift." In nothing that was said or done was there a suggestion of any qualification or restriction with respect to the gift. What ¹⁵⁷ therefore occurred on the occasion while both parties were present is not only consistent with a purpose to make an immediate and irrevocable gift, but inconsistent with any other. When her attention was called to what was necessary to make the gift effective—that is to say, powers of attorney to transfer the securities—she immediately executed them. The surrender of her own box to the trust company, and the placing of the securities made marketable by her blank transfers in the box rented by the nephew, which immediately followed, completed the transaction. Confining the inquiry to the immediate occurrence, can there be any question as to the legal effect of the transaction? There is present in the case a clearly expressed purpose to make a present gift, followed by a sufficient delivery. Thus every requirement is met, and were we to stop the inquiry here, the gift would have to be sustained. It was because the court below extended the inquiry, and allowed what subsequently occurred to overcome the plain and obvious intendment of what was said and done when the gift was made, that a conclusion adverse to the plaintiff was reached. The evidence on this branch of the case was admitted for the purpose of showing that the parties themselves understood the transaction as meaning something different from that indicated by the plain and natural meaning of their words and acts at the time. It is perfectly competent to show this, since the effort of the law always is to develop and give effect to the real purpose of the parties; but too great latitude was here allowed, and evidence was introduced which in no aspect can be considered as indicating a common and mutual understanding and purpose, but simply a purpose by the donor inconsistent with the facts of the transaction. It is never permitted a donor to impeach his gift; therefore what was said or done by Mrs. Pomeroy, unassociated with her donee and unassented to by him, is wholly irrelevant to the issue and cannot be considered. The court below placed much emphasis on the fact that Mrs. Pomeroy had at a later period inquired of an officer of the bank whether the power of attorney she had given "would put matters in proper shape so that if anything should happen to her Mr. Reese

could transfer the securities." This inquiry may reflect some light on her understanding of the effect of the original transaction; but on its face the transaction ¹⁵⁸ was an executed gift in the donee, and it is wholly immaterial, limiting this inquiry to what is pertinent to the issue, what either thought in regard to it, except as the other is shown to have had the same understanding. The only relevant evidence on this branch of the case was that which related to the conduct of the parties with reference to the subject matter. True, this was confined principally to the acts of Mrs. Pomeroy, but since these extended to at least a qualified control of the securities, and the actual conversion of a part, the knowledge and assent of the donee might be inferred in connection therewith. Immediately following the transfer of the securities the nephew returned to California. Mrs. Pomeroy, who had been deputized by him to have access to the safe, remained until November 10th of the same year, when she too went to California. Before removing she took from the safe Reading bonds to the amount of three thousand dollars and sold them. She also collected certain coupons, and left authority with the trust company to collect others, as they matured, the proceeds to be credited on her account. After she had removed to California, she instructed the company to subscribe for an allotment of four shares of Lehigh Coal and Navigation stock. On her return to Philadelphia in June, 1905, the authority she had given to the trust company was canceled. To allow this evidence the effect contended for, too much would have to be supplied; as it stands, it is wholly inadequate to the purpose. The selling of the three thousand dollars of bonds may very well have been within the implied power of the deputization, or in consequence of direct instructions from the principal. The burden in such case is upon the party setting up the fact relied upon to overcome the natural and obvious meaning of the transaction. This burden was not discharged so long as what Mrs. Pomeroy did with the proceeds of the sale of the bonds was left unexplained. She was a deputy in custody of the securities, and the presumption is that if she converted any of them, it was in the course of her agency, and that she fully accounted for them. The law will not presume the contrary. As much may be said with respect to the coupons and dividends collected by her and carried to her credit in the bank. Giving these facts the utmost significance that can be claimed for them by the appellees, they are at least equivocal;

if they may be regarded ¹⁵⁹ as indicating a continued ownership of the securities in Mrs. Pomeroy, with quite equal reason they may be referred to the agency she was invested. To allow such uncertain and ambiguous circumstances to defeat what the conduct of the parties in connection with the immediate transaction shows to have been intended to be an absolute gift, is to misapprehend the true force and significance of the evidence.

The decree of the court below is reversed; the plaintiff's bill is reinstated, and it is now ordered that a decree be entered directing an injunction mandatory in form to the Philadelphia Trust, Safe Deposit and Insurance Company, executor of the will of Anna K. Pomeroy, deceased, requiring it to sign as such executor such powers of attorney as may be required to transfer to William K. Reese the said recited securities. The cost of this proceeding to be paid by the executor of the will of Anna K. Pomeroy, deceased.

The Essentials of a Gift of funds on deposit are discussed in *Bailey v. New Bedford Inst. for Savings*, 192 Mass. 564, 116 Am. St. Rep. 270, and cases cited in the cross-reference note thereto. After a gift *inter vivos* has been made complete by delivery, it is not necessary for the donee to retain possession of the property to make the gift effectual; but he may, without invalidating the gift, redeliver the property to the donor, as his agent, for safekeeping: *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694.

LENAHAN v. PITTSTON COAL MINING COMPANY.

[218 Pa. 311, 67 Atl. 642.]

CONSTITUTIONAL LAW—Employment of Minors.—The legislature, under its police power, can fix an age limit below which boys should not be employed, and when the age limit is so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and if such boy is injured while engaged in the performance of the prohibited duties for which he is employed, the employer is liable in damages for the injuries thus sustained. (p. 86.)

STATUTES Fixing Age Limit for Employment—Violation—Contributory Negligence—Assumption of Risks.—A boy, employed in violation of a statute fixing the age limit under which boys shall not be employed in a certain business, is not chargeable with contributory negligence, or with having assumed the risks of employment in such business. (p. 887.)

T. F. Farrell and E. A. Lynch, for the appellant.

B. R. Jones, L. B. Jones and H. A. Fuller, for the appellee.

³¹² ELKIN, J. When this case again comes up for trial in the court below much will depend upon the exact duties which the boy, Munley, was required to perform by the appellee company. If it was a part of his duties to oil the "scraper line," which is the contention of the appellant, the negligence of the appellee would be established; if, on the other hand, as is asserted by appellee, it ³¹³ was no part of his duty to oil the "scraper line," the rule relied on by the court below would control the case.

The act of June 2, 1891 (Pub. Laws, 176), which, as its title declares, was intended to protect the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and to preserve the property connected therewith, provides (section 8) that "no person under fifteen years of age shall be appointed to oil the machinery and no person shall oil dangerous parts of such machinery while it is in motion." The boy, Munley, was fourteen years, four months and three days old at the time the accident occurred. At the trial the learned court below directed a compulsory nonsuit to be entered, which, on motion made, he refused to take off on the ground that the boy was guilty of contributory negligence in attempting to oil dangerous parts of the machinery while in motion, which was in violation of the statute, and therefore negligent. This would be the correct rule if the injured boy had the right under the law to engage in the employment which occasioned the injury. The learned trial judge took the view that the boy, being over fourteen years of age, was presumed under the common-law rule to have sufficient capacity to be sensible of danger and to have the power to avoid it, and that such presumption had not been overcome by the evidence produced at the trial. The exact question raised by this appeal is whether this common-law rule was modified or changed by the statutory regulation. The injured boy was under fifteen years of age, and if the appellee company employed him for the purpose of oiling machinery, it did so in violation of the statute. Is it, therefore, in position to set up in this case the rule which presumes a boy over fourteen to be capable of appreciating danger so as to apply the rule of contributory negligence to his acts, when the legislature in express terms provided that an employer shall not

engage a person under the age of fifteen years to perform this dangerous work? After full consideration we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and if the boy is injured while engaged in the performance of the prohibited duties for which ^{§14} he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principle that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child so employed did not have the mature judgment, experience and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation. There can be no question that this statute was intended as a protection to the employes, and its object was to prevent children under the age of fifteen years from being employed in and around the anthracite coal mines in that dangerous kind of work designated in the act, and it should be given a construction to best effectuate the purpose of its enactment. This exact question has not been before our courts, but it has been passed upon by the courts of many other jurisdictions, and so far as we are informed the rule hereinbefore stated has been uniformly followed.

Judgment reversed and a venire facias de novo awarded.

A Statute Making It Unlawful to Employ Children in designated kinds of work who are under a certain age is constitutional: In re Spencer, 149 Cal. 396, 117 Am. St. Rep. 137.

An Employer Who Violates a Statutory Duty imposed on him for the better protection of his employes cannot, according to the better view, invoke the doctrine of assumption of risks or contributory negligence when sued by an injured employe: See the note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 891.

MELROY v. KEMMERER.

[218 Pa. 381, 67 Atl. 699.]

ACCORD AND SATISFACTION—Consideration.—If a debtor in failing circumstances and contemplating bankruptcy offers his creditor thirty per cent of his debt as a settlement in full, and the creditor dissuades him from going into bankruptcy, accepts his alternative offer, receives the money and closes the account, the transaction is a good accord and satisfaction based upon a sufficient consideration, and the creditor cannot recover the balance. (p. 889.)

H. W. Schantz and E. Hollen, for the appellant.

C. T. Reno, for the appellee.

³⁸³ **MITCHELL, C. J.** It is said in *Ebert v. Johns*, 206 Pa. 395, 55 Atl. 1064, that the rule that the acceptance of a smaller sum for a debt presently due, though agreed and expressed to be payment in full, is not a good accord and satisfaction, was a deduction of scholastic logic, and was always regarded as more logical than just, and hence any circumstance of variation is sufficient to take a case out of the rule. As illustrations of such circumstances of variation, it has been held that payment a day or even an hour before the debt is due, or at a different place, or of a certainty in amount where the amount of the debt is uncertain, or payment of even a part by a third person, or additional security of any kind such as the indorsement of a note by a third person, or payment in chattels or anything other than money, will be a good discharge of the whole by way of accord and satisfaction: Note to *Cumber v. Wane*, 1 Smith's Lead. Cas., *357; and see a full collection of the more recent cases in the note to *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, in 20 L. R. A. 785.

The rule itself is founded on the want of consideration for the agreement. As a part can never be equal to the whole, payment of a part of a debt presently due gives the creditor nothing that he was not entitled to, and deprives the debtor of nothing he was not bound to part with before, and therefore there is no consideration. The logic is unimpeachable, but it fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it. As said in *Ebert v. Johns*, 206 Pa. 395, 55 Atl. 1064, "to a merchant with a note coming due, five thousand dollars before 3 o'clock to-day ³⁸⁴ which will save his commercial credit may well be worth more than twenty thousand

dollars to-morrow after his note has gone to protest." If the debt is not due till to-morrow, the payment of the lesser sum under all the cases will be a good accord and satisfaction, but if the debt was due yesterday but the debtor can only pay part to-day, the benefit to the creditor of getting that part now rather than the whole when it is too late, is just as great, and whatever conclusion the scholastic logic and theoretical reasoning may lead to, the importance of the practical result is a matter for the creditor to decide for himself, and, having so decided and got the benefit of it, justice and common honesty ought to hold him to his agreement. For this reason, the force of which is universally accepted, the courts, so far as they could without sacrifice of the maxim of *stare decisis*, have brought the law into closer accord with modern business principles.

In the present case the debtor, being in failing circumstances and contemplating bankruptcy, offered the plaintiffs thirty per cent of his debt as a settlement in full. The plaintiffs dissuaded him from going into bankruptcy, accepted his alternative offer, received the money, and closed the account. They have now brought this suit for the balance. In the absence of any express decision in this state on this point the learned judge below did not feel at liberty to depart from the general rule. We have no such hesitation. The exact point is whether the debtor's relinquishment of his intention to seek a discharge in bankruptcy and his payment of thirty per cent instead, constitute a sufficient consideration to bind the creditor to the agreement. On that point we have no doubt.

A valuable consideration may consist in some right, interest or benefit to one party, or some loss, detriment or responsibility resulting actually or potentially to the other: *Bouvier's Law Dictionary*. "If there is any advantage to the creditor the law will not weigh the adequacy of the consideration": *Fowler v. Smith*, 153 Pa. 639, 25 Atl. 744.

The accord in this case was good on both branches. By it the creditors got a sum certain, instead of the chances of an uncertain dividend in bankruptcy; on the other hand, the debtor accepted the responsibility of paying a sum certain whether his assets were sufficient or not, and gave up his right to a release ³⁸⁵ of his future assets, and to a discharge from his whole debt without regard to the sufficiency of his present assets.

The decisions on this exact point in other states are not numerous, but the general trend is uniform to the result we have

reached. In *Hinckley v. Arey*, 27 Me. 362, it was said by Tenney, J.: "In this case the plaintiff was informed that the defendant contemplated taking the benefit of the bankrupt act, which was then in force. If this intention had been carried out, the plaintiff would lose the whole debt, beyond what he might receive as a dividend; and the latter, judging from his letter, he did not consider as very valuable. To save himself from a greater loss under the law, he agreed upon the terms of composition offered. The defendant, upon the agreement and payment to Hubbard, took no further steps to obtain relief under the bankrupt law." It was accordingly held that the accord and satisfaction were good. The same ruling was made in *Dawson v. Beall*, 68 Ga. 328. And in *Curtiss v. Martin*, 20 Ill. 557, *Engbretson v. Seiberling*, 122 Iowa, 522, 101 Am. St. Rep. 279, 98 N. W. 311, 64 L. R. A. 75, and *Rice v. London etc. Mortgage Co.*, 70 Minn. 77, 72 N. W. 826, the courts went still further, and held the satisfaction valid where the debtor was insolvent or in failing circumstances, though there was no express intention to seek a discharge in bankruptcy. In the last-named case it was held that an agreement on behalf of the estate of a debtor supposed to be insolvent was good, though it turned out in fact that it was solvent. And in *Pettigrew Co. v. Harmon*, 45 Ark. 290, the principle that part payment by a third person makes the accord valid was held to govern where the third person was one to whom the debtor had assigned his assets for the payment of his debts.

On principle and on authority, therefore, the agreement in the present case was binding, and there being no dispute on the material facts, the defendant's sixth point asking for binding instructions should have been affirmed.

Judgment reversed.

Accord and Satisfaction is the subject of a note to *Harrison v. Henderson*, 100 Am. St. Rep. 390. That the acceptance from an insolvent of part payment in full satisfaction of a claim is founded on such a consideration that the entire debt is discharged, see *Engbretson v. Seiberling*, 122 Iowa, 522, 101 Am. St. Rep. 279; *Canton Union Coal Co. v. Parlin*, 215 Ill. 244, 106 Am. St. Rep. 162; *Dreyfus v. Roberts*, 75 Ark. 354, 112 Am. St. Rep. 67.

CORGAN v. GEORGE F. LEE COAL COMPANY.

[218 Pa. 386, 67 Atl. 655.]

MASTER AND SERVANT—Employment for Definite Term—Right to Discharge.—Under a contract of employment for a definite term, provided the duties of the employment are satisfactorily performed, the employer has the absolute right, whenever he becomes in good faith dissatisfied with the services of the employé, to discharge him, and it is immaterial in such case that in fact no valid grounds for the discharge exist. (p. 892.)

MASTER AND SERVANT—Employment for Definite Term—Right to Discharge.—Under a contract of employment for a definite term, provided the duties of the employment are satisfactorily performed, the employer has the right, whenever he becomes in good faith dissatisfied with the services of the employé, to discharge him, and is not bound to give any reason for the dismissal at the time, and if he gives a wrong reason therefor, he is not thereby estopped from setting up any other or different cause really existing when the servant is discharged. (p. 893.)

CORPORATIONS—Suit for Profits.—A shareholder cannot ordinarily sue the corporation for his share of accumulated profits until a dividend has been declared. (pp. 893, 894.)

CORPORATIONS—Sale of Stock—Right to Dividends.—As between the vendor and vendee of shares of corporate stock, the vendee is entitled to all dividends declared thereon after the sale of the stock, and, although the transfer has not been recorded, the transferee has a right to the dividends as against the transferor. (p. 894.)

JUDGMENTS—Wrong Reason Therefor.—If a judgment is right, even though the reasons given therefor wholly fail to sustain it, or would logically lead to a different one, it must stand. (p. 895.)

R. B. Sheridan, J. L. Lenahan, J. P. Costello and J. T. Lenahan, for the appellant.

J. McGahren and F. Donnelly, for the appellee.

888 POTTER, J. This is an appeal from the refusal to take off a judgment of compulsory nonsuit. Complaint is also made of the rejection of certain evidence, offered to show the withholding of dividends or profits alleged to be due to appellant. The plaintiff was employed as "inside foreman" by the defendant, a corporation operating a colliery. He was engaged at a salary of one hundred and twenty-five dollars a month, under a contract which provided that his appointment was to be "for so long a time up to five years, that said M. H. Corgan satisfactorily performs his duties as foreman for said company." Plaintiff also purchased seventy-five shares of the capital stock of the defendant company, par value one hundred dollars per share, for which he paid fifteen hundred

dollars. He entered upon his duties under the contract of employment and so continued until February 13, 1904, when he was discharged. He then brought this suit, claiming to recover damages for the breach of the contract of employment, and certain dividends and profits which he alleged had wrongfully been withheld from him upon the seventy-five shares of stock which he had purchased.

Upon the trial, plaintiff testified that Mr. Lee, the manager, had expressed no dissatisfaction with his work; but that, in January, 1904, plaintiff had made demands, through his attorney, for the proportionate profits which he alleged were due him on his stock, and thereupon Lee came to him and said that he could not have a man in his employ who was lawing him, and asked plaintiff to withdraw the threatened suit, or else resign. Plaintiff refused to resign, and Lee then said he would have to discharge him, which he did after thirty days' notice. He testified that no complaint was made as to his work, and no other reason was given for the discharge, except the threatened ~~sue~~ suit. Prior to the discharge, the plaintiff had sold his stock to Mr. Lee, for the sum of five thousand dollars, and had transferred it to him. It also appears from the testimony that while he held the stock, he received upon it, not as dividends formally declared, but as a division of earnings, or profits, made by general consent, more than two thousand five hundred dollars. On cross-examination plaintiff admitted that while he was in charge, there were two squeezes or "cave-ins" at the mine, which resulted in considerable loss to the defendant company. He also admitted that he had given no notice to the mine inspector of the fact that he was going to rob or skip the pillars in the mine, which action was the cause of the caving in. Nor did he give the mine inspector notice of the squeezes. He did, however, make regular monthly reports to the mine inspector in his capacity as mine foreman.

The contract of employment was for a definite term, provided the duties of the employment were satisfactorily performed; and the only reasonable inference from the language used is that the services were to be satisfactory to the management of the employer, the defendant company. Under such a contract, it is well settled that the employer "has the absolute right, whenever he becomes in good faith dissatisfied with the services of the employé, to discharge him; and it has been held immaterial in such a case that in fact no valid grounds

for discharge exist. Under a contract of this character the dissatisfaction of the master must be genuine": 20 Am. & Eng. Ency. of Law, 2d ed., 15. It is suggested here that dissatisfaction with the manner in which plaintiff performed his duties as foreman was not alleged as a reason for the discharge; but in Allentown Iron Co. v. McLaughlin, 1 Mon. 726, it was held by this court that while the master might not have the right to discharge his servant for the cause assigned by him, "if, at the time, the defendant company had a right to discharge him for any cause, such discharge would not be unlawful because a wrong reason had been given for it." The same principle is laid down in Wood on Master and Servant, section 121: "The master is not bound to give any reason for the dismissal at the time, and if he does, he is not thereby estopped from setting up any other or different cause which really existed when the servant was discharged." ³⁰⁰ Other authorities to the same effect are numerous. Thus in Rossiter v. Cooper, 23 Vt. 522, where a contract of employment provided that the employer, if he became dissatisfied, had the right to dismiss the employé upon giving him one day's notice, it was held that the employer was at liberty at any time to put an end to the contract, without informing the employé of the ground of his dissatisfaction, and without in fact having any satisfactory reason for it. In Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157, it was said: "It is settled law that, where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not a question for the jury." As we coincide with this view of the case, it is unnecessary to examine the grounds, which the court below regarded as sufficient to justify the defendant company in discharging the plaintiff from its employment. The evidence is ample to show that the dissatisfaction was genuine, and there is nothing to show that it was malicious. Whether or not it was well founded, we need not inquire.

As to the question raised by the second assignment, we can see no error in the exclusion of the evidence which was offered to show that the plaintiff had not received the share which he claimed of the surplus funds in the treasury of the company. In his statement, the plaintiff claims dividends or profits. But he does not allege that dividends as such have been declared by the corporation. On the contrary, the offer of evidence which was excluded, expressly admitted that no divi-

dends had been declared. Until they were, the plaintiff was in no condition to lay claim to them in this suit. "A shareholder cannot ordinarily sue the corporation for his share of accumulated profits until a dividend has been declared—a matter which generally rests within the sound discretion of the directors, which discretion the courts will not control unless it has been plainly abused": 10 Cyc. of Law & Pr. 566. If any such agreement was made as plaintiff sets forth in his statement, under which the dividends and profits were to be declared and paid monthly, it could be enforced only in a court of equity. It will be remembered, also, that the plaintiff had sold his stock prior to the bringing of this suit; and as admittedly no dividend had actually been declared prior to the transfer of the ³⁹¹ stock, it is difficult to see how the plaintiff has any standing in this respect. Nor would he have any right to participate in any distribution of profits made after the transfer. The law in this respect is thus summed up in 2 Cook on Corporations, fifth edition, section 539: "As between the vendor and vendee of shares of stock, it is a settled rule that the vendee is entitled to all the dividends of the stock which are declared after the sale of the stock. Even though the transfer has not been recorded, the transferee has a right to the dividends as against the transferrer. The law, moreover, refuses to investigate the question when the dividend was earned. In contemplation of law the net profits are earned at the instant the dividend is declared. This rule is just, inasmuch as the accrued profits and expected dividends enter into the value and price at which the stock is sold": Citing *Coleman v. Columbia Oil Co.*, 51 Pa. 74, and numerous other cases.

In the act of June 2, 1891, Public Laws, 176, article 12, rule 1, it is provided that "The owner, operator or superintendent of a mine or colliery . . . shall place the underground workings thereof, and all that is related to the same, under the charge and daily supervision of a competent person who shall be called 'mine foreman.'" Article 14, section 2, provides that "The owner, operator or superintendent of a mine or colliery" shall give notice to the mine inspector in certain cases, among others, "Fifth. Where the pillars of a mine are to be removed or robbed," and "Sixth. Where a squeeze or crush or any other cause or change may seem to affect the safety of persons employed in any mine." It would seem, therefore, that the court below was in error in hold-

ing that the plaintiff, who was employed as a "mine foreman," and whose duties as such were confined to the underground portion of the colliery which constituted the mine proper, was the superintendent of the colliery within the meaning of the act. If he was not superintendent, he was not required under the law to give the notices prescribed by article 14. Even had he been so required, the same duty rested upon the owner and operator of the mine, and the consequences of their default could not justly be visited upon the plaintiff unless the performance of that particular duty had been delegated to him, and of this there was no evidence. However, if the plaintiff failed to make out ³⁹² a case that entitled him to go to the jury, the court below committed no error in refusing to take off the nonsuit, even if it did assign an erroneous reason for its entry. To quote from *Brew v. Hastings*, 206 Pa. 155, 55 Atl. 922: "As we have more than once said, we do not review reasons for judgments. If the judgment be right, even though the reasons given wholly fail to sustain it, or would logically lead to a different one, it must stand."

The judgment of compulsory nonsuit entered in this case is affirmed.

The Remedies of Employés Wrongfully Discharged by their employer are discussed in the notes to *Decamp v. Hewitt*, 43 Am. Dec. 205; *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 515.

Dividends on Corporate Stock belong to the person holding it at the time they are declared: *Clark v. Campbell*, 23 Utah, 569, 90 Am. St. Rep. 716; *White River Sav. Bank v. Capital Sav. Bank*, 77 Vt. 123, 107 Am. St. Rep. 754. As between the vendee and vendor of stock, dividends declared after the sale belong to the vendee, although the transfer has been recorded in the books of the corporation: *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412.

A Right of Action for Dividends declared by a corporation accrues when each dividend is declared: *Winchester etc. Turnpike Co. v. Wickliffe*, 100 Ky. 531, 66 Am. St. Rep. 356; *Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 35 Am. St. Rep. 462.

COMMONWEALTH v. LOUGHHEAD.

[218 Pa. 429, 67 Atl. 747.]

HOMICIDE—Killing to Prevent Escape.—If a misdemeanor has been committed, and is charged in the warrant, flight of the accused from an officer even after actual capture and custody, there having been no conviction, will not justify the use of a deadly weapon, and a killing in such a case is manslaughter at least. (pp. 896, 897.)

HOMICIDE—Killing to Prevent Escape.—In a case of arrest for misdemeanor, an officer is never required to retreat, and may meet force with force, but he cannot justifiably take the life of a person who is fleeing from arrest, or of one who has been arrested and has escaped from custody and is fleeing from him, when the charge is simply a misdemeanor. (pp. 896, 897.)

S. Bell, S. V. Wilson and H. B. Hartswick, for the appellant.

J. A. Gleason, J. H. Kelley, district attorney, and W. H. Patterson, for appellee.

⁴³⁰ Per CURIAM. This appeal is from a conviction of voluntary manslaughter. The appellant was a constable, and was deputized by another constable to assist him in arresting a number of persons who were charged in the warrant with assault and battery, disorderly conduct and malicious destruction of property. After one of the persons named in the warrant had been taken into custody, he broke away from the officers and, while running to effect his escape, he was shot and killed by the appellant. ⁴³¹ The instruction to the jury on the main point of the defense was that where a misdemeanor has been committed and is charged in the warrant, flight from an officer even after actual capture and custody, there having been no conviction, will not justify the use of a deadly weapon.

This was a correct statement of the law. The rule is otherwise when felony has been charged or has been committed in the presence of the officer. While in the case of a misdemeanor, an officer is never required to retreat, and may meet force with force, he cannot justifiably take the life of a person who is fleeing from arrest or of one who has been arrested and has escaped from custody and is fleeing from him: 2 Bishop's New Criminal Law, sec. 650; Kerr on Homicide, 11. In Wharton on Homicide, third edition, 1907, page 741, it is said: "An officer has no right to shoot a person who is merely

running away from him without committing any violence, when under arrest or to void arrest for a misdemeanor. He must at least stop short of force which will result in the sacrifice of human life; and a killing in such a case is manslaughter at least."

We find no merit in any of the assignments of error. The judgment is affirmed.

An Officer is not Justified in Killing a mere misdemeanor, to effect his arrest or to prevent his escape after arrest: *State v. Smith*, 127 Iowa, 534, 109 Am. St. Rep. 402; note to *State v. Evans*, 84 Am. St. Rep. 679-703.

THOMPSON v. BALTIMORE AND OHIO RAILROAD COMPANY.

[218 Pa. 444, 67 Atl. 768.]

RAILROADS—Turntables—Injury to Children.—If a railroad company erects a turntable in its own yard in a populous part of a city and leaves it unlocked when not in use, it owes the duty to a trespassing child attracted thereto through an open gateway not to injure him intentionally, but it is under no active duty to take care of him, either by keeping him out of the yard, or by protecting him from injury after he has entered it from his own acts, or the acts of others, who, like himself, have entered without permission. (p. 900.)

INFANTS—Trespassers—Use of Land by Owner.—The owner of land who makes changes on it, in the course of its beneficial use, which tend to attract children and to expose them to danger, is under no obligation to take special precautions for their safety when they enter without permission. (p. 900.)

W. B. Linn, for the appellant.

C. N. Farrar, Jr., and J. J. McDevitt, Jr., for the appellees.

446 FELL, J. The defendant maintained a large train yard, used for the shifting and storage of cars and the receipt and delivery of freight, in close proximity to a thickly populated section of the city of Philadelphia. Ten or twelve feet from an entrance to the yard from a public street there was a turntable, which was not kept locked when not in use but was fastened by a brake that anyone could open. A high board fence surrounded the yard, but in places it was broken and the gates were usually open. Little or no effort appears to have been made to exclude the public from the yard, and at times it was used by persons residing in the vicinity as a

playground. One of the ⁴⁴⁷ plaintiffs, a boy not quite eight years of age, entered the yard at night through an open gateway, and while standing near the turntable, with which some children were at the time playing, was struck by a projecting bar which they used in turning it, and was thrown into the pit and caught between the wall and the turntable.

The principles that fix the relation between a land owner and a person entering on the land without permission were fully considered in *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. 129, 98 Am. Dec. 317, a case in which the plaintiff was injured by the breaking down of a station platform on which he was standing, from mere curiosity, to witness the approach of a train. It was there held that the permissive use of the platform by persons not having business with the company imposed on it no liability for defects in construction, and that a person using the private property of another, by permission or sufferance, takes upon himself the risks incident to it. It was said in the opinion by Sharswood, J.: "It will appear on an examination of the interesting and elaborate discussions in the English courts of the question whether an action could be supported by such trespasser for personal harm occasioned by the spring-gun, mantrap, or dog-spike, set on the grounds of the defendant, in which it was determined that where there was no proper warning given, such an action well lies, that it rested mainly on the ground that a man cannot lawfully do indirectly that which it is unlawful for him to do directly. He cannot shoot or maim or set a ferocious dog upon a mere trespasser. He shall not there place a concealed machine where it will be likely to do the same thing, or let such a dog loose in his grounds without warning: *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes*, 3 Barn. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628. It is, however, equally well settled that the owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a public nuisance if it were in a public street or common where all persons have a legal right to be without question as to their purpose or business."

In *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, a contractor, who was in exclusive possession of land for the purpose of carrying out his contract, had caused an excavation to be made and had ⁴⁴⁸ left it unguarded at night. A person crossing the land fell into the excavation and was killed.

In the opinion denying the right to recover it was said: "The law fully recognizes the right of him, who, having dominion of the soil, without malice does a lawful act on his own premises and leaves the consequences of an act thereby happening where they belong, upon him who has wandered out of his way, though he may have been guilty of no negligence in the ordinary acceptation of the term." In *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, a child under eight years of age was drowned in an abandoned well, eighty feet from a city highway, in an uninclosed lot which was a place of resort in hot weather. The instruction to the jury that "The true principle which must be applied to a case of this kind is this: The owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them as to protect those who stray upon them," was expressly disapproved and the judgment for the plaintiff was reversed. In *Baltimore & Ohio R. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706, a boy under six years of age went, for his own amusement, on the platform of a railroad station to observe an approaching train and was struck by an iron step which was bent and projected a few inches from the car. A judgment for the plaintiff was reversed on the ground that the company owed him no duty of protection under the circumstances. This principle has been applied in a variety of cases of trespass by children. In *Rodgers v. Lees*, 140 Pa. 475, 23 Am. St. Rep. 250, 21 Atl. 399, 12 L. R. A. 216, it was applied in a case where a child took hold of a chain which was a part of a hoisting apparatus and was over a sidewalk outside of the building line; in *Moore v. Pennsylvania R. R. Co.*, 99 Pa. 301, 44 Am. Rep. 106, where a boy was walking along the tracks of a railroad on the outer ends of the sleepers and was injured by a passing train; in *Oil City etc. Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128, where a boy in crossing a bridge walked on a gaspipe five inches in diameter and fell through an opening in the floor.

Of *Hydraulic Works Co. v. Orr*, 83 Pa. 332, relied on by the plaintiffs, it has often been said that it is authority for its own facts, and, as far as it appears to sanction the doctrine that a child cannot be treated as a trespasser, it has been expressly overruled: See *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, and *Rodgers v. Lees*, 140 Pa. 475, 23 Am. St. Rep. 250, 21 Atl. 399, 12 L. R. A. 216. In the first of these cases it ⁴⁴⁹ was said: "In *Hydraulic Works Co. v.*

Orr, 83 Pa. 332, there was a recklessness that may be said to partake of the nature of wantonness, and it is only upon this principle that judgment can be logically sustained." In *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, an open vat, into which hot tar and grease were run, had been placed in an open space so near the line of the street that a child might unconsciously walk into it. In *Rachmel v. Clark*, 205 Pa. 314, 54 Atl. 1027, 62 L. R. A. 959, the defendants had used for storage the sidewalk of a street in connection with an open paved space in front of their building, separated from the street only by an imaginary line. The negligence was in placing on a public way, where all persons had a right to be, a slab of slate in such a position that the touch of a child's hand would cause it to fall.

The fact that the person injured was a child makes no difference unless there was negligence. The plaintiff's youth relieves him of the charge of contributory negligence, but it does not give rise to an imputation of negligence on the part of the defendant. He was where he had no right to be, on the property of the defendant, which it was using in a lawful manner for a lawful purpose in the conduct of its business. It owed him the duty not to injure him intentionally, but it was under no duty actively to take care of him either by keeping him out of the yard or by protecting him after he had entered it from his own acts or the acts of others who, like him, had entered without permission. There was no negligence unless there was breach of duty. There was no breach of a duty owing an adult. An owner of land is not liable for its condition to an adult who enters without permission. Unless a different standard of duty is to be established as to a child, there was no liability in this case.

Whether an owner of land who makes changes on it in the course of its beneficial use, which tend to attract children and to expose them to danger, is under a duty to take special precautions for their safety, is a question on which there is a conflict of authority. That such a duty exists has been asserted in some jurisdictions and denied in others. The earlier cases on the subject followed *Sioux City etc. R. R. Co. v. Stout*, 84 U. S. 657, 21 L. ed. 745, but the tendency of the later decisions is decidedly against the imposition of such a duty; some of the courts that adopted the ruling in *Sioux City etc. R. R. Co. v. Stout* have since repudiated it, ⁴⁵⁰ and

others have followed it with hesitation or have limited its application to a particular class of improvements.

The establishment of such a duty would create a restraint, which in some cases would amount to a prohibition, upon a mode of beneficial use of land, for the protection of intruders and intermeddlers. It is difficult to see any ground upon which such a duty can be placed. An owner is not liable for leaving his land in its natural shape. Why should he be held liable for placing structures upon it which are harmless in themselves and are necessary for the lawful use he wishes to make of it? It cannot be said that he invites or allures children because no such intention in fact exists, nor that he sets a trap for the innocent and unwary. The law does not impose a duty upon the land owner to take special precautions for a class of persons, a doctrine which, if carried to its logical conclusion, would, as was said in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, "charge the duty of the protection of children upon every member of the community except their parents." In *Delaware, L. & W. R. R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 831, it was said by Gummere, J.: "The viciousness of the reasoning which fixes the liability on the land owner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is unwarranted."

If the standard of duty contended for is set up, it will be an exception to the general rule and a wide and dangerous extension of the liability governing the ownership of property; where it would logically end it is difficult to determine. As was suggested in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, it might make it "the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches." In the opinion in *Turess v. New York etc. R. R. Co.*, 61 N. J. L. 314, 40 Atl. 614, it was said by Magie, C. J.: "It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery or implement maintained by them thereon, which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of ⁴⁵¹ being climbed, and maintains thereon a windmill to

pump water to his buildings; he who leaves his mowing machine or dangerous agricultural implements in his field after his day's work; he who maintains a pond in which boys may swim in summer and on which they may skate in winter—would seem to be amenable to this rule of duty."

The doctrine of the so-called turntable cases has been disapproved in *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, 27 L. R. A. 724; *Walker's Admr. v. Potomac etc. R. R. Co.*, 105 Va. 226, 115 Am. St. Rep. 861, 53 S. E. 113; 7 L. R. A., N. S., 1019; *Delaware etc. R. R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 831; *Daniels v. New York & N. E. R. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283, 13 L. R. A. 248; *Frost v. Eastern R. R. Co.*, 64 N. H. 220; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, 53 Atl. 268, 60 L. R. A. 133; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644, 55 L. R. A. 310; *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, 38 L. R. A. 573; *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148, and in many other cases. The doctrine is a sweeping innovation on the settled common-law rule that a land owner is not liable for the condition of his premises to one who enters them without permission. We are of opinion that it is not sound in principle and that it cannot be sustained.

The judgment is reversed and judgment is now entered for the defendant.

Mr. Justice Mestrezat Dissented, and said in part, that "the question involved in this case is not a new one, either here or in many other jurisdictions. It is attempted in the opinion to show that the principle announced by the majority of the court is the law in many jurisdictions, including our own, and that the contrary doctrine is a sweeping innovation on the settled common-law rule that a land owner is not liable for the condition of his premises to one who enters without permission. I do not agree with either of these conclusions. On the contrary, while the right of the child to be protected, under the circumstances of this case, has been attacked, yet with deference I submit that the weight of judicial decisions and of text-book authority is overwhelmingly against the doctrine announced in the majority opinion.

"A half century ago this court, in the case of *Rauch v. Lloyd*, 31 Pa. 353, 72 Am. Dec. 747, approved the principle announced in the leading English case of *Lynch v. Nurdin*, 1 Q. B. 29, and refused to follow the contrary doctrine adopted in *New York and*

one or two other states. Mr. Justice Woodward, speaking for the court, said: 'But that the same rule should not be applied to a child of tender years was so successfully demonstrated by Lord Denman in *Lynch v. Nurdin*, 6 Ad. & E. 30, and by Chief Justice Redfield in *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, that I shall content myself with referring to their reasonings. Nor am I unmindful of the counter current of authorities in New York, but the preponderance of both reason and authority will be found favorable to the two adjudications first named. Every case is to be determined by its own circumstances, and that children are to be held responsible only for the discretion of children seems self-evident propositions. A blind man is not bound to see, a deaf man to hear, nor a lunatic to reason; and yet they have a right to redress for injuries inflicted by the negligence of others. Children of tender age are not responsible to the law either criminally or civilly; and that for want of discretion.' It was there held that where a child of tender years attempted to pass under a train of railroad cars, negligently left standing on the crossing of a public street and by which he was injured, the owners of the cars were liable, but under similar circumstances they would not have been liable if an adult had been injured. In *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. 129, 98 Am. Dec. 317, relied on to sustain the position of the majority of the court in the present case, Mr. Justice Sharswood, delivering the opinion, declared the doctrine of *Lynch v. Nurdin* still to be the law, saying: 'No reference is made in the opinion (he referred to) to *Lynch v. Nurdin*, 1 Q. B. 29, a decision much controverted, but one which has stood its ground.'

"In *Hydraulic Works Co. v. Orr*, 83 Pa. 332, a child six years old, while at play, strayed from the street through an open gate into an alley and was killed by a falling platform twenty-four feet from the street, which was raised and lowered in receiving and shipping goods. At the entrance to the alley where it abutted on the street was a gate, which was posted 'Private' and 'No admittance.' The gate was frequently open, although the employees of the factory which adjoined the alley were instructed to keep it shut. The father and mother of the child brought an action to recover damages for his death on the ground that the defendant was guilty of negligence in respect to the condition or character of the platform and in not keeping the gate fronting on the street closed. There was a verdict and judgment for the plaintiffs which were sustained by this court. It was there held, in the language of the syllabus, that while it is true, in general, that where no duty is owed no liability arises, this rule varies with circumstances, and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the question of duty then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the

act of imputed negligence. Chief Justice Agnew delivered the opinion and in part said: 'Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim "*Sic utere tuo ut alienum non laedas*," must say this cannot be true—that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow—especially, too, when prompted by knowledge that a fastening was needed. Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child.' Mr. Justice Paxson disagreed with the views expressed in the opinion of the chief justice and noted his dissent on the record.

"*Hydraulic Works v. Orr*, 83 Pa. 332, has been followed and approved by this court in all the cases on the subject, if we except some dicta used in the opinions in one or two cases. In *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, Mr. Justice Woodward, delivering the opinion and speaking of *Hydraulic Works Co. v. Orr*, 83 Pa. 332, says: 'No cause was ever more justly decided. It was the case suggested by Baron Martin in *Hardcastle v. South Yorkshire Ry. Co.*, of a dangerous appliance adjoining a public way. The children were trespassers certainly, but then they were children, and the defendants were bound to have regard for the reckless and thoughtless traits of childhood. . . . Even a trespasser may have redress for negligent injuries inflicted upon him. . . . *Hydraulic Works Co. v. Orr*, 83 Pa. 332, rested on principles and precedents that sustained it amply, but which have no application here.' *Schilling v. Abernethy*, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792, quotes from and follows *Hydraulic Works v. Orr*, 83 Pa. 332. Mr. Justice Gordon, delivering the opinion, said: 'We there held (*Hydraulic Works Co. v. Orr*) that circumstances may beget duties which under ordinary circumstances cannot be implied, and that when such circumstances are shown to exist, the question arising therefrom is not for the court, but for the jury. . . . Whether, then, the owner of these premises (in the case being decided), under the circumstances made apparent by the evidence, was or was not justified in maintaining such a dead-fall as this bowing wall along the side of this passageway was surely a question for the jury, and one that could not lawfully have been withdrawn from the consideration of that body.' In *Biddle v. Heston-*

ville etc. Ry. Co., 112 Pa. 551, 4 Atl. 485, *Hydraulic Works v. Orr*, 83 Pa. 332, is quoted with approval in the opinion, which concludes as follows: 'It is very true extra precautions are not required in anticipation of the intrusions of trespassers, even though they be children, but when they do so intrude and are known to be in an improper place, they must not be so wholly neglected as to endanger their lives or limbs. Any other doctrine would so illy accord with Christian civilization as to render its maintenance impossible.'

'In *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. 135, 2 Am. St. Rep. 542, 8 Atl. 213, *Sioux City etc. R. R. Co. v. Stout*, 84 U. S. 657, 21 L. ed. 745, the first of the turntable cases, is cited with approval, and the principle there decided is stated in the following quotation: 'Whilst a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.' The opinion of this court then continues: 'This same doctrine has been approved by our own authorities, inter alia, in the cases of *Pennsylvania Co. v. Toomey*, 91 Pa. 256, *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. 33, *Hydraulic Works Co. v. Orr*, 83 Pa. 332, *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, and *Biddle v. Hestonville etc. Ry. Co.*, 112 Pa. 551, 4 Atl. 485.' In *Corbin v. Philadelphia*, 195 Pa. 461, 78 Am. St. Rep. 825, 45 Atl. 1070, 49 L. R. A. 715, decided in 1900, *Hydraulic Works Co. v. Orr*, 83 Pa. 32, is cited with approval, and Mr. Justice Brown, speaking for the court, quotes two-thirds of the opinion in that case, including the strong and emphatic language used by Mr. Justice Agnew. In *Rachmel v. Clark*, 205 Pa. 14, 54 Atl. 1027, 62 L. R. A. 959, decided in 1903, *Hydraulic Works Co. v. Orr*, 83 Pa. 332, was cited with approval and Chief Justice Agnew's opinion was quoted in part as follows: 'Duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence.'

'*Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, was decided by this court about two and a half years ago, and is the last expression of opinion by this court on the subject. The opinion was written by Mr. Justice Thompson who cites with approval and quotes from *Hydraulic Works Co. v. Orr*, 83 Pa. 332. In his opinion, alluding to some of the attacks made upon *Hydraulic Works Co. v. Orr*, 83 Pa. 332, he says: 'It is difficult to understand why this case has become like a shuttlecock in battledore to be pitched up and down. The boy in that case was six years old, and while playing in the street strolled into the alley, when the gates were open, and while there the platform fell upon him. The facts were submitted

act of injured negligence. Chief Justice Agnew delivered the opinion and in part said: 'Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the scrutiny of persons as business, by accident, or from curiosity, even to only to those who will be probably there? The common feeling of mankind, as well as the maxim "*Sic utere tuo ut alienum non laedas*," must say this cannot be true—that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place and under these circumstances, he had good reason to expect that one day or other some one, probably a thoughtless boy in the hurry of play, would be led there, and injury would ensue—eventually, now, when prompted by knowledge that a fatality was needed. Perhaps the best monitor in such a case is the consciousness of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child.' Mr. Justice Paxson disagreed with the views expressed in the opinion of the chief justice and noted his dissent as the record.

Hydraulic Works v. Orr, 53 Pa. 332, has been followed and approved by this court in all the cases on the subject, if we except some which were in the equities in one or two cases. In *Granlich v. Warner*, 86 Pa. 74, 27 Am. Rep. 684, Mr. Justice Woodward, delivering the opinion and speaking of *Hydraulic Works Co. v. Orr*, 53 Pa. 332, says: 'No cause was ever more justly decided. It was the case suggested by Baron Martin in *Hardcastle v. South Yorkshire Ry. Co.*, of a dangerous appliance adjoining a public way. The children were trespassers certainly, but then they were children, and the defendants were bound to have regard for the reckless and thoughtless traits of childhood. . . . Even a trespasser may have redress for negligent injuries inflicted upon him. . . . *Hydraulic Works Co. v. Orr*, 53 Pa. 332, rested on principles and precedents that sustained it amply, but which have no application here.' *Schilling v. Abernethy*, 121 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792, quotes from and follows *Hydraulic Works v. Orr*, 53 Pa. 332. Mr. Justice Gordon, delivering the opinion, said: 'We there held (*Hydraulic Works Co. v. Orr*) that circumstances may beget duties which under ordinary circumstances cannot be implied, and that when such circumstances are shown to exist, the question arising therefrom is not for the court to say. . . . Whether, then, the owner of these premises (now being decided), under the circumstances shown by the evidence, was or was not justified in erecting such a tall as this hoisting wall along the side of the building is a question for the jury, and not for the court.'

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to the jury and the verdict was in favor of the plaintiff below.' Justice Thompson then quotes that part of the opinion in *Schilling v. Abernethy*, 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792, which approves *Hydraulic Works Co. v. Orr*, 83 Pa. 332.

"It will, therefore, be observed that from 1877, the year in which *Hydraulic Works Co. v. Orr* was decided, until 1904 the principle announced in that case has been recognized and approved time and time again by this court. It is claimed, however, in the majority opinion in the case at bar that certain decisions of this court have practically overruled *Hydraulic Works Co. v. Orr*. We will briefly refer to these cases. The first case is *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, from which we have already made a quotation which shows that it sustains *Hydraulic Works Co. v. Orr*. *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, is cited in the majority opinion as sustaining its position. There, the nearest paved highway ran three hundred feet from the place of the accident and the nearest road was about eighty feet. There were houses about three hundred feet off, but the built-up part of the city was nearly one-half mile distant. The facts, therefore, are not similar to those in *Hydraulic Works Co. v. Orr* or to those in the case at bar. It is important in considering the *Gillespie* case to note the fact that the opinion was written by Mr. Justice Paxson who had dissented in *Hydraulic Works Co. v. Orr*. It will be observed throughout his opinion that he reflects upon this latter case by the use of certain dicta which should have had no place in the decision. This was the first opportunity the learned justice had after dissenting in *Hydraulic Works Co. v. Orr* to get his views in a majority opinion. In *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, referring to a dictum of Justice Paxson in the *Gillespie* case, Justice Thompson, speaking for this court, says: 'A dictum occurs in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, that *Hydraulic Works Co. v. Orr*, 83 Pa. 332, was in direct conflict with *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684, but an examination of that case will show that the deductions leading to such dictum are not warranted and that the case rested upon well-defined and settled principles.'

"In *Rodgers v. Lees*, 140 Pa. 475, 23 Am. St. Rep. 250, 21 Atl. 399, 12 L. R. A. 216, Mr. Justice Green wrote the opinion and Mr. Justice Clark dissented. The majority opinion in that case distinguishes *Hydraulic Works Co. v. Orr*. It is true that in his opinion Justice Green quotes some dicta from the opinion in *Gillespie v. McGowan*, 104 Pa. 144, 43 Am. Rep. 365, which reflects upon *Hydraulic Works Co. v. Orr*; but it should be noted that the dicta are the words of Mr. Justice Paxson who had dissented in the hydraulic works case, and also that they were obiter and not necessary to the decision of the *Rodgers* case. It will, therefore, be observed that the cases upon which the majority opinion relies to over-

throw the doctrine announced in *Hydraulic Works Co. v. Orr* cannot be regarded as sustaining the position in view of the numerous cases which distinctly recognize and sustain the principle of that decision.

"This is a turntable case and the principles announced in those cases have been recognized and followed not only by the supreme court of the United States, in which they originated, but by the courts of the great majority of the states of the Union as well as by those of England. It is true that New York, New Hampshire and possibly one or two other states reject the doctrine of the turntable cases. But this does not justify the majority of this court in overruling our own cases which specifically repudiate the New York doctrine, and are in harmony with the adjudications of the supreme court of the United States and of the courts of the great majority of the several states of the Union. The earliest turntable case was *Sioux City etc. R. R. Co. v. Stout*, 84 U. S. 657, 21 L. ed. 745, decided in 1873. That was the unanimous judgment of the supreme court of the United States, and it was there held: 'While it is the general rule, in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.' It was also held: 'While a railway company is not bound to the same degree of care in regard to mere strangers who are even unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.' In that case a judgment was sustained in favor of a child six years of age who was injured while playing with other children on a turntable located in an open space, about eighty rods from the company's depot in a village of about one hundred and fifty persons. The *Stout* case was followed in the supreme court of the United States by *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38 L. ed. 434, decided in 1893, announcing and approving the same doctrine, although not a turntable case. Mr. Justice Harlan delivered an exhaustive opinion in which he reviews all the cases upon the subject, and concludes with an affirmation of the doctrine announced in the *Stout* case. He notes the fact that *Lynch v. Nurdin*, 1 Q. B. 29, is cited with approval in nearly all of the cases. He says that it has been claimed that *Lynch v. Nurdin* was overruled in England; but he quotes from the opinion of Lord Chief Justice Cockburn in *Clark v. Chambers*, [1878] L. R. 3 Q. B. Div. 327, showing the contrary. He also quotes from the lord chief justice's opinion as follows: 'It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal

to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so, because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion.' The learned justice then says: 'We adhere to the principles announced in *Railroad Co. v. Stout*, 84 U. S. 657, 21 L. ed. 745. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile made by it in the vicinity of its depot building. . . . It knew that children were in the habit of frequenting that locality and playing around the shaft house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near the pit, beneath the surface of which was concealed (except when snow, wind or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision. . . . What difference in reason, we may observe in this case, is there between an express license to the children of this village to visit the defendant's coal mine, in the vicinity of its slack pile, and an implied license, resulting from the habit of the defendant to permit them, without objection or warning, to do so at will, for purposes of curiosity or pleasure?'

'The majority opinion in the present case says that the turntable cases have been disapproved in New York and in a few of the other states. This is true, but this court, on the other hand, affirmed *Sioux City etc. R. R. Co. v. Stout*, 84 U. S. 657, 21 L. ed. 745, the original turntable case, by a unanimous judgment in *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. 135, 2 Am. St. Rep. 542; and in that case it is said that the doctrine of the turntable cases was approved in *Pennsylvania Co. v. Toomey*, 91 Pa. 256; *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. 33, *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, and *Biddle v. Railway Co.*, 112 Pa. 551. Shall we now eliminate the principle from our own jurisprudence, overrule all our own cases, and follow the cases of three or four other states which we have expressly repudiated and which, as seen in 1 *Shearman and Redfield on Negligence*, section 73, have been condemned in England and are directly opposed to the current of American cases?

'Neither space nor time will permit me to refer to the numerous cases decided in the courts of last resort in the various states of the Union which sustain the doctrine enunciated in *Hydraulic Works Co. v. Orr* and in the turntable cases. We will, how-

ever, refer to and quote from some text-books which without exception support the principles of the turntable cases. The principle underlying these cases is well stated in Ray's *Negligence of Imposed Duties, Personal*, 33: 'If an act you are contemplating, right in itself, will likely cause some one to expose himself to danger which he does not anticipate, it is your duty to take care that such exposure does not prove injurious to him. In determining the question whether the act will induce such exposure, it is your duty to consider the motives and impulses that induce action by others who are likely to be influenced by your act. If men may be misled in their judgment by your act, you must take measures to warn them or to avoid injuring them by proper care. If children from their known childish instincts and curiosity may be led into danger, such care is due them also.' The same learned author also says: 'The owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows, or ought to know, may attract them, and who knows it is so placed that it does attract them to play with it—is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them. Whoever, therefore, does anything in or immediately adjacent to a public street, park or locality where children may rightfully congregate and are accustomed to so do, calculated to attract children into danger, which they cannot appreciate, or are too untrained and inexperienced to resist, owes the imposed duty of protecting them against the temptation he places before them, by suitably guarding the source of danger, or, in case this cannot be done, by giving timely warning to their parents or guardians of the existence of the danger.' In 1 *Shearman and Redfield on Negligence*, fifth edition, section 73, it is said: 'It was held in some English cases, that if a child's own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of injury, the latter cannot recover damages. But these decisions have been condemned in England, and are directly opposed to the current of American cases. The law has been settled to the contrary, in America, by the famous series of turntable cases, in which railroad companies were held liable by the federal supreme court, as well as by several state courts of last resort, for injuries suffered by little children, in consequence of their own acts in meddling with railroad turntables, which were left open to public access, unfastened and unguarded, although, of course, perfectly harmless, if let alone.' In a note to the section will be found a reference to the states whose courts have sustained the doctrine of the text. In volume 2 of the same work, section 705, it is said: 'The owner of land, where children are allowed or accustomed to play, particularly if it is unfenced, must use ordi-

nary judgment and keep it in a safe condition, for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees.'

"In the recent second edition of his exhaustive work on the Law of Negligence, Judge Thompson says (section 1024): 'A well-grounded exception to the foregoing principles is that one who artificially brings or creates upon his own premises any dangerous thing which from its nature has a tendency to attract the childish instincts of children to play with it, is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they be protected from injury while so playing with it, or coming in its vicinity. Things of this kind frequently pass under the designation of attractive nuisances.' In section 1031 the learned author says: 'In respect of the first class of cases, that of attractive nuisances, it is to be observed that it would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking-meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed; and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life.' This extract is quoted and indorsed by the supreme court of the United States in *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, 38 L. ed. 434.

"The same principle is announced in other text-books: Wharton on Negligence, 2d ed., secs. 112, 343, 824a; Beach on Contributory Negligence, 3d ed., sec. 204; Barrows on Negligence, p. 69; Bishop on Noncontract Law, sec. 854.

"It is unnecessary to discuss the doctrine of the turntable cases. It has been thoroughly discussed by both the English and the American courts, and for the purposes of this case nothing need be added to the reasoning of those cases. It does not deprive the land owner of the use of his premises nor make him liable for their condition to one who enters without permission. All that it requires, and which humanity demands, is that he will not erect upon his premises a dangerous machine or structure, unguarded or unprotected, so near a public highway that children accustomed to frequent the highway will be allured or enticed into a danger which may result in their death. The doctrine now announced by the majority of this court will require the people in the densely populated parts of the city of Philadelphia to keep their children of tender age at all times in the house or in the charge of a nurse. The playground of such children must be in the house and not upon the public places, even the parks of the cities of the commonwealth. They cannot be permitted to go to the parks for recreation or play

without being subjected to the dangers of the traps and pitfalls which a reckless and heartless owner of property may erect or construct. With a small expenditure of money, turntables and other attractive playthings for children may be guarded, and children at play may be protected and get the recreation which they require. Under the evidence in this case a few dollars would have restored the fence surrounding the turntable, and the children of that populous neighborhood would have been protected from the dangers of the place. I cannot agree that the thousands of people who live in the city shall be required to keep their children in their houses or employ nurses, most of them illy able to bear the expense, to protect their children, when such protection could be given by the owner of the premises with a small expenditure of money. It seems to me a sacrifice of humanity to the greed of commercialism.

"The doctrine announced in the majority opinion is unquestionably a departure from the settled law of this commonwealth. It is substantially the doctrine of the dissenting opinion in *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 Atl. 1100, filed less than three years ago. It is not in accord with our own cases or with those of the overwhelming majority of the other states; it is in conflict with the decisions of all the federal courts of this country, and it is condemned by the courts of England.

"For the reasons stated, I would affirm the judgment of the court below."

In the subsequent case of *Davis v. Pennsylvania R. R. Co.*, 218 Pa. 463, 67 Atl. 777, it appeared that a railroad company, in removing bags of phosphate from its station building in the course of repairs, piled them on its own premises abutting on a public highway and covered the bags with tin, so that the glare of the sunlight from the tin frightened a horse and thereby injured the person driving it, and the supreme court decided that the railroad company, in such case, was not guilty of negligence, and that there could be no recovery, on the ground that "an owner of real estate has the right to use his property for every lawful purpose for which he may desire to use it, and is only required to exercise ordinary care in that use in order to relieve him from liability for damages on account of injuries incidentally resulting to a traveler on the highway."

As in the principal case, Mr. Justice Mestrezat again dissented.

The Liability of a Railroad Company for injuries sustained by children from turntables which it has left unfastened and unguarded is discussed in the note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 417. There has been a most deplorable tendency on the part of some courts in recent years to exonerate railway companies from all responsibility to children trespassing upon their premises: *Delaware etc. R. R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727; *Walker v. Potomac etc. R. R. Co.*, 115 Am. St. Rep. 871; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 487.

CASES
IN THE
SUPREME COURT
OF
UTAH.

BARTHOLOMEW v. FAYETTE IRRIGATION CO.

[31 Utah, 1, 86 Pac. 481.]

WATERS, Finding as to Use of, When Too Indefinite.—In a suit respecting the use of water it is not sufficient to find that the plaintiff had not the water every ten or twelve days from a specified ditch, but the court should find as to the manner in which the plaintiff had and was entitled to the use of the water, and what rights with respect thereto had been acquired by him. (p. 917.)

WATERS, Corporation Owning a Majority Interest in, Rights and Powers of.—When a majority of the persons owning a water right which had been used and which they are entitled to use on their lands form a corporation and transfer their interests to it, the corporation acquires no greater or different rights than were held by the several persons so conveying to it, and hence it has not the right to deny to a minority owner not joining in the corporation the same right to the use of the water which he had before the corporation was formed. It cannot, as a majority owner, exercise an absolute power over the water, and if it undertakes to do so, the court will interpose to compel it to permit the use by the minority owner of the water to which he is entitled. To the extent of his interest the minority owner has an equal right with the corporation to a voice in the proceedings to determine matters of regulation and distribution of the water in which he is interested. (pp. 917, 918.)

W. F. Livingston, for the appellant.

Jacob Johnson, for the respondent.

3 STRAUP, J. This action was brought by plaintiff against the defendant, a private corporation, to restrain it from regulating and controlling the distribution of the waters of Warm creek, situate in Sanpete county. Judgment was for the defendant. Plaintiff appeals.

The creek is a natural stream of water having its source from natural springs east of the town of Fayette. Many years ago the plaintiff and others appropriated all the waters

of the stream for irrigation and culinary purposes. The stream is sufficient to irrigate only about two hundred and fifty or three hundred acres. The plaintiff was one of the earliest appropriators, and made his appropriation in 1883. In 1888 the owners and appropriators, by arbitration, determined the quantity of water in the creek and divided it into five hundred and sixty-five shares or acres, of which plaintiff's quantity was fixed at thirty-nine and a fraction acres or shares. He owned fifty-five acres of land lying to the east of Fayette, upon which the water was used. Of the five hundred and sixty-five acres or shares the stockholders of the defendant corporation own four hundred and four shares or acres, and the remainder is owned by persons not stockholders of the defendant corporation. There is no question raised as to the quantity of water to which plaintiff is entitled. When the waters of the stream were first appropriated, there were what are called the "North Bench and the South Bench Ditches," also called the "Field Ditches," in which waters of the stream coursed to irrigate lands outside of the town of Fayette. There was also a ditch ⁴ called the "City Ditch," in which the waters of the stream coursed to irrigate the town lots of Fayette and to supply the people of Fayette with water for culinary purposes. Later the two field ditches were consolidated into one ditch, the South Bench ditch, which was extended a distance of more than its original length.

The points of contention are as to the manner in which the plaintiff is entitled to use the water out of the field ditch, and as to the authority of the defendant corporation to regulate and control its distribution. On the part of the plaintiff it is contended that for many years—fifteen or twenty—and until interfered with by the defendant, he used the water of the creek by what is known as "half turns"—that is, every irrigating season he used the stream for nineteen and twenty hours each ten or twelve days; that he acquired a right to so use it; that such a use is necessary, especially to grow garden and fruit products, which were, for many years, raised by him, and that such a use is also better adapted to, and more economical in, the raising of ordinary farm products. From the time of the appropriation of the water, and until the incorporation of the defendant in 1903, in the spring of each year, the water owners and users of the field ditches met in mass or public meetings, and elected a committee, generally of three persons, whose duty it was to measure and distribute

the water, and to make out bulletins to the water users. It was testified to by some witnesses that the water users indicated at such meetings, and by other witnesses that the water users indicated to the committee when making out the bulletins, whether they desired to use the water by the whole or half turn; that is, for instance, as to plaintiff's case, whether he would take the water every ten or twelve days for nineteen and twenty hours, the half turn, or every twenty or twenty-one days for thirty-nine hours, the whole turn; and that the water was distributed by the committee accordingly, and as indicated by the user. Some took the water by the half turn, others by the whole turn. The evidence shows that the plaintiff, until interfered with by the defendant, had the use of the water from the field ditch every ten or twelve days. In 1903 a majority ⁵ of the water users and owners formed a private corporation. The plaintiff and four or five other owners and water users did not join the corporation, nor did they convey or grant any right or title to it.

After the incorporation, and especially in 1904, the defendant, as such corporation, assumed to and did regulate, control, manage and distribute the waters of the stream, as well as manage, control and regulate the ditches. In the defendant's answer it is alleged, and in its brief it is asserted, that in the year 1903 a majority of the water owners formed a corporation, the respondent herein, "for the purpose of managing, regulating, controlling and distributing the waters of Warm creek to and among its stockholders and other owners of the water of said creek, and to maintain and keep in repair the various ditches incident to the use, control, regulating, and distributing of said water." In its brief it is further stated: "The only real question involved in this litigation is: By what authority was this water to be regulated, controlled and distributed to the respective owners thereof? Heretofore it has been a majority of such owners, and that was the case in 1904; when the corporation managed the matter it held and owned four hundred and four out of the five hundred and sixty-five of the acres, so called, of water in the creek. The great majority of the people of that community associated themselves together and formed the respondent corporation for express purpose of accomplishing this purpose, and may we not inquire, what better agency could be employed for the purpose?" The position of the defendant is also well defined by the testimony of the president of the corporation wherein

he said: "We own a majority of stock in the ditch and we claim the right, if we handle his [plaintiff's] water and him [plaintiff] being in the minority, that he should be governed by the corporation, it being a majority, and should be subject to the rules and regulations of the corporation. . . . We claim the right to control him and assess taxes against him." To the same effect is also the testimony of other officers and stockholders of the defendant, wherein it was testified to by them: "The present corporation regulates everybody's water just the same, whether they are ^e in the corporation or not, it makes no difference." "As a board we controlled the water, and distributed it to the plaintiff as we did to others." After the incorporation of the defendant, public meetings were no longer held by the water owners or users, nor was any committee or water-master appointed or elected to regulate or distribute the water, except such as were appointed or elected by the corporation, either at its stockholders' meetings or by its board of directors. The corporation claimed the right to so appoint a water-master and to regulate and to distribute the water, because it represented a majority of the water owners. The corporation also claimed the right to determine, and did determine, that a whole turn was the most economical use of the water, and that the water should be, and it was, so distributed by it to the users, including the plaintiff, in 1903 and 1904. This method gave the water to plaintiff thirty-nine hours every nineteen or twenty-one days, in the irrigating season, instead of nineteen and twenty hours every ten or twelve days, and with such a long interval of time between irrigations, garden and fruit products could not be successfully grown by him. Through his appropriation and usage of the water, he claimed to have acquired the right to the use of the water by the half turn. He protested and objected to the corporation distributing the water, and its distributing it to him by the whole turn. All the evidence in the case shows that garden and fruit products could not be raised with an interval of nineteen or twenty-one days between irrigations; that such products require irrigation at least every ten or twelve days.

The court found (tenth finding): "That the plaintiff has not heretofore had his turn of water out of the said field ditch every ten or twelve days during any year." The court also found (eighth finding): "That the said city stream has been so regulated as to furnish each person using the same,

one turn in periods of time ranging from six to ten days apart, and has been used by the owners thereof in the irrigation of their gardens, or orchards, and for domestic and culinary purposes, and that transfers of water from the field ditches to said city ditch have been allowed each year and that plaintiff's 7 said orchards, gardens and a portion of his said land have been and can be, without inconvenience to any person, irrigated from said city ditch." It is further found by the court (twelfth finding): "That in the year 1904 the defendant corporation, by its officials, assumed the management and control of said ditches and water, and did distribute said water to the respective parties entitled thereto, including the plaintiff, and in proportion to their respective interest therein, and that in such distribution by the defendant the plaintiff suffered no injury from the acts of the defendant." In its conclusions of law (fifth conclusion) the trial court held: "That the acts of the defendant in the maintaining and repairing the South Bench ditch and the regulating, controlling and distributing of the waters of Warm creek in the year 1904 was no violation of the rights of the plaintiff or any other person, but were the lawful and necessary acts and conduct of the defendant in the reasonable and necessary control, management and distribution of the waters of Warm creek to the respective parties entitled to its use, and to the extent of their just proportion thereof." It was further found by the trial court that the plaintiff sustained no injury, that he was not entitled to injunctive relief, and his complaint was dismissed.

We think the court erred in its tenth finding, as being against the evidence. It was admitted by the defendant that, because of its adoption of the whole turn rule as to the use of the water in the field ditches, the plaintiff, in the years 1903 and 1904, was deprived of the use of water, in the irrigating seasons, for a period of nineteen to twenty-one days. In justification thereof, among other things, it was claimed by it, that the plaintiff could have transferred water from the field ditches into the city ditch from which he could have irrigated his garden and orchard as often as the raising of such products required. While the court, in the eighth finding, found that the city stream had been regulated so as to furnish each person using the same one turn in periods of time ranging from six to ten days apart, and that it had been used by the owners thereof in the irrigation of gardens, orchards and

for culinary purposes, and that transfers of water from the field ditches to said city ditch had been allowed each year, and that plaintiff's orchard and garden had been, and could be, irrigated from the city ditch, no finding is made by the court that the plaintiff had any right or interest in and to the city ditch, or in and to its use, or that he had any right to transfer to it water from the field ditches, or that he had any right whatever to irrigate his garden or orchard or any portion of his land from the city ditch. Under the issues and upon the evidence the court was called upon (1) to determine what authority the defendant corporation had to regulate, control and distribute the waters of the creek, the use of which belonged to plaintiff, and (2) to ascertain the manner in which the plaintiff had and was entitled to use the water of the creek through the field ditches. The question as to what right he had in and to the city ditch, or what use he was authorized to make of it, was not in issue or involved. The plaintiff alleged and claimed the right to the use of the water of the creek through the field ditches, not the city ditch, and that his right thereto was interfered with by the defendant. To merely find, as the court did, that the plaintiff "had not the water every ten or twelve days from the field ditch," is not finding that he did not have it a less or a greater number of days, nor as to what use he had made or was entitled to make of it, nor as to what right or interest he had acquired in and to the use of the water through it. Plaintiff might have used the water through the field ditch every nine or thirteen days, which fact would not be repugnant to the finding, but would be consistent with plaintiff's claim and antagonistic to that of defendant. The court therefore erred in not making a finding as to the manner in which the plaintiff had and was entitled to the use of the water of the creek through the field ditches, and what rights with respect thereto had been acquired by him.

It is also clear that the defendant did not acquire the right to regulate and distribute the waters of the creek in manner as found and decreed by the court, and as shown by the evidence. Before the incorporation, the stockholders of the defendant, the plaintiff, and all others having a right to the use of the water in the stream, were tenants in common. Assuming now, that a majority of the tenants in common, in a meeting where all are entitled to representation and to participate in the proceedings, have power to control the minor-

ity with respect to the regulation and distribution of the water when no vested right of the minority is impaired by the exercise of such power, still a majority of such cotenants may not thus control the minority at a meeting or proceeding in which they have no right of representation nor voice in the action taken. A majority of the tenants in common organizing themselves into a corporation can do no more in such case, in their corporate capacity, than they could have done individually. When the defendant, therefore, through mere actions of its stockholders or its board of directors, or otherwise, merely through its corporate capacity, assumed to do as it did, the regulation, control and distribution of water the use of which belonged to plaintiff, such action was an invasion and impairment of plaintiff's rights. To the extent of his interest, he had an equal right with that of defendant to a voice in the proceedings determining matters of regulation and distribution of waters in which he was interested. The defendant, neither in law nor in fact, having acquired dominion over, or right to control or distribute, such water, the court erred in adjudging that the acts of the defendant in "controlling and distributing the waters of Warm creek in the year 1904 was no violation of the rights of plaintiff": *Fisher v. Bountiful City*, 21 Utah, 29, 59 Pac. 520.

The judgment of the court below is reversed, the case remanded, the court directed to make a finding and enter judgment awarding to plaintiff the use of the water of the creek through the field ditch as in his complaint prayed for, and to grant the injunction asked. Costs to be taxed against respondent.

Bartch, C. J., and McCarty, J., concur.

Water Companies owning and operating ditches are trustees for their stockholders: *Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 23 Colo. 513, 55 Am. St. Rep. 149. As to the duties and liabilities of water and irrigation companies, see *State v. Washington Irr. Co.*, 41 Wash. 283, 111 Am. St. Rep. 1019; *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607.

TANNER v. EDWARDS.

[31 Utah, 80, 86 Pac. 765.]

PUBLIC OFFICER.—The Acts of a De Facto Officer are Valid Only so far as concerns the public. If he performs services or duties, no matter how faithfully, he cannot maintain any action to recover the emoluments. (p. 920.)

PUBLIC OFFICERS—Right of De Jure Officer not Impaired by the Payment of His Salary to Another.—The wrongful payment of the emoluments or salary to a de facto officer does not impair the de jure officer's right to it, nor his right to recover from the state or municipality which made the wrongful payment. (p. 921.)

PUBLIC OFFICER, Right of to Salary Whether He Performs the Duties or not.—The right of an officer who has been appointed, commissioned and qualified, and is an officer de jure, to his salary cannot be successfully denied on the ground that, during the time for which the salary was sought, he was not discharging the duties of the office, and its duties were being discharged by the officer de facto to whom the salary has been paid. (p. 923.)

M. A. Breeden, attorney general, for the appellant.

Warner & Davis, for the respondent.

⁸² BARTCH, C. J. Upon the hearing of an application therefor, which was made by the relator, Caleb Tanner, the district court issued a peremptory writ of mandamus to compel the auditor of public accounts, the defendant, to draw a warrant, in favor of the relator, in payment of salary, as state engineer, from March 15 to March 31, 1905, for the sum of one hundred and forty-one dollars and sixty-six cents. From that judgment the auditor appealed to this court.

The controlling question presented is whether the state auditor can refuse to issue a warrant for the salary of an officer for a portion of the time during which such officer did not personally assume charge of the office, and discharge the duties thereof, although he was appointed and commissioned by the governor for the whole term and had duly qualified. In other words, can the auditor or disbursing officer question the right of an officer, who has the proper credentials from the appointing power and has duly qualified, to any portion of the emoluments of the office? The attorney general, representing the appellant, referring to the relator, in his brief, says: "It is true the evidence shows that he filed his bond and took the oath of office on the fourteenth day of March, 1905, but there is no pretense or claim whatever that he assumed the duties of the office until March 20th"; and

then contends that "before a public officer is entitled to receive the emoluments of an office," he must not only be appointed and qualified, but must take charge, assume the duties of, and perform the services in the office, and insists that no claim can be made for the "salary or perquisites of an office for any period during which the claimant was not actually in office, even though wrongfully hindered from occupying the position"; the salary, as is urged, "being the reward for expressed services."

Although, it must be admitted, there are authorities which give some support to this contention, we are of the opinion that it cannot be maintained within this jurisdiction, and that the question here presented must be answered in the negative.

⁸³ The decisions on this subject appear to be irreconcilable. Some cases seem to hold that to entitle an officer to the emoluments of the office, he must take possession and actually discharge the duties of the office, and that if an officer de facto is in possession, performs the services, and is paid the salary, the officer de jure loses his right to recover the salary from the state or municipality. It seems such holding is based upon the theory, in part, at least, that an officer de jure has no property right in the office, and that his right to the emoluments is dependent upon the performance of the duties and not upon the office. Notwithstanding that this doctrine has been maintained by courts of high authority, it does not appear to have the support either of logic or sound reason. A de facto officer has no title to the office. In general he is a mere usurper, and when he commits an act for his own benefit it is void. His act is only valid when it concerns the public, and this upon the principle that the public is presumed to be unaware of his want of title. If he performs the services or duties, no matter how faithfully, he can maintain no action to recover the emoluments. This upon the ground that he has no title to the office because of which the emoluments accrue, and the principle that one cannot sue to recover what does not belong to him. Most of the cases of the class referred to, even while denying the right of the de jure officer to recover the emoluments from the state or municipality, after they have been paid to the officer de facto, hold that the latter must account to the former for the same in an appropriate action, thus virtually recognizing the fact that the emoluments are in

some way attached to the office, and belong to the holder of the legal title. Logically, therefore, it would seem to follow that payment to one not entitled to the office or its emoluments would not discharge the obligation to the person lawfully entitled thereto. If it be true that the *de jure* officer may recover the emoluments from the officer *de facto*, it must be upon the ground that he has some property rights of some sort in them, not, perhaps, property rights as ordinarily understood, but still some veritable, though they be intangible,⁸⁴ rights or interests of pecuniary value of which the law takes cognizance. This must be true, else no action could lie to recover the emoluments from the officer *de facto*, for it is self-evident that no action lies in favor of one to recover what lawfully belongs to another. If, as it seems to us, this is an uncontrovertible fact, then upon what legal ground can the state or municipality pay the salary, or emoluments, to one having no right or title to the office, without any fault or consent of the holder of the legal title, and thereby shake off all its responsibility to the *de jure* officer? How can the payment of the salary, in contravention of the will of the holder of the legal title to the office, to a person not entitled to recover it, and who can maintain no action to recover it, relieve the state or municipality from liability, or impair the right of the *de jure* officer to recover it? It would seem clear that such payment can or ought not have such effect in the law, which is supposed to be the embodiment of justice, logic, and sound reason. And there is a strong line of authorities, including many later decisions, based, as we think, upon sounder reasons than the class of cases above referred to, which hold that wrongful payment of the emoluments of salary of an office to a *de facto* officer, or person not entitled to receive it, does not impair the *de jure* officer's right to it, nor his right to recover it from the state or municipality that made the wrongful payment. And this upon the ground that the salary attached to a public office does not accrue by virtue of a contract, or *ex contractu*, but is an incident to the title to the office, inseparable from it, and that the right of the *de jure* officer to the salary does not depend upon the occupation and exercise of, but upon his title to, the office. Under this class of cases the acts of the *de facto* officer are held valid with respect to third persons and the public to prevent a failure of justice, but payment of the emoluments to him, for the services performed, constitutes no defense

in a suit, by the officer *de jure*, to recover them from the state or municipality. If, therefore, the disbursing officer of a state or municipality wrongfully pays the salary annexed to a public office to a *de facto* officer, he does so at his peril, ^{as} he having no right to assume that such salary belongs to anyone except the person who holds the legal title.

Strictly in line with the authorities so holding, this court, in *Kendall v. Raybould*, 13 Utah, 226, 44 Pac. 1034, held that: "The right to hold an office includes the right to receive the salary incident to it," and, in the course of the opinion, it was said: "The term 'office' is defined as 'a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging': 2 Blackstone's Commentaries, 36. It embraces the idea of tenure, duration, emoluments, and duties, and these ideas or elements cannot be separated, and each considered abstractly. All, taken together, constitute the office in a case like this." It was there also said that the relator "had a right to demand the order of the auditor on the treasurer to pay his claim, and it was the duty of the respondent to issue it. Nor could he lawfully refuse to perform such duty because, as is insisted by counsel, the salary had previously been paid to McAllister, who was claiming to hold the office. There was no authority for any other person other than the relator to hold the office, this court having adjudged the appointment of McAllister void. Therefore payment to him is no defense as against the relator. A disbursing officer has no right to assume that anyone but the legal officer has the right to receive the salary of the office. If he pays it to anyone else he does so at his peril": See, also, *Williams v. Clayton*, 6 Utah, 86, 21 Pac. 398; *People v. McAllister*, 10 Utah, 357, 37 Pac. 578.

In *Mechem on Public Officers*, section 855, the author says: "The relation between an officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of law, and, when it so exists, it belongs to him 'not by force of any contract, but because the law attaches it to the office.' The most that can be said is that there is a contract to pay him such compensation as may from time to time be by law attached to the office."

In *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458, it was said: "A *de facto* officer has no legal right to the emoluments of the office, the duties of which he per-

forms under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer de facto. In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347, the court says: 'It is abundantly settled by authority that an officer de facto can, as a general rule, assert no right of property, and that his acts are void as to himself, unless he is also an officer de jure.' In *Cro. Eliz.* 699, the doctrine is tersely stated as follows: 'The act of an officer de facto, when it is for his own benefit, is void; because he shall not take advantage ⁸⁶ of his own want of title which he must be conscious of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good.' . . . It is well settled that an office which has attached to it emoluments has a pecuniary value, although primarily it is an agency for public purposes, and that the right to the emoluments follows the legal title to the office."

So, in *Ward v. Marshall*, 96 Cal. 155, 31 Am. St. Rep. 198, 30 Pac. 1113, it was observed: "The plaintiff, by virtue of his election and qualification as justice of the peace, became entitled to the salary attached to such office during the term, should he live so long, and was not guilty of any misconduct for which he should be removed, or did not otherwise forfeit his legal title to such office. The right to receive the salary is an incident which attaches itself to the legal title to the office": 8 Am. & Eng. Ency. of Law, 2d ed., 808; *Mechem on Public Officers*, sec. 342; 23 Am. & Eng. Ency. of Law, 2d ed., 396, 397; *State v. Carr*, 129 Ind. 44, 28 Am. St. Rep. 163, 28 N. E. 88, 13 L. R. A. 177; *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458; *People v. Smyth*, 28 Cal. 21; *Rasmussen v. Commrs. Carbon Co.*, 8 Wyo. 277, 56 Pac. 1098, 45 L. R. A. 295; *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835, 7 N. E. 787; *City of Philadelphia v. Rink* (Pa.), 2 Atl. 505; *Carroll v. Siebenthaler*, 37 Cal. 193; *Scott v. Crump*, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1; *Auditors of Wayne Co. v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382.

In this case commission from the governor and qualification of the respondent were prima facie evidence of the officer's title to the office and right to the compensation, and therefore the auditor had no right to pay the salary to the de facto officer: *Williams v. Clayton*, 6 Utah, 86, 21 Pac. 398.

We do not deem it necessary to decide any other question presented. The writ was properly issued.

The judgment is affirmed with costs.

McCarty and Straup, JJ., concur.

Payment to a de Facto Officer of the Salary appertaining to the office releases the municipality, according to the weight of authority, from any further liability to pay it. There are cases, however, deciding that such payment in no way impairs the right of the officer de jure to recover the salary from the city: *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, and cases cited in the cross-reference note thereto: *Brown v. Tama County*, 122 Iowa, 745, 101 Am. St. Rep. 296. That the officer de facto is liable to the officer de jure for the amount of the salary paid, see *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224; *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228.

GARFF v. SMITH.

[31 Utah, 102, 86 Pac. 772.]

JUDICIAL OFFICERS, Liability of.—A public officer acting judicially or in a quasi judicial capacity cannot be made personally liable in a civil action unless the act complained of is willful, corrupt or malicious, or without his jurisdiction. (pp. 926, 927.)

JUDICIAL ACTS, What are—Sheep Inspectors.—The acts of a sheep inspector in quarantining sheep and in defining the place and limits of the quarantine are not ministerial, but quasi judicial. (p. 928.)

JUDICIAL ACTS AND OFFICERS—Sheep Inspectors.—If sheep inspectors and their deputies are required by law to inspect and quarantine sheep and make regulations for such quarantining, without prescribing at what character of place nor within what limits the sheep must be quarantined, the determining of such place and limits involves matters of judgment and discretion, not from fixed and designated, but from varied and multifarious, facts, and the acts of such officers are quasi judicial in their character, for which they cannot be held liable in a civil action in the absence of malice, fraud or corruption. (pp. 928, 929.)

M. A. Breeden and Street & Bramel, for the appellant.

Frick, Edwards & Smith, for the respondent.

¹⁰⁴ STRAUP, J. The respondent, plaintiff below, brought this action against Jesse M. Smith, the state sheep inspector, James P. Sharp, his deputy, and others, his bondsmen, to recover damages alleged to have been sustained through the negligence of defendants Smith and Sharp in quarantining sheep belonging ¹⁰⁵ to plaintiff and his assignors. As to the

defendant Smith and his bondsmen, the court took the case from the jury. Upon the issues submitted the jury rendered a verdict in favor of plaintiff and against defendant Sharp in the sum of eight hundred and fifty dollars. From the judgment entered upon the verdict against him, the defendant Sharp appeals.

The complaint, so far as material, alleges that Sharp, by virtue of his office, inspected and quarantined the sheep of plaintiff and his assignors, defined the place and limits of quarantine, and required plaintiff and his assignors to confine and keep the sheep within such limits; that in fixing the place and limits the defendant Sharp was guilty of negligence, and acted without due regard for the rights of plaintiff and his assignors in the particular that he selected and designated a place where there was no sufficient or proper food for the sheep, and where there were large quantities of greasewood, which, if eaten by sheep in considerable quantities and by drinking water thereafter, would make them sick and cause them to die; and that, no other food being obtainable, some of plaintiff's sheep ate large quantities of greasewood and drank large and excessive amounts of water, which caused their death. There are no allegations in the complaint, nor is there any evidence showing, that either of the defendants knew, or that it was common knowledge, that it is harmful or injurious to sheep to eat greasewood and to drink water thereafter, nor that the defendants, in the performance of their duty or otherwise, in defining the limits and designating the place, or in any other particular, acted with malice or wantonness, or that they acted beyond the scope of their authority, or without or in excess of their jurisdiction. The evidence shows that plaintiff and his assignors, in the latter part of April, 1903, were driving a herd of about two thousand and five hundred head of sheep, some of which were affected with an infectious disease called "scab," from the west, through Tooele county, to Draper, in Salt Lake county, and to Woodland, in Summit county. They stopped in Tooele county several days for shearing, after which they proceeded on their way with the sheep. When about three or four miles from the shearing ¹⁰⁸ camp, or corrals, they were intercepted by defendant Sharp, who inspected the sheep, found them diseased, quarantined them within limits of about four miles square, and directed that they be confined within such limits. The evidence on behalf of plaintiff tends to show that there was

no grass or other vegetation within the quarantine limits, except sagebrush, shadscale, greasewood, and, at places, small cedars. The plaintiff and his assignors insisted that they be permitted to proceed, for the reasons, as stated to them by Sharp, that they had ground leased for lambing at Draper and Woodland, and that there was no sufficient food for the sheep at the place of quarantine. Sharp replied that he could not give his consent to permit them to go on; and told them to see Mr. Smith. He went with them to a near-by place to telephone to Smith. Not being able to communicate with him, they went to Salt Lake City. Failing there to see him, they returned to the sheep. With Sharp's permission, the sheep were then taken back to the foothills, and without the limits of the quarantine. The sheep were confined in quarantine for a period of only twenty-seven hours. Because of the confinement of the sheep during this period at an improper place, on account of the want of proper food and pasture, the alleged resulting damages are claimed.

From the testimony of witnesses for plaintiff it is claimed that he and his assignors lost about fifteen hundred head of sheep as a result of twenty-seven hours of quarantine, because of the sheep eating a large amount of greasewood and drinking water thereafter. But the evidence on behalf of plaintiff also shows that the sheep had passed an unusually hard winter; that a cold snap had set in immediately after shearing; that before the quarantine the sheep had been driven along and kept about places of growing greasewood; that before the quarantine quite a number of sheep had died en route and about the shearing camp, but, as claimed by plaintiff, from cold and storms; and, while it is testified to that the eating of greasewood and the drinking of water by the sheep caused their death, it is not very satisfactorily made to appear that their death was caused from the eating of greasewood during ¹⁰⁷ the twenty-seven hours as a consequence of the quarantine. The appellant contends (1) that the evidence is insufficient to charge him with negligence; (2) that in inspecting and quarantining the sheep, and in defining the place and limits of quarantine, he, as a public officer in the performance of a public duty, acted in a quasi judicial capacity within the powers and jurisdiction conferred by law, and that if he can at all be made liable in a civil action, it is necessary to allege and prove that he acted with malice, or through fraud or corruption; and (3) that because of a want of such

allegations and proofs the trial court erred in overruling his motion to direct a verdict in his favor and in overruling his motion for a new trial.

In view of the principles of law applicable to this kind of a case it is not necessary to determine whether the evidence is sufficient to show even negligence on the part of the appellant, resulting from his acts, complained of, defining the place and limits of quarantine; the only acts of negligence attempted to be proved and to which the evidence relates. All the authorities agree that a public officer, acting judicially, or in a quasi judicial capacity, cannot be made personally liable in a civil action, unless the act complained of be willful, corrupt, or malicious, or without the jurisdiction of the officer. But if the duties of the officer are merely ministerial, he is liable in a civil action, when, in the performance of them, he acts negligently. These principles of law, of course, are conceded by respondent. It, however, is claimed by him that the appellant, in defining the place and limits of the quarantine, acted ministerially, and hence he is liable if he acted negligently. We are of the opinion that the character of the acts performed by appellant are quasi judicial in their nature, and not ministerial. It has well been said that: "Official duty is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and designated facts": *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091.

¹⁰⁶ It has also been defined as follows: "A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed": *State v. Meier*, 143 Mo. 439, 45 S. W. 306. To the same effect are also the following: *Girder v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Throop on Public Officers*, sec. 535; 23 Am. & Eng. Ency. of Law, 376.

The statute (Laws 1903, c. 42, p. 35) creating the office of state sheep inspector, and providing for the control and suppression of scab and other infectious diseases in sheep provides, among other things, that the state sheep inspector shall have

charge of the enforcement of the provisions of the act, and for the appointment of deputies, whose duty it is, among others, to inspect and quarantine sheep within their district. Section 10 (page 37) of the act provides: "When sheep are found diseased, or have been exposed to disease, by having been corralled, herded, or grazed in the same place with sheep that have been diseased or quarantined, regulations for their quarantine must be made at once by the state sheep inspector or one of his deputies, who must define the place and limits within which such sheep may be grazed, herded, or driven, and such sheep must be held in quarantine until pronounced cured from disease by the state sheep inspector, or one of his deputies. The expense of dipping, hand-dressing, spotting, feeding, and taking care of all sheep quarantined under the provisions of this act, must be paid for by the owner or agent in charge of such sheep."

When sheep are found to be diseased, the statute requires that the state sheep inspector or his deputy shall at once make regulations for their quarantine, and shall define the place and limits within which such sheep must be held until pronounced cured from disease by him or his deputy. The law does not prescribe nor define the time nor mode of the performance of the act with such certainty that nothing remains for judgment or discretion. The kind of regulations to be made, and the defining of the place and limits of quarantine, are wholly left to the judgment and discretion of the officer, to be determined by him, not from fixed and designated facts, but from the facts and circumstances of the particular case.

¹⁰⁰ It is strongly urged by respondent that, while the act of inspecting and quarantining the sheep may be judicial in its nature, nevertheless the act of defining the place and limits of quarantine is but ministerial. We discern no such distinction. The law does not prescribe the mode of doing the one act any more than it does the other. The law requires the officer to make regulations for the quarantine. Defining the place and limits of quarantine is but part of such regulations. The law does not prescribe at what character of place nor within what limits the sheep shall be confined, nor even the kind of regulations that shall be made by the officer. Such determinations involve judgment and discretion, not from fixed and designated, but from varied and multifarious, facts. They are dependent upon the number and diseased condition of the sheep, their treatment, care and preservation, the dan-

ger of their contact with and infection of other sheep, the rights of and protection to the public, and a variety of other things, depending upon the exigencies of the case, and; of necessity, must be largely left to the sound discretion of the officer in the exercise of an honest judgment. The law does not prescribe the mode of doing the act with such certainty that one person can do it as well as another by merely following that which is pointed out by the statute: *Mechem on Public Officers*. It is quite apparent that the doing of the acts complained of involves such discretionary powers as to make their exercise judicial in their nature, and that the officer performing them is not liable in a civil action, in the absence of averments and proof that he acted with malice or through fraud or corruption: *Fath v. Koeppel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539; *Spalding v. Vilas*, 161 U. S. 483, 16 Sup. Ct. Rep. 631, 40 L. ed. 780; *Chamberlain v. Clayton*, 56 Iowa, 331, 41 Am. Rep. 101, 9 N. W. 237; *Wall v. Trumbull*, 16 Mich. 228; *Bailey v. Berkey* (C. C.), 81 Fed. 737; *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530; *Pike v. Megoun*, 44 Mo. 491; *State v. Thomas*, 88 Tenn. 491, 12 S. W. 1034; *Schooler v. Arrington*, 106 Mo. App. 607, 81 S. W. 468; *State v. Hastings*, 37 Neb. 96, 55 N. W. 774; *Kendall v. Stokes*, 3 How. (U. S.) 87, 11 L. ed. 506, 833; *Daniels v. Hathaway*, 65 Vt. 247, 26 Atl. 970, 21 L. R. A. 377. Whether there be such liability against an officer exercising quasi judicial functions, even where he acts maliciously or corruptly, a principle of law concerning which the authorities widely differ, we need not determine in this case.

For the foregoing reasons the judgment of the court below is reversed, the respondent given leave to amend his complaint, and the court directed to grant a new trial. The costs of this appeal to be taxed against respondent.

Bartch, C. J., and McCarty, J., concur.

A Judicial Officer cannot be called to account in a civil action for his determination of acts in his judicial capacity: *Stewart v. Case*, 53 Minn. 62, 39 Am. St. Rep. 575; *Barker v. Wheeler*, 60 Neb. 470, 83 Am. St. Rep. 541. Official action is judicial when it is the result of judgment or discretion; it is ministerial when it is absolute, certain and imperative, involving the mere execution of a set task, and when the law which imposes it prescribes the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion: *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245. The power of a fish inspector to determine the quality of fish offered for sale in the markets, and to reject such as is unwholesome, is judicial; *Fath v. Koeppel*, 72 Wis. 289, 7 Am. St. Rep. 867.

REAMS v. TAYLOR.

[31 Utah, 288, 87 Pac. 1089.]

PLEADING.—A Demurrer Admits an Agreement as Alleged, together with all other facts properly pleaded. (p. 932.)

PRINCIPAL AND AGENT—Insane Persons.—An insane person cannot have an agent, because he cannot delegate powers either directly or by implication of law. (p. 932.)

GUARDIAN AND WARD, Liability of the Latter for the Acts and Agreements of the Former.—His guardian cannot bind an insane person by agreement. Hence, a person accepting the lease of the property of an insane ward with an agreement by the guardian that certain repairs shall be made to remove known dangerous defects cannot recover of the ward if injured by such defects. (p. 934.)

LANDLORD AND TENANT—Risk Assumed by the Latter.—A tenant accepting a lease of premises known to be in a dangerous condition must be deemed guilty of contributory negligence or to have assumed the risk, and hence cannot recover for personal injuries subsequently suffered through such condition. (p. 934.)

LANDLORD AND TENANT.—A tenant accepting a lease and taking possession of premises on which are dangerous defects should either repair the defects and deduct the cost from the rent, or surrender the premises, and failing to do either, if he is injured by such defects cannot recover therefor. (p. 934.)

C. S. Patterson, for the appellant.

Stewart, Stewart & Budge, for the respondent.

²⁹⁰ **FRICK, J.** This is an action for damages for personal injuries. The material allegations in the complaint are, in substance, as follows: That the defendant is an insane person, and that one Thomas E. Taylor is the duly appointed and acting guardian of the person and estate of the defendant. That the defendant is the owner of certain real estate in Salt Lake City, Utah, describing it, upon which is situate a certain two-story building used for tenement purposes. That at a time stated the plaintiff leased from Thomas E. Taylor, "agent and guardian" of the defendant, a part of said building, to be occupied by plaintiff as a tenant. That the lease was oral, and that, at ²⁹¹ the time of the making thereof, there existed a certain cellarway which opened or extended into a driveway extending along some distance from said building, and which cellarway was distant four feet from the door which opened into the apartment leased and to be occupied by the plaintiff. "That at the time said plaintiff so leased said property from said defendant she called the attention of said Thomas E. Taylor, guardian and agent as aforesaid, to said cellarway, and to

the dangerous condition thereof, and informed him that, if she leased said premises, she would require the defendant to protect said cellarway by means of a door or otherwise, in order to make the same safe, and avoid the danger of falling into said cellarway and receiving injury therefrom. That the said Thomas E. Taylor, guardian and agent, as aforesaid, at that time promised and agreed to make said cellarway safe, and cover the opening by means of a door." About a month after the leasing and occupancy of said apartment by plaintiff, and at the time when said guardian called for the first monthly installment of rent, plaintiff again called his attention to said cellarway, which remained in the same condition as when she leased the apartment, and said guardian "again promised and agreed to have said cellarway sufficiently protected." That in leasing said premises plaintiff relied on the promises of said Thomas E. Taylor, and that, in case he had not promised to make the repairs aforesaid, she would not have leased said apartment and remained therein. That about two months after taking possession of said apartment the plaintiff, in going along said driveway, and in passing said cellarway, in attempting to reach the door leading to her apartment, in the night-time, walked into said cellarway and fell, sustaining personal injuries and damages, to recover which this action is brought. Thomas E. Taylor, the guardian, is not made a party to the action, nor is any recovery sought against him. He was, however, served with summons as the guardian of the defendant, she continuing to be an insane and incompetent person, and as such guardian he interposed a demurrer to the complaint setting forth various grounds, one of which is that the complaint does not state ²⁰² facts sufficient to constitute a cause of action. The lower court sustained the demurrer, and plaintiff electing not to amend her complaint further, a judgment dismissing the action was duly entered against her, from which she prosecutes this appeal.

There are various errors assigned, but, in view of the conclusion reached, we shall consider but the one error, to wit, Did the court err in sustaining the demurrer upon the ground that the complaint does not state a cause of action, and in entering judgment dismissing the action? It will be observed that plaintiff seeks to recover judgment against an insane or incompetent person, and thus hold her estate liable. While the action is one sounding in tort, it seems to be based upon a

contract or agreement made by the guardian of the defendant in respect to repairs to be made by him on the cellarway. In this view it is clear that, if the defect in the cellarway had been repaired, as alleged, the plaintiff would not have fallen into it; and hence there would have been no cause for this action. The demurrer, of course, admits the agreement, as alleged, together with all other facts properly pleaded.

The theory upon which plaintiff seeks to recover in this action is not very clear. The agreement by the guardian to make the repairs is perhaps pleaded for the purpose of avoiding the application of the doctrine of contributory negligence against, or assumption of the risk by, the plaintiff. If it is not for this purpose, we can conceive of no other unless it be for the purpose of recovering as upon a breach of said agreement, from which the injury arose. If recovery is sought upon the ground that the plaintiff relied upon the special promise of the guardian to repair the cellarway, and that the guardian, in making the promise, thereby assumed the risk of injury therefrom, then a recovery against defendant would be possible only upon the ground that the guardian acted as the authorized agent of the defendant, and, as such agent, could, and did, bind her in that regard.

In this case, however, the principle upon which the relation of principal and agent is based wholly fails. There cannot be an agent unless there is a principal. In order to create the ²⁰³ relation there must exist a person who is competent to select and appoint an agent to act for the principal. An agent can and does exercise delegated powers only, and an incompetent person cannot delegate powers arising either directly or by implication of law. The doctrine of principal and agent, therefore, cannot apply between an insane person and his guardian, at least not where the insane person is sought to be held upon a default of the supposed agent's personal promise or undertaking. This is settled by the case of *Andrus v. Blazzard*, 23 Utah, 233, and authorities cited at pages 248, 249, 63 Pac. 888, 54 L. R. A. 354. The exceptions to the general rule above stated and referred to in *Mechem on Agency*, section 48, and the other authorities cited by counsel for appellant, have no application to this case. The case of *In re Strasburger*, 132 N. Y. 128, 30 N. E. 379, is one of that class of cases where a person, after entering into a lease containing certain covenants, becomes insane, and his estate is used for a breach of these covenants. In such cases the

covenants do not cease, although the covenantor becomes insane or incompetent. His estate must still comply with the covenants, or become liable thereon. Neither is the case of *Stillwell's Admr. v. South Louisville Land Co.*, 22 Ky. Law Rep. 785, 58 S. W. 696, 52 L. R. A. 325, cited by counsel for appellant, applicable to the facts in the case at bar. It is true that the agreement set forth in that case is, in many of its features, much like the one in this case, but in that case the agreement was pleaded for the sole purpose of avoiding the defense of contributory negligence. In that case the agreement was made with the owner of the property personally, and such owner was sued, and it was held that the tenant had a right to rely on the promises of the owner that he would repair the defect in the premises, and that by this promise the owner assumed the risk of injury to the child of the tenant; and hence the tenant was not guilty of contributory negligence in permitting his child to be on the leased premises. Both the defect and the circumstances were, however, different than they are in the case at bar. If in this case suit were brought against the guardian personally, the ²⁹⁴ question would be presented, in one phase perhaps, that is presented in that case. In the case at bar, however, the plaintiff is presumed to know the law. She knew that she was dealing with the guardian of an insane person, and that, therefore, the guardian could not bind the insane person by the agreement; and hence she should have governed herself accordingly. She had no right to go upon the assumption that the estate of the insane person would, as a matter of law, be held liable in case she was injured by reason of the guardian's failure to comply with this agreement to close up the open cellarway. As against the estate of the insane person, we are clearly of the opinion that it was plaintiff's duty to guard against injury from that source; that, with full knowledge of the conditions surrounding her, as clearly appears from the allegations of the complaint, she assumed the risk of injury. Under the allegations of her complaint she became simply a tenant, and, as such, was charged with full knowledge of the legal rights and duties pertaining to that relation. It will, we think, not be disputed that, in the absence of deceit or misrepresentation by the landlord, the tenant will take the risk of the condition of the premises leased by him, and, if injured by reason of their unsafe condition, especially when

open and unconcealed, as a general rule, cannot recover against the landlord for such injury.

In the case at bar there was neither deceit nor misrepresentation, and the contract or agreement made by the guardian, as we have seen, was not binding upon the insane owner of the property; hence her estate, if bound at all, would have to be bound under the general law applicable to the relation of landlord and tenant. Under this law the plaintiff does not state a cause of action: *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465. Under the authorities, she was guilty of contributory negligence, and likewise of having assumed the risk of injury, in view of her knowledge of the defect complained of, and, after knowledge thereof, having continued in the possession of the premises. The case of *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. Rep. 485, 35 N. E. 48, is a well-considered case. Under the law, as stated in that ²⁰⁵ case, the plaintiff could not recover against the defendant in view of the allegations of the complaint even if the defendant had been a competent person, and had personally made the agreement set forth in the complaint. The plaintiff would, as against her landlord, have had no right to expose herself to the risk of injury from existing and visible defects in the premises leased by her. It was her duty to repair the defect and deduct the expense therefor from the rent, or she might, under the lease in this case, have surrendered the premises. She chose to do neither, and hence cannot recover. The following cases all support the conclusions reached by us: *Kampinsky v. Hallo*, 23 N. Y. Supp. 114; *Kabus v. Frost*, 18 Jones & S. 72; *Edwards v. New York & H. R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Arnold v. Clark*, 13 Jones & S. 252; *Hendry v. Squier*, 126 Ind. 19, 25 N. E. 830, 9 L. R. A. 798; *Town v. Armstrong*, 75 Mich. 580, 42 N. W. 983.

We do not wish to be understood as holding that, in a proper case, the tenant might not recover against the landlord for personal injuries sustained by the tenant arising from defective premises. What we do hold is that the case at bar does not fall within the principles of law where such a recovery is permissible.

The court, therefore, did not err in sustaining the demurrer, and in dismissing the action.

The judgment is affirmed, with costs.

McCarty, C. J., and Straup, J., concur.

A Guardian cannot, by Any Contract into which he may enter with third persons, bind the person or estate of his ward: See the note to *Schmidt v. Shaver*, 89 Am. St. Rep. 282.

As Between Lessor and Lessee the maxim of a caveat emptor applies in respect to the condition of the leased premises, and ordinarily the lessor is not answerable to the lessee for injuries due to obvious defects and dangers: *Phelan v. Fitzpatrick*, 188 Mass. 237, 108 Am. St. Rep. 469; *Whitmore v. Orono Pulp etc. Co.*, 91 Me. 297, 64 Am. St. Rep. 229; *Clifton v. Montague*, 40 W. Va. 207, 52 Am. St. Rep. 872; *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. Rep. 485.

MILL v. BROWN.

[31 Utah, 473, 88 Pac. 609.]

CERTIORARI, Inquiry into the Constitutionality of a Statute Under.—In a proceeding by certiorari the constitutionality of a statute may be inquired into and determined, if, on finding that the statute is invalid, the acts of the court or judge must be held to have no support, and to be hence of no force or effect. (p. 941.)

STATUTE, Effect of Unconstitutional.—An unconstitutional law by which it is sought to affect the rights of a citizen is of no force or effect, and does not bind anyone. (p. 941.)

CERTIORARI—Inquiry into the Regularity of the Manner of the Appointment of a Judge.—In certiorari the court cannot inquire into the regularity of the manner of the appointment or the qualification of the judge whose judgment is assailed. (p. 941.)

STATUTES, Classification, Constitutionality of.—The legislature may make a classification so affecting cities of the first and second classes and other parts of the state that juvenile courts may be created for such cities, and the powers of such courts left elsewhere to the district courts. (p. 942.)

CONSTITUTIONAL LAW—Creation of New Courts.—The facts that certain powers and duties may be exercised by certain courts does not prohibit the legislature from creating new courts, conferring upon them like powers and duties under a constitution declaring that the constitutional power shall be vested in the supreme court, in district courts, in justices of the peace, and in such other courts inferior to the supreme court as may be established by law. (p. 942.)

CONSTITUTIONAL LAW—Creating Juvenile Courts.—The legislature may create a court or courts wherein juvenile offenders may be dealt with, although they were formerly dealt with in other courts. (p. 942.)

CONSTITUTIONAL LAW—Juvenile Courts, Vesting Exclusive Jurisdiction.—The legislature may vest in juvenile courts in cities of the first and second class exclusive jurisdiction of juvenile offenders, where the object is to relieve the overcrowded courts in those cities of this burden. (pp. 942, 943.)

STATUTES, Implied or Indirect Amendment of—Constitutional Law.—A statute creating juvenile courts and prescribing their functions is not unconstitutional under a constitution providing against amending any law without setting forth the new section as amended.

This statute is not intended as an amendment of any other law, and if it has such effect, it is incidental and by implication merely. This prohibition was not intended to prevent new legislation that may incidentally affect earlier laws. (p. 943.)

CONSTITUTIONAL LAW—Juvenile Courts.—The statutes creating courts having jurisdiction of juvenile offenders are in no sense criminal, and are not intended to provide punishment, but to save the child from becoming a criminal, and are hence not unconstitutional, though they do not provide for trial by jury, or arraignment, or plea, nor notice to the person or a warrant of arrest, and require the child to be a witness against himself. (p. 946.)

CONSTITUTIONAL LAW—Juvenile Courts—Attempting to Give Jurisdiction Over Adults.—Section 7 of the statutes of Utah providing for criminal courts, and declaring, where a child is delinquent as defined by the act, his parent responsible for or aiding, encouraging, causing, or contributing to the delinquency, shall be guilty of a misdemeanor, and may be brought before the court and examined, and if found guilty, the court may impose conditions on him, and as long as he complies therewith, may suspend the sentence, is unconstitutional, because it denies to him the right of trial by jury. (pp. 946, 947.)

CONSTITUTIONAL LAW—Juvenile Courts, Statute not Void as a Whole.—Though the statute creating juvenile courts is invalid in so far as it undertakes to pronounce the parent of the delinquent child guilty of misdemeanor in certain cases and punishable therefor, but does not provide for a trial by jury, this does not render the balance of the statute unconstitutional or void. (p. 947.)

CONSTITUTIONAL LAW—Juvenile Courts—Rights of Parents. Before a child can be made a ward of the state by proceedings in the juvenile courts, it must appear that the child is delinquent within the meaning of the statute, and that the parent or legal guardian is incompetent or has neglected and failed to care and provide for the child the training and education contemplated and required by both law and morals, and a court committing a child without first finding the existence of these conditions exceeds its power. (pp. 949, 950.)

JUVENILE COURTS—Notice to Parents.—Though a parent or guardian is not a necessary party to the proceedings in juvenile courts, and cannot be bound by a judgment respecting his rights to the custody and control of the child, yet it is proper to give such formal notice to such parent or guardian to the end that all the facts may be elicited by the investigation. (p. 950.)

JUVENILE COURTS, Practice in.—Findings Should be made in each case in conformity with the facts, and judgment rendered in accordance therewith. (p. 951.)

CERTIORARI—Judgments of the Criminal Courts, When will be Set Aside upon.—A judgment of the juvenile court will be vacated on certiorari when it does not appear from the record that facts existed or were found authorizing the court to deprive the father of the custody of the child and commit it as a ward of the state. (p. 952.)

Certiorari to review the proceedings of the judge of the juvenile court of the city of Salt Lake. The statute whose constitutionality was assailed consisted of twelve sections, in addition to the one declaring that the statute took effect upon

its approval. The first section provided that in cities of the first and second classes there was created a special court to be known as the juvenile court, which should have jurisdiction of all cases relating to children, including juvenile delinquents as described in section 6 of the act, and of the hearing and punishment of all delinquent adult persons as described in section 7, and that the court should have jurisdiction in all cases where the custody or legal punishment of children was in question; that the judge should be known as the judge of the juvenile court, and should be appointed by a commission known as the juvenile court commission, consisting of the mayor, chief of police, and city superintendent of public schools. By the second section the office of probation officer was created for every county in the state, to be appointed by the judge of the district court having jurisdiction, and in counties containing cities of the first and second classes to be appointed by the judge of the juvenile court. The probation officers were vested with power to make arrests and perform other duties incident to their office, and were required, before the fifteenth day of December of each year, to submit to the board of county commissioners a report in writing showing the number and disposition of delinquent children brought before the court during the year ending the 30th of November, previously. They were also required in their report to the county commissioners to show the number and disposition of delinquent children brought before the court, together with such other useful information regarding the cases and the parentage of the children as might be obtained at the trials thereof.

The third section of the act required proceedings thereunder to be by complaint or sworn statement, and authorized the probation officers to conduct proceedings against a child at the request or in the absence of the county attorney. In the complaints to be presented the acts claimed to have been committed by the child were required to be stated in a general way. By the fourth section, in cities of the first and second classes, when a child eighteen years of age, or under, was arrested, it was required to be taken directly before the juvenile court, or, if taken before a justice of the peace, or a judge of the city court, upon a complaint sworn out for any reason, it was the duty of such justice or judge to transfer the case to the juvenile court, and the officer in charge of the child was required to take it before that court, where the further proceedings against it were to be conducted. Whenever a

complaint was pending against any child claimed to be delinquent under the act, it was the duty of the court or magistrate before any other proceedings were had in the case, to give notice in writing of its pendency to the probation officer of the county, whose duty it was to inquire into and make a full examination of the parentage of the child, and the facts and circumstances of the case, and report the same in writing to the court or magistrate, and if upon investigation and consultation it was made to appear to the court or magistrate, that the child was guilty of the charge, the court or magistrate must immediately certify the case to the district court, and transmit all papers relating thereto. For the purposes of the act there was created a juvenile department of the district courts outside of cities of the first and second classes. By section 5, when any case of a delinquent child came under the provisions of the act, the court might continue the hearing from time to time, commit the child to the care of the probation officers, and allow it to remain at its own home, subject to the visitation of such officer, and the child to report to the court or such officer as often as might be required, or the court might cause the child to be placed in any suitable family home, subject to the friendly supervision of the probation officer, and the further order of the court; or the court might commit the child to the state industrial school, or to any institution in the county incorporated under the laws of the state that may care for children or be provided by the state or county, suitable for the care of children, or to any state institution which might be established for the care of boys and girls; the child in no case to be committed beyond the age of twenty-one. A child, when committed, was subject to the control of the board of managers of the institution, which had power to parole the child on such conditions as it might prescribe, and the court, on recommendation of the directors, might discharge the child from custody whenever in the judgment of the court its reformation was complete, or the court might commit the child to the care and custody of some association which would receive it, embracing in its objects the care of neglected and delinquent children. A delinquent child was defined by section 6 of the act, which was declared to apply only to children of eighteen years of age and under, not inmates of a state institution or any institution incorporated under the laws of the state for the correction of delinquent children, as follows: "Delinquent child

shall include any child eighteen years of age or under such age who violates any law of this state or any city or village ordinance, or who is incorrigible, or who knowingly associates with thieves, vicious, or immoral persons; or who is growing up in idleness and crime; or who knowingly visits or enters a house of ill-repute; or who knowingly patronizes or visits any policy shop or place where any gambling device is or shall be operated, or who patronizes or visits any saloon or dram-shop where intoxicating liquors are sold; or who patronizes or visits any public poolroom or bucketshop; or who wanders about the street in the night-time without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks, or jumps on or attempts to board any moving train, or enters any car or engine without lawful authority; or who habitually uses vile, obscene, vulgar, profane or indecent language, or is guilty of defacing or writing on any wall, or building or in any public or private place any vile, obscene, profane or indecent language, or drawing any obscene or vulgar picture or pictures, or is guilty of any immoral conduct in any public or private place or about any schoolhouse." This section also provided that the disposition of any child under the act, or evidence given in the cause, should not in any civil, criminal or other proceeding be lawful or proper evidence against the child, except in subsequent cases under the act.

By section 7 any parent or legal guardian or person having the custody of the child, and being responsible for or in any act encouraging, causing, or contributing to the delinquency of the child was made guilty of a misdemeanor, and whenever complaint was made of the delinquent adult person, he was to be brought before the juvenile court and examined by it, and if guilty, the court might, upon conviction, impose conditions upon such person, and so long as such person should comply therewith, the sentence imposed might be suspended.

The eighth, ninth, and tenth sections of the act related to the salaries of the judges and probation officers, the residence of the judge, the courtroom to be provided, and the mode of serving process, with respect to which mode, the act declared that the laws governing the city and municipal courts relative to the service of process, subpoenas, and payment of witnesses and other costs were made applicable to the same subjects in the juvenile court.

By section 11 the method of the presentation of the claims of probation officers was provided for, and by section 12 it was declared that the provisions of the act should be construed in accordance with the provisions of section 4052 of the Revised Statutes of Utah, 1898. The section thus referred to is as follows: "The rule of the common law, that penal statutes are to be strictly construed, has no application to the Revised Statutes. The provisions of the Revised Statutes are to be construed according to the fair import of their terms with a view to effect the objects of the statutes and to promote justice."

N. W. Sonnedecker, for the appellant.

Benner X. Smith, Frank B. Stephens and James Ingebretzen, for the respondent.

⁴⁷⁴ FRICK, J. This is an application to this court, in its original jurisdiction, for a writ of certiorari. The application is made under ⁴⁷⁵ section 3631 of the Revised Statutes of 1898, by Emil Mill (hereinafter styled applicant), as father of Albert E. Mill, a minor. The writ was duly issued by this court, directed to Willis Brown, as judge of the juvenile court of Salt Lake City, who made and filed his return by filing an answer in connection with what purports to be a transcript of the proceedings of the juvenile court which it is sought to have reviewed by this application. From the application and return it appears that Albert E. Mill is a minor of about the age of thirteen years; that a complaint in writing was duly filed in the juvenile court against him as a delinquent child under chapter 117, page 182 of the Laws of Utah of 1905, entitled "Juvenile Courts"; that in such complaint he was charged with petit larceny for taking a box of cigars, was found guilty of that charge, and ordered committed to the Industrial School of the state of Utah as a delinquent child until he shall have attained the age of twenty-one years, unless sooner released by the board of control of said institution. The proceedings of the hearing and the judgment of the court are attacked upon various grounds, some of which will be noticed hereafter, and those presently noticed are: That chapter 117, aforesaid, is unconstitutional and void; that the judge of said court does not possess the legal qualifications to act as judge of said court; and that he was not chosen or appointed in accordance with law. While the record of the

proceedings certified up is somewhat meager and unsatisfactory, sufficient appears therefrom to warrant us in reviewing the essential parts of the proceedings.

At the threshold of this investigation we are met by the respondent with two propositions: (1) That we cannot, in this proceeding, examine into and pass upon the constitutionality of said chapter 117; and (2) that we cannot pass upon either the regularity or manner of appointment or the qualifications of respondent.

In view of the nature of the inquiry before us, we cannot accede to the first of the two propositions above stated. True, if the inquiry were limited to the determination as to whether the respondent was entitled to hold the office as juvenile ⁴⁷⁶ judge under a certain law, then we could not, in this proceeding, inquire into and pass upon the constitutionality of the law under which he held the office. The inquiry, however, is much broader. The attack upon the law is that it affects the rights of the applicant, regardless of whether the respondent is holding the office legally or otherwise. If the law be unconstitutional, then the acts of the respondent which affect the rights of the applicant have no support, and are, therefore, void and of no force and effect. This inquiry goes directly to the power—jurisdiction—of respondent to act, not to his qualification to do so, and hence can be inquired into in this proceeding. We cannot assent to the doctrine that a citizen affected by a law may not, at any time and in any judicial proceeding, attack that law as being unconstitutional and therefore void. An unconstitutional law by which it is sought to affect the rights of the citizen is of no force or effect, and would not bind anyone: *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178. Any act, therefore, of the respondent affecting the applicant's rights, if such act is based upon an unconstitutional law, is both without and beyond jurisdiction, and therefore void. The first objection cannot be sustained.

The second objection, however, is well taken. If the acts complained of are supposed to be illegal only because the respondent was chosen or appointed under a supposed invalid law, or because he does not possess the proper qualifications, then the attack must be direct, not a collateral one. But this is so because the respondent would, in such a case, still act as judge, if not under strict legal right, then as one in fact. His legal right to act would have to be determined by a direct

proceeding for that purpose. This principle of law is not changed by the fact that the same statute or law under which he acts also provides for his qualifications, election or appointment. This principle is well established by the following authorities: *Scheiwe v. Holz*, 168 Ill. 432, 48 N. E. 65; *Fraser v. Freelon*, 53 Cal. 644; *State v. Osburn*, 24 Nev. 187, 51 Pac. 837; *Coyle v. Sherwood*, 1 Hun, 272; ⁴⁷⁷ *Nelson v. People*, 23 N. Y. 293; *People v. Whito*, 24 Wend. (N. Y.) 520.

There are many other constitutional objections presented which we shall not notice or discuss in detail, for the reason that they are all thoroughly considered by the courts whose decisions we will cite hereafter, and which are all determined against the contentions of the applicant. Apart from the general objections just referred to above, there are several that are directed specially to some of the provisions of our constitution. It is asserted, for instance, that chapter 117 is unconstitutional because (1) it confers jurisdiction and powers upon a court created by an act of the legislature which are now discharged by the district courts, which courts are constitutional courts; and (2) because, in the state at large, the powers of juvenile courts are still to be exercised by the district courts, while in cities of the first and second classes such is not the case. This contention is not tenable. The classification of cities for certain purposes is too well established to require discussion. But the fact that certain powers or duties may be exercised by certain courts does not prohibit the legislature from creating new courts and conferring upon those like powers and duties. Indeed, our constitution seems to have been framed with this object in view. Section 1 of article 8 vests the "judicial powers of this state . . . in a supreme court, in district courts, in justices of the peace and such other courts inferior to the supreme court as may be established by law." While there are certain limitations in respect to certain powers as applied to certain courts, the constitution wisely refrains from conferring exclusive original jurisdiction upon any of the courts, but vests such original jurisdiction in all the courts to be apportioned and exercised as the legislature may direct. There can be no valid reason, therefore, to dispute the right of the legislature to create a court or courts wherein juvenile offenders or delinquents may be dealt with although they were formerly dealt with in other courts. Nor does the fact that in cities

of the first and second classes juvenile courts are given exclusive jurisdiction over juvenile offenders ⁴⁷⁸ in any way offend against any constitutional provision. The object is to relieve already overcrowded courts in such cities from this burden, and confer the power to deal with children belonging to the class defined in the act upon the courts especially designed and adapted to carry into effect the provisions of the act. Nor does it in any way contravene any constitutional provision, because the act devolves the duties of the juvenile courts, as exercised by them, in cities of the first and second classes, upon the district courts held outside of such cities. The act, for this reason, is not obnoxious to the uniformity clause of the constitution. Uniformity, in the sense used in the constitution, simply means uniformity in respect to the class into which a subject matter may be classified, upon which the law is to operate. The children are dealt with precisely the same whether they are brought before a juvenile court in the city or before a district court in the state at large. The law operates in the one instance precisely as in the other. The only difference is that a district court in the state at large may be required to pass upon fewer cases. The law was enacted for the express purpose of relieving the district courts in cities of the burden, and thus give them the opportunity the country courts have to confine their work more strictly to contested law and equity cases. The law, therefore, aims at uniformity, in one sense, rather than at the opposite. The district courts are not deprived of any constitutional right or power by chapter 117 by reason of conferring jurisdiction upon juvenile courts: 11 Cyc. 711; *State v. Archibald*, 52 Ohio St. 1, 38 N. E. 314; *Hagany v. Cohnen*, 29 Ohio St. 82.

Nor is the objection valid that chapter 117 is against that provision of the constitution which prohibits the legislature from amending any law or section without setting forth the new section as amended. Chapter 117 is an independent and complete act in itself. It is not intended thereby to directly amend or modify any other law or section. If such is its effect, it is so incidentally or by implication merely. The provision of the constitution now under consideration ⁴⁷⁹ was not intended to prevent new legislation that might incidentally affect older laws without setting forth all the laws that might incidentally be affected by the new ones. If the constitutional provision were thus construed, new legislation would be made almost impossible; it would at least

impose intolerable burdens upon both the legislature and the courts, and would, in the end, be of much greater mischief than the one sought to be avoided. This objection, therefore, is likewise untenable: Cooley's Constitutional Limitations, 7th ed., 216; 1 Lewis' Sutherland on Statutory Construction, 2d ed., 239, 240. The case of *State v. Beddo*, 22 Utah, 432, 63 Pac. 96, illustrates a clear attempt to amend different sections without complying with the constitutional provision above referred to, and this, it was properly held in that case, could not be done. If, however, that case admits of a construction contrary to the doctrine above stated, then it would be in direct conflict with the authorities last above cited, and contrary to the rule approved and adopted by the great weight of authority upon the subject of affecting or amending existing laws incidentally or by implication, by new and independent acts, and therefore could not stand as an authority except so far as it is in harmony with the rule here adopted.

There are some constitutional objections to certain portions of the act that are more serious, however, namely, the objection that respondent's appointment is delegated to a special commission created by the act, and that his salary is to be fixed by such commission, to be paid out of the city treasury. may well be said to reach, if they do not go beyond, the limit of the legislature to invade local self-government as the same is implied by the spirit, if not the letter, of our constitution. These are matters upon which we entertain serious doubts. But, as these matters go again to the right of the respondent to discharge the duties of the office as an officer *de jure* merely, we cannot, in this proceeding, pass upon or decide them. Moreover, as at present advised, we assume, but do not decide, that even if the portions of the act above referred to were held to be bad, that they are not so connected with the other portions of the act as to vitiate ⁴⁸⁰ the whole law. The act would still create a *de jure* office which could be filled by a *de facto* officer, and all the other portions dealing with and affecting juvenile delinquents would still stand and be made effective in accordance with the true spirit and intent of the act taken as a whole. This does not apply to section 7 to which we will refer hereafter.

The other constitutional and legal objections respecting the right to trial by a jury, the want of arraignment and plea, the suspending of judgment or sentence, the manner of examination or trial, that the child is required to be a

witness against himself, the want of notice to the parent, the dispensing with the warrant and arresting the child and bringing him before the court, and all like questions, are fully, learnedly and satisfactorily discussed and decided against the contentions of applicant in the following cases: *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198; *Milwaukee Industrial School v. Supervisors of Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 102; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388; *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452, 6 N. E. 830; *State v. Home Society*, 10 N. Dak. 493, 88 N. W. 273; *Reynolds v. Howe*, 51 Conn. 472; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *Ex parte Nichols*, 110 Cal. 651, 43 Pac. 9; *State v. Phillips*, 73 Minn. 77, 75 N. W. 1029; *In re Mason*, 3 Wash. 609, 28 Pac. 1025; *In re Kelley*, 152 Mass. 432, 25 N. E. 615; *State v. Kilvington*, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284; *Matter of Knowack*, 158 N. Y. 482, 53 N. E. 675, 44 L. R. A. 699; *Jarrard v. State*, 116 Ind. 98, 17 N. E. 912; *State v. Brown*, 50 Minn. 353, 36 Am. St. Rep. 651, 52 N. W. 935, 16 L. R. A. 691; *State v. Marmouget*, 11 La. 225, 35 South. 529. It would not only seem useless to enlarge upon the reasons in the foregoing cases why acts similar to chapter 117 do not contravene constitutional or substantial rights, except perhaps in the particulars above referred to, but it would smack of pedantry to attempt to do so. There is not a single argument presented by applicant in this case which is not considered and answered in the foregoing cases. Quite true, there are a few cases seemingly to the contrary. One ⁴⁸¹ of those is *State v. Ray*, 63 N. H. 406, 56 Am. Rep. 529. While the argument of the court in that case is adverse to many of the decisions cited above, the question involved in nearly all of the cases above cited and involved in the case at bar was not in issue, and hence the New Hampshire case is not an authority. The law passed upon in that case did not confer the power upon the justice to take the action taken by him, and thus he exceeded his authority. No other question was involved, and hence no other could be decided. The case of *People v. Turner*, 55 Ill. 280, 8 Am. Rep. 645, was decided more than thirty-five years ago, and while, in that case, some of the contentions of counsel for applicant were upheld, nearly all of the cases decided since then, as appears from the list above cited, have taken a different, and, as it seems to us, a more rational view of the subject. The procedure in the state of Illinois in re-

spect to juvenile offenders has, however, been changed since the decision of *People v. Turner*, 55 Ill. 280, 8 Am. Rep. 645, and such laws are now upheld in that state, as can be seen from the later cases of *Petition of Ferrier*, 103 Ill. 367, 43 Am. Rep. 10, and *County of McLean v. Humphreys*, 104 Ill. 378. Such laws are most salutary and are in no sense criminal and not intended as a punishment, but are calculated to save the child from becoming a criminal. The whole and only object of such laws is to provide the child with an environment such as will save him to the state and society as a useful and law-abiding citizen, and to give him the educational requirements necessary to attain that end. To effect this purpose some restraint is essential. Such or similar restraint is, however, necessary in any institution of learning, however humble. Everywhere we are all met with restraint. Civilized society cannot exist without it, and no school can continue without discipline, and it is this discipline which is denominated restraint in schools such as are provided for juvenile offenders. We can see no valid reason for holding chapter 117 vulnerable to attack upon constitutional or other grounds, and therefore we cannot, for that reason alone, sustain the contentions of the applicant and set aside the judgment of the juvenile court.

⁴⁸² The foregoing does not apply to section 7 of said chapter. By the provisions of said section the juvenile court deals directly with adult persons. While the provisions of section 7 are entirely germane to the principal object of the main act, the acts denounced in section 7 are made a misdemeanor, and are thus a crime within the purview both of the constitution and the Criminal Code of this state. As we have already pointed out, the proceedings of the juvenile court do not fall, nor are they intended to come, within what is termed criminal procedure, nor are the acts therein mentioned, as applied to children, crimes. To constitute the act under section 7 of an adult a crime entitles such adult to the right of a trial as for any other crime. This right is denied by said section 7 and it cannot, therefore, be upheld. Quite true, some method is necessary to punish adults when interfering with children who may be held to be wards of the state, and no doubt it is proper for the legislature to provide for their punishment. When such is done, however, trial must be provided for in the proper forum and in legal manner. Section 7 of the act, for the reason that it violates this elementary

provision, so to speak, of criminal law and procedure, must, therefore, be held of no force or effect. This, however, in no way affects the other provisions or sections of the act. Section 7 was a mere excrescence, in one sense, on the principal provisions of the act, in no way connected with it so far as it affects the right to deal with children, and, as is clearly apparent, was not an inducement to the enactment of the other portions of the act. For these reasons, all other parts of the act may, and are permitted to, stand.

But there is another reason for which we think the judgment cannot be permitted to stand. By a careful examination of the cases above cited, it will be found that all the decisions rest upon the proposition that the state in its sovereign power has the right, when necessary, to substitute itself as guardian of the person of the child for that of the parent or other legal guardian, and thus to educate and save the child from a criminal career; that it is the welfare of the child that moves the state to act, and not to inflict punishment ⁴⁸³ or to meet out retributive justice for any offense committed or threatened. In other words, to do that which it is the duty of the father or guardian to do, and which the law assumes he will do by reason of the love and affection he holds for his offspring and out of regard for the child's future welfare. The duty thus rests upon the father first. As the duty is imposed by the moral as well as the laws of society upon the father first, so it must likewise logically follow that he must be given the first right to discharge that duty. Indeed, the common law based the right of the father to have custody and dominion over the person of his child upon the ground that he might better discharge the duty he owed the child and the state in respect to the care, nurture and education of the child. The right and duty are therefore reciprocal, and may be termed natural, as well as legal and moral. Before the state can be substituted to the right of the parent it must affirmatively be made to appear that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect or incompetency to discharge the duty and thus to enjoy the right. Section 6 of the act defines the acts which constitute a child a delinquent and thus a fit subject to be brought before the juvenile court for examination. To bring the child before the court, the act provides that a complaint in writing must be filed, which was done in this case. But

when a complaint is filed and one or more of the acts constituting delinquency are set forth, the court only acquires jurisdiction of the child for the purpose of investigating into its condition or conduct. Quite true, in some states, a formal complaint in writing may not be an essential, but it is made so in this state, and hence must be observed. But when the court has investigated the matters set forth in the complaint and finds some or all of the charges to be true, it does not follow, from that fact alone, that the state should forthwith be substituted in place of the parent or legal guardian and take full control of the person of the child. All that the court has established so far is that the child is a delinquent in view of the provisions of the act. The question as to ⁴⁸⁴ whether the parent has been derelict in respect to his duty, or whether he is a competent person or not to have charge of the child, and whether he has forfeited his natural and legal right to continue the relation, has not been touched upon, and no finding or adjudication of that fact has been made. There is nothing, therefore, up to this point, in the proceedings upon which a judgment can be based substituting the state as guardian of the person of the child in place of the parent. The whole fabric of the law, as is clearly shown by all the decisions cited, *supra*, rests upon this theory, and those laws are sustained by virtue of it. Until something is made to appear that the child is not cared and provided for in respect to the matters involved, there exists no reason for the state to take charge of the person of the child, and hence no right exists to do so under the act. True, the parent need not be made a party to, or even have notice of, the proceedings against the child. The parent is not bound by the judgment against the child, and may, at any time, institute proper proceedings to obtain custody of him. But the matter now under consideration lies deeper than this; it is one of power to render judgment placing the child in charge of one guardian, the state, before determining or passing upon the qualifications of the natural guardian to have charge of the child. The court might as well enter up a judgment without any complaint or investigation whatever. The relative rights and duties of the father or mother are so well and thoroughly discussed in the case of *Nugent v. Powell*, 4 Wyo. 173, at pages 189 to 199, 62 Am. St. Rep. 17, 33 Pac. 23, 20 L. R. A. 199, that we shall do no more than to refer to the discussion there presented. Moreover, in nearly all

cases cited in this opinion, the fact of the dereliction, negligence or incompetency of the parent is referred to as a ground for the exercise of the state of its right in respect to the child's custody. Indeed, in some of the cases it appears that this fact is made a part of the complaint and made a ground for the court to act, and in most of them the fact is found and adjudicated. While there is no express provision in chapter 117 requiring the juvenile court to find one way or the other in respect to the ⁴⁸⁵ competency of the parent, still it appears from various portions of the act that the legislature intended that the matter should be inquired into. It provides that the parentage should be investigated and reported upon to the district courts by their probation officers in the state at large, and in cities of the first and second classes the juvenile judge and his probation officers, it is clearly implied, must do the same. Some of the acts constituting delinquency as defined by section 6 of the act are so trivial in themselves that any thoughtless boy might commit them and thus be adjudged a delinquent, and by a careless judge be sent to the industrial school when the parent was not only willing, but most competent, to have control of the child, and would offer it better surroundings and training than the state at best could give or afford. We are constrained to hold, therefore, that before a child can be made a ward of the state, at least two things must be found: (1) That the child is a delinquent within the provisions of chapter 117; and (2) that the parent or legal guardian is incompetent or has neglected and failed to care and provide for the child the training and education contemplated and required by both law and morals.

The foregoing conclusions are based upon what we conceive to be the true spirit and intent of the act itself. If it should be contended that nothing appears in the act requiring such a finding to be made, then we must still construe it in the light of other provisions of the law which may affect the relation of parent and child, and the rights of the parent, in view of such relation. Such a provision is found in section 82 of the Revised Statutes of 1898, where it is expressly provided that a parent cannot be deprived of the custody of the child unless it is made to appear that he is unfit or incompetent to have such custody. We are doing no more, therefore, in requiring such a finding to be made, than is enjoined by positive law of this state. The act itself, where it

is silent, must be construed in connection with other provisions upon the same subject. Unless, therefore, both the delinquency of the child and incompetency, for any reason, of the parent concur and are so found, the court exceeds its power when ⁴⁸⁶ committing a child to any of the institutions contemplated by the act. While we do not wish to be understood as holding that investigations before juvenile courts must be conducted as trials usually are, still these courts should not disregard all rules of procedure. The law requires a written complaint to be filed, hence there should also be an investigation of the matters set forth in the complaint and witnesses examined, under oath, with the right of cross-examination. Since there is no appeal, and can be none in these cases, there should be as thorough an examination into the matters complained of as the nature of the case admits, under all the circumstances. We desire to observe, also, that while the parent or guardian is not legally a necessary party to the proceedings, and should not, and cannot be bound by any judgment rendered in the juvenile court respecting his rights to the custody and control of the child, yet, in view that he is affected, it perhaps were better that a formal notice of the hearing be served on him, if he can be found, to the end that all the facts may be elicited by the investigation. The whole proceedings should be conducted so as to subserve the rights and best interests of all, while in no way minimizing the beneficent purposes of the law itself. While, in the very nature of things, these courts cannot conform to the rigorous rules of criminal and law courts, their proceedings should still be conducted as a legal investigation.

From an inspection of the record in this case, meager as it is, we are forced to the conclusion that the difficulties complained of are due far more to the respondent than to the law. To administer juvenile laws in accordance with their true spirit and intent requires a man of broad mind, of almost infinite patience, and one who is the possessor of great faith in humanity and thoroughly imbued with that spirit. Those who come, and are intended to be brought, before juvenile courts must be reached through love, not fear. The purpose in bringing them before the court is to lead them away from, and to destroy their propensities to, vice; to elevate, not degrade; to reform, not to punish them. Their parents likewise must be met and dealt with in the same spirit. ⁴⁸⁷ They should be directed in a proper spirit, and not, as

this record discloses, be met with defiance. The conditions surrounding them may be due as much to lack of information and misfortune as to viciousness. The judge of any court, and especially a judge of a juvenile court, should therefore, be willing at all times, not only to respect, but to maintain and preserve, the legal and natural rights of men and children alike. Respondent, as this record discloses, either has no regard for, or is uninformed in respect to, the rules that the experience of past generations has evolved for the purpose of safeguarding the rights of all. Like most laymen, but seemingly without their good judgment, respondent seems to regard these rules as mere technicalities to be brushed aside as obstructions in the pathway of what is usually termed "common-sense justice." He seems to be a willing convert to the theory that he is better, if not wiser, than both law and rules of procedure, and that he may thus disregard either or both at pleasure. While juvenile courts cannot, and are not expected to, be conducted as criminal or other courts usually are, the judge should still not wholly disregard all wholesome rules in an attempt to establish guilt which he suspects, or, worse yet, merely imagines. Most of the rules of evidence and procedure were established, and their observance is necessary, to curb the propensities of the inquisitor, and it would, no doubt, better subserve the best interests of all if the most important of these rules were observed by respondent in his investigations. The fact that the American system of government is controlled and directed by laws, not men, cannot be too often nor too strongly impressed upon those who administer any branch or part of the government. Where a proper spirit and good judgment are followed as a guide, oppression can and will be avoided.

It further appears from the record before us that either respondent, or some one for him, has devised a printed record to which all cases are made to conform. Printed formulas are well enough as guides, but to have a printed record only is too much of a temptation to make every case fit the record instead of making a record to fit the case. As we have ⁴⁸⁸ already stated, the cases coming before the juvenile court are not criminal, and hence a criminal record does not fit those cases. Findings should be made in each case in conformity with the facts, and judgment rendered in accordance with the facts found.

Because a good and wholesome law has, in some instances, been abused, we are most earnestly implored to set aside the law. This we cannot do. The court may be reformed and the law amended, if, in the judgment of the legislature, this is necessary. All good laws may be, and at times no doubt are, abused, but this is no reason why they should either be held bad or repealed. While it is neither the duty nor the province of this court to suggest what the laws should be, or who should administer them, we cannot silently pass by what seems to us a total disregard of wholesome rules. The juvenile court law is of such vast importance to the state and society that it seems to us it should be administered by those who are learned in the law and versed in the rules of procedure, to the end that the beneficent purposes of the law may be made effective and individual rights respected. Care must be exercised in both the selection of a judge and in the administration of the law. When this is done, we have no doubt that most of the things complained of, and as they appear from the record, will be obviated. The juvenile law of this state is of too much importance to be hampered by or set aside for trivial or avoidable causes. All good citizens are interested in its proper administration and enforcement, and it is well worth the best efforts and patient care of those who, for the time being, are clothed with the power of administering such laws. If all governments are interested in the moral and educational welfare of those who in time will be called upon to discharge the duties of citizenship, how much greater should be that interest in a government like ours, where the citizen is the sovereign from whom emanates all the powers of government?

For the foregoing reasons, therefore, the judgment of the juvenile court committing Albert E. Mill to the Industrial School is set aside and annulled, and he is returned to the ⁴⁸⁹ custody of Emil Mill, his father, until said Albert shall be legally adjudicated to be a ward of the state in accordance with the views herein expressed; neither party to recover costs. It is so ordered.

McCarty, C. J., and Straup, J., concur.

CONSTITUTIONALITY OF STATUTES CONCERNING REFORMATORIES AND JUVENILE COURTS.

- I. Commitment Without Jury Trial, 953.
- II. Cruel and Unusual Punishment, 957.

IV. Arbitrary Deprivation of Custody, 953.**IV. Arbitrary Deprivation of Custody, 953.****V. Constitutional Limitation, 960.****VI. Legislation Concerning Juvenile Courts, 961.****I. Commitment Without Jury Trial.**

In many of the states of the American Union statutes exist which authorize the commitment of infants to reformatories under certain circumstances, and their detention there, upon an informal hearing and without a trial by jury. The constitutionality of such statutes has often been assailed on the ground that the infant was thus deprived of his liberty without due process of law and without a trial according to the course of the common law, but the almost universal trend of judicial authority is that such statutes are constitutional and valid, that the offending child is not entitled, previous to his commitment, to a trial by jury as the reformatory to which he is committed is not a prison, but a school where reformation and not punishment is the end sought to be obtained: *Reynolds v. Howe*, 51 Conn. 472; *Pugh v. Bowden* (Fla.), 45 South. 499; *Petition of Ferrier*, 103 Ill. 367, 43 Am. Rep. 10; *County of McLean v. Humphreys*, 104 Ill. 378; *Roth v. House of Refuge*, 31 Md. 329; *Farnam v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452, 6 N. E. 830; *State v. Brown*, 50 Minn. 353, 36 Am. St. Rep. 651, 52 N. W. 935, 16 L. R. A. 691; *People v. Catholic Protectors*, 61 How. Pr. 445; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 199; *Ex parte Crouse*, 4 Whart. 9; *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198; *State v. Kilvington*, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284; *Milwaukee Industrial School v. Supervisors of Milwaukee Co.*, 40 Wis. 328, 22 Am. Rep. 702. Perhaps the first case involving the question of the constitutionality of a statute enacted for the benefit and protection of helpless, wayward, or abandoned children by ordering their commitment to a reformatory without a trial by judge is that of *Ex parte Crouse*, 4 Whart. 9, wherein it was decided that a statute which authorizes the committal of infants to a house of refuge under certain circumstances and their detention there, without a previous trial by jury, is constitutional and valid. The court said that "the House of Refuge is not a prison, but a school, where reformation and not punishment, is the end; it may indeed be used as a prison for juvenile convicts who would else be committed to a common gaol and in respect to these, the constitutionality of the act which incorporated it stands clear of controversy. It is only in respect to the application of its discipline to subjects admitted on the order of the court, a magistrate or the managers of the almshouse, that a doubt is entertained. The object of the charity is reformation, by training its inmates to industry, by inculcating their minds with principles of morality and religion, by furnishing them with means to earn a living, and, above all, by separating them from the corrupting influence of improper associates. To this

end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae* or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right the business of education belongs to it. . . . As an abridgment of indefeasible rights by confinement of the person, it is no more than what is borne to a greater or less extent in every school; and we know of no natural right to exemptions from restraints which conduce to an infant's welfare. Nor is there a doubt of the propriety of their application in the particular instance. The infant has been snatched from a course which must have ended in confirmed depravity, and, not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it": *Ex parte Crouse*, 4 Whart. 9. In deciding the question under consideration in the same way, the court in *Reynolds v. Howe*, 51 Conn. 472, said: "It is further claimed that the statute is unconstitutional in granting power to justices of the peace to commit a person to a place of confinement upon an inadequate hearing, and especially without a right of appeal. But, as we have shown, the boy is not proceeded against as a criminal. Nor is confinement in the state reform school a punishment, nor in any proper sense imprisonment. It is in the nature of a parental restraint. It is a mode of education to usefulness; compulsory, but not for that reason improper, and the restraint is a necessary incident of the compulsory education. It is all made necessary by the corrupting influences that surround, and are likely to control, the boy, and by the need of society for protection, and that necessity justifies the proceeding. To make the restraint and instruction of any permanent value, they must be continued for a long time." In *Petition of Ferrier*, 103 Ill. 369, 42 Am. Rep. 10, it was decided that an act of the legislature providing for the committing to an industrial school of dependent infant girls found begging, wandering, consorting with criminals or vicious persons, or in houses of ill-fame, or poorhouses, is not unconstitutional, as being in restraint of personal liberty, nor because a trial by jury is not accorded. The above-cited case in effect overrules the earlier case of *People v. Turner*, 55 Ill. 280, 8 Am. Rep. 645, where it was decided, without the citation of any authority, that a statute authorizing the commitment to a reform school of children between six and sixteen years of age who are vagrants, or destitute of parental care, or are growing up in mendicancy, idleness or vice, to remain until reformed, or until the age of twenty-one, is unconstitutional as permitting and authorizing the commitment of a minor to such institution without having been charged with or convicted of any crime, thus depriving him of his personal liberty without due process of law, and without a regular trial according to the course of the common law. In declaring a statute of this nature constitutional the court, in *Re Mason*, 3 Wash. 609, 28 Pac. 1025,

said: "In the first place, the reform school is not, in any sense, a penal institution or a prison, but a school. Three classes of infants may be committed there: 1. Those who have neither homes nor friends—vagrants; 2. Those who have homes and friends but are unmanageable there; 3. Those who have been convicted of offenses against the laws of the state less than murder or manslaughter. Those in the first two classes have committed no legal offense, but the state, in the absence or inability of friends to control and care for them, charitably takes them into its own charge and proceeds to educate them in all of the branches taught in the public schools of the state, as well as in morals, temperance, frugality and industry. They are not subject to the penal laws of the state, and have no right to trial by jury."

The court in upholding the constitutionality of such a statute in the case of *Milwaukee Industrial School v. Supervisors of Milwaukee Co.*, 40 Wis. 328, 22 Am. Rep. 702, said: "The gravest objection, however, made to the statute is that the commitment of a child to one of these schools until majority, except for crime, operates as an imprisonment of the child for that period, without due process of law, and that the statute authorizing it is therefore a positive violation of the constitution. In the first place, we cannot understand that the detention of the child at one of these schools should be considered as imprisonment, any more than its detention in the poorhouse; any more than the detention of any child at any boarding-school standing for the time in loco parentis to the child. Parental authority implies restraint, not imprisonment, and every school must necessarily exercise some measure of the parental power of restraint over children committed to it. And when the state, as *parens patriae*, is compelled by the misfortune of the child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. The state does not—indeed, we might say could not—intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child, arising from want or default of parents. And, in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children. This seems too plain to need authority; but the cases cited for the respondent, and others, amply sustain our view."

An infant committed by a justice of the peace to a reform school is not punished or imprisoned in the ordinary meaning of these words; hence he is not deprived of his constitutional right to a jury trial: *State v. Brown*, 50 Minn. 353, 36 Am. St. Rep. 651, 52 N. W. 935, 16 L. R. A. 691. A statute authorizing the grand jury, where an infant under the age of sixteen years is charged with crime, and the charge

appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to the house of refuge, and directing the court thereupon to order such commitment without trial by jury, is constitutional: *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388.

Under an act of Congress providing for the commitment of young girls to the reform school for girls in the District of Columbia, it is competent for the president of the board of trustees of that institution, upon the application of the father of a girl fifteen years of age, and for good cause shown, to commit the child to that institution during minority without notice and opportunity given her for a judicial hearing, and it makes no difference that girls may, under certain provisions of the act, be committed to the same institution instead of a work-house or prison, upon conviction of offenses of certain grades, as this fact does not convert it into a place of punishment: *Rule v. Geddes*, 23 D. C. App. 31.

Under the statute of the state of Washington a juvenile offender charged before a justice of the peace with a petty offense is entitled to demand a jury trial before the justice, and another statute provides that when such juvenile offender has been convicted before a justice of the peace, the justice shall transmit him and the papers to a judge of a court of record, who shall then issue an order to the child's parent or guardian to show cause why such child should not be committed to the reform school, and it has been held that such statutes are constitutional, and that where a juvenile offender has been convicted before a justice of the peace, and the matter has been transferred to the superior court for final disposition, the further proceedings had in that court do not constitute a trial at which the child is entitled to a jury. When such child has neither demanded a jury trial before the justice, nor appealed from the justice's judgment of conviction, he cannot thereafter complain that he has been deprived of a trial by jury: *State v. Packenham*, 40 Wash. 403, 82 Pac. 597.

A few cases hold statutes of the nature of those above considered unconstitutional. Thus it has been decided that a statute which authorizes a justice of the peace to commit to the industrial school a minor under the age of seventeen years, upon a complaint charging a crime with respect to which the jurisdiction of the justice only extends to requiring the accused to recognize with surties for his appearance in court, is unconstitutional and void, as depriving a person of his liberty and imprisoning him for crime without a trial by jury: *State v. Ray*, 63 N. H. 406, 56 Am. Rep. 529. It has also been maintained that a statute relating to juvenile offenders and purporting to give to inferior tribunals jurisdiction of offenses punishable by infamous punishment, with authority to commit such offenders to reformatories, without a trial by jury, is unconstitutional: *Commonwealth v. Horregan*, 127 Mass. 450.

II. Cruel and Unusual Punishment.

The constitutionality of statutes of the nature of those under consideration has been attacked on the ground that they provide for the imposition of cruel and unusual punishment, but the courts, in so far as they have passed upon this question, find the contention to be without merit. Thus in *State v. Phillips*, 73 Minn. 77, 75 N. W. 1029, it was said that "it is further claimed that the act is unconstitutional because it provides for cruel and unusual punishment, and for a greater degree of punishment for children under sixteen years of age than for older children. The claim is without merit. The school is not a 'prison,' a place of punishment, in the usual acceptance of the term, but a public industrial school, where children who have made a wrong start in life are educated, trained and afforded an opportunity to become honest, self-reliant, industrious and useful citizens. The necessary restraint imposed upon them is not punitive, but parental, in its character. The law establishing the school, and providing for commitments to it, and for its management, is constitutional." A statute authorizing and empowering justices of the peace to commit infants to the care and guardianship of the board of managers of a reform school in consequence of incorrigibly vicious conduct, though for a time exceeding the criminal jurisdiction of such justices, is a valid exercise of legislative power, and does not provide for cruel and unusual punishment: *State v. Brown*, 50 Minn. 353, 36 Am. St. Rep. 651, 52 N. W. 935, 16 L. R. A. 691. In *People v. Illinois State Reformatory*, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139, it was decided that the act to establish the Illinois state reformatory and making an appropriation therefor was a valid and constitutional enactment. "The intention of such act is to afford a means for the reformation of youthful criminals, and a sentence under it must be regarded as a penalty and punishment for the crime of which the party committed has been convicted, and as an adult convicted of burglary is by law to be sentenced to the penitentiary, and to either solitary confinement, or to hard labor therein, while, under the terms of such statute, a minor over the age of sixteen, instead of being sentenced to confinement or hard labor in the penitentiary, is committed to the reformatory for twenty years, where he may receive an education and be admitted to parole, and where he may be discharged long before the expiration of his sentence. The punishment of the minor defendant is not so great as that inflicted on adults for the same offense, and is therefore not disproportioned to the nature of the offense of which he is convicted. In such case where the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual, or not proportioned to the nature of the offense, unless it is a cruel and degrading punishment not known to the common law, or a degrading

punishment which has become obsolete in the state prior to the adoption of its constitution, or is so wholly disproportioned to the offense as to shock the moral sense of the community": *People v. Illinois State Reformatory*, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139.

A statute creating and establishing a state reform school is constitutional, as the legislature has the power to provide for the detention and education of minor offenders, and the fact that the term of detention is made greater by the judgment of the court than the term of the longest imprisonment in the county jail allowed for the same offense does not render the act invalid as prescribing an unjust or unequal penalty. It cannot be said that the punishment inflicted is greater than can be put upon an adult for the same offense, the object of the act not being punishment, but reformation, discipline and education, and to afford the juvenile offender the opportunity and instruction to learn a trade, and to qualify himself for the duties of citizenship: *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *Ex parte Nichols*, 110 Cal. 651, 43 Pac. 9.

III. Local or Special Legislation.

Statutes regulating the treatment, control and commitment of neglected and delinquent children in countries of one hundred and fifty thousand inhabitants and over, and applying at the time of its enactment to only two counties in the state, are not invalid as being in violation of a constitutional provision prohibiting the passage of local laws, since they will, in future, include other counties thereafter coming within the class described, nor are such statutes illegal and unconstitutional on the ground that they are special or local laws, for the reason that they apply a rule of procedure and punishment to a class of children in certain counties that is not applied to the same class in other counties of the state. Such statutes are valid on account of the conditions surrounding the class of children to which they are made applicable and which reasonably justify the distinction made: *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508.

IV. Arbitrary Deprivation of Custody.

The constitutionality of statutes authorizing the commitment of minors to reformatories has sometimes been attacked on the ground that they arbitrarily deprive the parent of the custody of his child without notice or due process of law, but the courts uniformly uphold the validity of the statutes against such attack. Thus in *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197, the court said: "No provision is made in the statute for notice to the parent, guardian or next friend. It was not the intention to confer upon mayors and like officers judicial powers over the legal rights of parents to the custody of their children. The paramount object is the good of such infants as are destitute of parental care. It is the exercise of that parental guardianship which the state has assumed. The proceeding

is in its nature special. While notice to parents or others standing in that relation to infants should be given when practicable, it is not essential to the jurisdiction of the examining officer. These officers are not invested with power to finally adjudicate the legal rights of the parties. The scope and purpose of this statute is to provide, in a summary manner, for the destitute and homeless, as well as the vicious, and to provide for the maintenance and discipline of those who might otherwise grow up in habits of idleness and crime. . . . The next inquiry is whether an act which does not require notice is against public policy and in violation of the fundamental law of the land. The error of the court below consisted in assuming that the judgment of the committing officer divested the parent of his legal right, without an opportunity of being heard. It is obvious that this is a misconception. The proceeding is purely statutory. It is intended to provide a summary method for caring for destitute children. The commitment is not designed as a punishment for crime, but to place destitute, neglected and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities, for their proper care, and to prevent crime and pauperism. As to such infants it is a home and a school, not a prison." Again, in *Reynolds v. Howe*, 51 Conn. 472, it was said: "Nor is it a serious objection to the law that it deprives a parent of the services of his son. It is the duty of the parent to bring up his children to lives of industry and virtue, and where he neglects this duty, and is bringing them up to vice, he is the last one who should complain of the loss of their services. As well might a parent complain of such a loss in cases where a son is committed to prison for crime." In *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452, 6 N. E. 830, the court said: "It is argued that the right of the father to the society, education and earnings of his child is taken from him by a summary proceeding without notice or trial. If the statute is to be construed as authorizing a final adjudication upon the rights of the father, taking from him the custody and care of his child, it would be a grave question whether it could be sustained. But we do not so construe the statute. . . . The proceeding is intended to be summary. The statute not only requires no notice to the parent, but does not make him a party, and gives him no right to be heard, even if present; and it does not prescribe a fact as constituting the unfitness of the parent—as support as a pauper or sentence to the state's prison for instance—but leaves the question of unfitness, in the respect specified, to the summary determination of any magistrate without revision or appeal. As a proceeding to ascertain whether a child, who is growing up without salutary control, and exposed to vicious habits, is in that condition in spite of proper parental control, or for want of it, with a view to supplying the control if needed, the meaning of the statute is plain, and in the line of legislative precedent. As a proceeding to

determine the fact of the father's unfitness and consequent forfeiture of his parental rights, and to adjudicate upon his right to the custody of the child, it lacks essential features which we are accustomed to find in all legislation affecting rights of property or persons; and we do not think that the necessity of construction requires us to give that meaning to the language of the statute."

"Such commitments of children were denounced as an arbitrary interference with the natural affections and relations of parent and child; as an arbitrary invasion of natural and inalienable rights of both parent and child. As will be presently seen, we cannot consider the statute as authorizing the separation of parent and child, when the parent is able and willing to perform his duty to the child. And when a parent is unable or unwilling to provide for his child, and leaves the child dependent on the charity of the state, we are at a loss to comprehend the right of the parent to object to the form which the state gives to its charity, with intelligent regard for the welfare of the child. And as regards the right of the child infringed by such considerate benevolence exercised toward it by the state, on which misfortune has made it dependent, we can only say that we have little consideration for the inalienable right of idleness, ignorance and vice, or for the want of care which fosters it. . . . It is difficult to comprehend the right of a parent to complain that the discharge by the state of his own duty to his child, which he has wholly failed to perform, is an imprisonment of the child as against his parental right to it": *Milwaukee Industrial School v. Supervisors of Milwaukee Co.*, 40 Wis. 328, 22 Am. Rep. 702.

A statute establishing a home of refuge for the correction and reformation of juvenile offenders and regulating the commitments thereto, and providing a method for ascertaining by a judicial investigation whether there is proper cause for commitment to a reform school, is not objectionable as arbitrarily taking children from their parents: *Janard v. State*, 116 Ind. 98, 17 N. E. 912.

The cases are generally agreed that statutes authorizing courts and magistrates to commit neglected or vicious children to a reformatory, when the circumstances are such as to expose them to lead idle or dissolute lives, are constitutional and valid as against the rights of the parent; but that such adjudication is not conclusive, and that on habeas corpus the custody may be restored to the parent on showing the removal of the cause of commitment, and the parent's competency and fitness to again take charge of the child: *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452, 6 N. E. 830; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; *State v. Kilvington*, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 384; *Milwaukee Industrial School v. Supervisors of Milwaukee Co.*, 40 Wis. 328, 22 Am. Rep. 702.

V. Constitutional Limitation.

A provision in a state constitution which declares that "the legislature may provide by law for the establishment of a school or schools

for the safekeeping, education, employment and reformation of all children under the age of sixteen years, who, for want of proper parental care, or other cause, are growing up in mendicancy or crime," is a limitation on the power of the legislature, and a statute establishing such a school, to the extent that it prescribes an age greater than that fixed by the constitution for such commitment, is unconstitutional and void: *Scott v. Flowers*, 60 Neb. 675, 84 N. W. 81.

VI. Legislation Concerning Juvenile Courts.

Legislation to establish juvenile courts and to regulate their jurisdiction of, and control over, delinquent children is of such recent date that in but few of the states has the law received consideration in the courts of last resort. Little doubt can exist that statutes conferring jurisdiction upon the judge of any constitutional court to summarily commit minors of incorrigible and vicious conduct and habits to state reformatories.

A statute was passed in Pennsylvania, entitled an act "defining the powers of the several courts of quarter sessions of the peace within this commonwealth, with reference to the care, treatment and control of dependent, neglected, incorrigible and delinquent children under the age of sixteen years, and providing for the means in which such power may be exercised." The constitutionality of this act was attacked on various grounds, among them being, that it created a new court; that it deprived juveniles charged with crime of their liberty without due process of law, and of their constitutional right of trial by jury, and that it was class legislation. The supreme court, however, declared the act constitutional, and not open to any of the objections urged against it: *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198.

In passing upon some of the objections raised as to the validity of the act, the court said that: "No new court is created by the act under consideration. In its title it is called an act to define the powers of an already existing and ancient court. In caring for the neglected or unfortunate children of the commonwealth, and in defining the powers to be exercised by that court in connection with these children, recognized by the state as its wards, requiring its care and protection, jurisdiction is conferred upon that court as the appropriate one, and not upon a new one created by the act. The court of quarter sessions is not simply a criminal court. The constitution recognizes it, but says nothing as to its jurisdiction. Its existence antedates our colonial times, and by the common law and statutes, both here and in England, it has for generations been a court of broad general police powers in no way connected with its criminal jurisdiction": *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198. In passing upon the objection that the child was not taken into custody by due process of law, the court said: "To save a child from becoming a criminal, or from continuing in a career of crime, to

end in maturer years in public punishment and disgrace, the legislature may surely provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state, when compelled as *parens patriae* to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. The act simply provides how children who ought to be saved may reach the court to be saved. If experience should show that there ought to be other ways for it to get there, the legislature can, and undoubtedly will, adopt them, and they will never be regarded as undue processes for depriving a child of its liberty or property as a penalty for crime committed. The last reason to be noticed why the act should be declared unconstitutional is that it denies the appellant a trial by jury. Here again is the fallacy, that he was tried by the court for any offense. 'The right of trial by jury shall remain inviolate' are the words of the Bill of Rights, and no act of the legislature can deny this right to any citizen, young or old, minor or adult, if he is tried for a crime against the commonwealth. But there was no trial for any crime here, and the act is operative only when there is to be no trial. The very purpose of the act is to prevent a trial': *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198.

A lately enacted statute of Florida establishing juvenile courts and regulating their jurisdiction and control over delinquent children was declared constitutional in so far as it conferred jurisdiction upon the judge of any circuit court or county court to commit persons who were minors, and of incorrigible and vicious habits or conduct, to the state reform school without a trial by jury, but such statute, in so far as it authorized a judge of any criminal court of record to commit such minors to such school was unconstitutional, as a judge of such court had a right to commit to such school only after a regular conviction in such court for a crime: *Pugh v. Bowden* (Fla.), 45 South. 499.

In passing upon these questions the court said:

"Section 1, chapter 5388, page 63 of the Laws of 1905, provides: 'When a person under the age of eighteen years is convicted before any court of an offense punishable by imprisonment in the county jail, such court may sentence him to the State Reform School, or to such other punishment provided by law for the same offense.'

"The jurisdiction of the criminal court and the judge thereof, in committing a person to the State Reform School by virtue of the pro-

visions of this section, is not doubted; and as the commitment to the school, under this section, is after trial and conviction of a criminal offense and in the nature of a sentence in lieu of other punishment, a person so committed could claim no other trial by jury than that to which he is entitled in his trial for the offense of which he was so convicted. But Raymond Ingram was not committed to the reform school under the provisions of this section.

"The proceedings under which Raymond Ingram was committed to the reform school were had under the provisions of section 9, chapter 5388, page 66 of the Laws of 1905, which is as follows: 'The judge of any circuit court, criminal court of record, or county judge, may commit any person over ten years and under eighteen years of age, residing in his jurisdiction, to the guardianship of said institution where complaint in writing, setting out the acts of said person, has been filed, which complaint has been sworn to, and due proof be made in the presence of said person that he is a proper person for the guardianship of said institution, in consequence of incorrigible and vicious conduct.'

"We think this section is constitutional, in so far as it confers jurisdiction of the matters therein contained upon the judge of any circuit court or county judge.

"The circuit court is a court of general jurisdiction, and section 11 of article 5 of the constitution of 1885, after enumerating specific grants of jurisdiction, provides that the circuit courts shall have original jurisdiction 'of such other matters as the legislature may provide.'

"By the provisions of section 17 of article 5 of the constitution 'the county judge shall have jurisdiction of the settlement of the estates of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate.' A limited jurisdiction in civil and criminal cases also is conferred upon him.

"And so, by section 2604 of the General Statutes of 1906, the county judge is given power to appoint guardians in cases where it appears necessary and proper; and by section 2607 of the General Statutes of 1906, he is empowered to take cognizance of all matters concerning infants and their estates; and by section 2636 and 2639 of the General Statutes of 1906, he may bind out apprentices and hear complaints of apprentices against their masters. County judges have exercised these powers since 1828.

"The State Reform School is not simply a place for correction, but a school where the young offender, separated from vicious associates, may receive careful physical, intellectual, and moral training, be reformed and restored to the community with purposes and character fitting for a good citizen, an honorable and honest man, with a trade or skilled occupation fitting such person for self-maintenance.

tenance: Gen. Stats. 1906, sec. 4166. To this end, when the natural parents become unequal to the task of education and training, or unworthy of it, in caring for the neglected or unfortunate children of the state, we think it entirely appropriate and legal for the legislature to confer the jurisdiction of the proceedings to commit these unfortunate wards of the commonwealth to the reform school upon the county judge, who performs already under the constitution kindred duties, and exercises powers of a similar nature. No greater power than that already possessed by him under the constitution is given to the county judge by the provisions of this section. There is no constitutional prohibition of the power thus conferred upon the county judge, and this section of the statute does not contemplate or require the prosecution of the child for an offense upon indictment or information, or a trial by jury: *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198; 5 Am. & Eng. Ann. Cases, 92.

"In so far as this statute authorizes the commitment, by a judge of the circuit court, or a county judge, of children who are incorrigible to the State Reform School without a trial by jury, it is constitutional: *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198, and note.

"The State Reform School, as we have seen, is not a prison or penitentiary, but a school where a child who has not been convicted of a criminal offense, but who is of incorrigible and vicious conduct, may receive physical, intellectual and moral training.

"The constitutional provision that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' does not apply. This is not a proceeding according to the common law, in which the right of a jury trial is guaranteed, but the proceeding is a statutory one, and the statute, too, enacted since the adoption of the constitution. This constitutional provision does not extend the right, but merely secures it in cases in which it was matter of right before the adoption of the constitution: *Hunt v. City of Jacksonville*, 34 Fla. 504, 43 Am. St. Rep. 214, 16 South. 398.

"We are of the opinion, however, that section 9, chapter 5388, page 66 of the Laws of 1905, in so far as it authorizes a judge of any criminal court of record to commit persons therein mentioned to the State Reform School, is unconstitutional.

"Under the constitution of 1885 the criminal court of record is given jurisdiction of all criminal cases not capital arising in the county. It cannot exercise jurisdiction in any civil case. Offenses triable there must be prosecuted upon information, under oath of and to be filed by the county solicitor, who is made the prosecuting attorney of said court. The style of all process shall be 'The State of Florida,' and all prosecutions shall be conducted in the name and by authority of the state.

"We are of the opinion that it is not competent for the legislature to empower the judge of a criminal court of record to commit a person to the State Reform School other than according to provisions

of section 1, chapter 5388, page 63 of the Laws of 1905; certainly not upon a petition of a person other than the county solicitor and without a trial by jury.

"The judge of the criminal court of record may exercise his constitutional jurisdiction only upon information, under oath, of the county solicitor.

"The commitment, then, of Raymond Ingram upon petition of his father, as shown in these proceedings, is illegal, and the judgment of the circuit court remanding Raymond Ingram to the custody of the sheriff is reversed."

A statute relating to societies organized for the purpose of securing homes for orphans or abandoned, neglected or grossly ill-treated children, by adoption or otherwise, and providing that jurisdiction shall be conferred upon the county judges to judicially investigate the cases of such children brought before them, and if after such judicial investigation upon notice it shall be determined that such child belongs to the classes enumerated, such judge shall enter an order directing that he or she be turned over to one of such societies, does not conflict with a provision of the state constitution which confers upon the court exclusive original jurisdiction in probate matters, the appointment of guardians and the settlement of their accounts, for the reason that the duties placed upon the county courts by such statute are not in violation of, but in aid of, their constitutional jurisdiction over guardians. A children's home society, to whose custody children have been committed by a county court, occupies the legal relation of a substitute or temporary guardian to such children, and as such its acts are subject to approval or disapproval of the court making the appointment, and such appointment may be revoked as in other guardianships. Nor is such statute unconstitutional as providing for an involuntary servitude which is not a punishment for crime without due process of law: *In re Kol*, 10 N. Dak. 493, 88 N. W. 273.

A statute conferring power on the probate court to commit to the industrial school for girls any girl under sixteen years of age who leads a vagrant life is not repugnant to a constitutional provision that probate courts shall have jurisdiction of the property of certain persons as shall be provided by law, and shall also have jurisdiction in habeas corpus: *In re Gassaway*, 70 Kan. 695, 79 Pac. 113. The statute involved in this case provided for a hearing before the probate court after notice, and the court said that: "In the determination of the question the court exercises judicial discretion and judgment, determines from the evidence what would be to the best interests of the state and of the girl, and renders its judgment accordingly. The authority thus exercised is purely judicial, and is not inconsistent with the full and free exercise of the duties imposed upon such court by the constitution. We have, therefore, a judicial tribunal, created by the constitution, exercising judicial functions. . . . The act conferring this jurisdiction upon the probate court

is not in violation of any provision of the constitution. Indeed, we think that the provision referred to contemplates the exercise by the probate court of such other judicial functions as the legislature might confer upon it": *In re Gassaway*, 70 Kan. 659, 79 Pac. 113.

A statute relating to the treatment and control of neglected and delinquent children, and creating a juvenile court with power to commit them to reformatories, is not unconstitutional as containing more than one subject, nor for its failure to provide for the separation of neglected from delinquent children: *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508.

A statute regulating the treatment and control of neglected and delinquent children and providing that the circuit courts exercising jurisdiction in counties having a population of one hundred and fifty thousand inhabitants or over within the state shall have original jurisdiction to commit to a reformatory in all cases coming within the terms of the act, and also providing how such juvenile court shall be organized and how it shall proceed, is not unconstitutional as local, special or class legislation, although it applies, at the time of its passage, to only two of the counties within the state, since it will include other counties, which may thereafter come within the class described: *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508.

A statute to establish juvenile courts and to regulate the jurisdiction and control of delinquent children, and providing that in certain counties such jurisdiction shall be exercised by the circuit court commissioner, is unconstitutional, in that it extends the constitutional jurisdiction of such court commissioners, limited to the powers of a circuit judge in chambers: *Hunt v. Wayne Circuit Judges*, 142 Mich. 93, 105 N. W. 531, 3 L. R. A., N. S., 564; *Hooper v. McKenzie*, 142 Mich. 120, 105 N. W. 541. In passing upon this question the court, in *Hunt v. Wayne Circuit Judges*, 142 Mich. 93, 105 N. W. 531, 3 L. R. A., N. S., 564, said: "The objection made is that the legislature may not confer upon circuit court commissioners the powers required by the act to be exercised, and that this being so, the act must be held to be entirely invalid and inoperative. As to the first proposition, that circuit court commissioners may not be vested with the powers of this act, there seems to be but little or no contention. If it is held, as it may be, that the act should be construed as one not intending to create a new court or courts, but as vesting further or new jurisdiction in existing courts, we escape serious objections leveled at the idea that the statute creates a new court, but in so holding we make no headway against its contention that the constitution does not permit circuit court commissioners to be clothed with these new judicial powers. If we go further and hold that the proceedings contemplated are not criminal proceedings, but are special statutory inquiries, that the right of trial by jury is not invaded, that the commitment provided for is not imprisonment, for all of which rulings support is found in cases already cited, we are still confronted with the alleged purpose of

the legislation to establish juvenile courts and to confer upon them powers beyond those which a circuit court commissioner may exercise."

A statute relating to juvenile offenders and purporting to give to inferior tribunals jurisdiction of offenses committed by such juveniles punishable by infamous imprisonment, and to commit them to reformatories without a trial by jury, is unconstitutional as an illegal extension of the constitutional jurisdiction of such courts: *Commonwealth v. Horregan*, 127 Mass. 450.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

**BERG v. SEATTLE, RENTON AND SOUTHERN RAIL-
WAY COMPANY.**

[44 Wash. 14, 87 Pac. 34.]

STREET RAILWAYS—Fellow-servants, Conductor and Motorman of, When are.—The motorman and conductor of one car of a street railway are fellow-servants of the conductor and motorman of another car, when they are engaged in the same common employment, meeting and passing each other frequently, and associating together every day, and there is such coassociation and co-operation in the same line of employment that each necessarily knows the habits and capacity of the other, and has an opportunity to exercise a mutual influence upon the other. (p. 972.)

John P. Hartman, for the appellant.

Martin J. Lund and Walter S. Fulton, for the respondent.

¹⁷ **MOUNT, C. J.** Action for personal injuries. Plaintiff recovered a judgment for five thousand dollars. Defendant appeals.

The appellant operated a line of electric street railway between Seattle and Renton, a distance of twelve miles. The line consisted of a single track, with numerous switches and sidetracks or turnouts. There were but two through cars between Seattle and Renton. There were four or five local cars running between Seattle and Rainier Beach, which was a station some eight miles out of Seattle. The respondent was employed as a motorman on one of the through cars. These two through cars were called express cars by reason of the fact that they were not required to stop at all of the stations and street crossings, and because it was the duty of the local

cars, which stopped at each street crossing, to turn out on the sidings in order that the through cars might pass them. All the cars ran on schedules fixed by the railway company. The railway company had constructed a block-light system, known as a single block system, between Norman street and Lane street in the city of Seattle. The distance between these two ¹⁸ streets was sixteen hundred and sixty-five feet. There were sidings at Norman street and at Lane street, but none between these points. The grade was not level, but the railway line was straight between these points, so that a car could be seen in the daytime from one end of the block system to the other, except in foggy weather. Norman street was farther south from Seattle than Lane street. Renton was in a southerly direction from Seattle.

The block-light system consisted of five poles about equal distance apart, one pole being at Lane street, one at Norman street, and the other three between those two extremes. On each of these poles were two red incandescent electric lights. When the lights were turned on at Norman street by means of a rope or lever, one red light burned on the north side of each pole through to Lane street. When the lights were turned on at Lane street, they burned on the south side of each pole through to Norman street. The lights could be turned off only at the point where they were turned on. These lights were for use in the night-time and in foggy weather. The motormen on all cars were required to turn on the lights when entering the block, and the next car back was required to turn the lights off. It was the duty of conductors to see that the motormen turned the lights on and off. On the morning of October 25, 1904, respondent, as motorman on his car, left Renton for Seattle. When he arrived at Norman street he says he was a little late, a minute or two. The morning was very foggy. He found the lights turned to the north, indicating that a car was preceding him through the block. The lights were not burning to the south. The conductor on respondent's car told respondent to proceed through the block. Respondent thereupon proceeded at the rate of about eight miles per hour and, at about the middle of the block, after he had gone a distance of eight hundred and seventy feet, he collided with a car coming south, and was severely injured. The motorman on the southbound car had neglected to turn on his lights south, and had proceeded ¹⁹ with those lights not burning. Respondent stated

that, if these lights had been thrown on, he would have seen them and the accident could not have happened. The motorman on the southbound car testified that he did not turn his lights on because the conductor on the car preceding respondent's car had just come through the block and changed to the car southbound, and said that the north lights were his lights thrown on by him as he had just come through the block.

There was dispute at the trial as to what the rules of the company were with regard to the use of the lights, the company claiming that the motormen were prohibited from passing a burning light which such motorman himself had not turned on, while respondent's evidence was to the effect that motormen were only prohibited from running on lights pointing against the way his car was going. We must assume, for the purposes of this case, that the rule of the company was as stated by the plaintiff. The question is then squarely presented, whether the failure of the conductor and motorman, whose duty it was to turn the lights on, which they neglected to do, rendered the company liable to the respondent. In other words, were the motorman and conductor on the one car fellow-servants of the motorman and conductor on the other car?

It seems to us that there can be no escape from the conclusion that they were fellow-servants. They were each engaged in the same common employment, meeting and passing each other frequently and associating together every day. This case cannot be distinguished from the case of *Grim v. Olympia Light etc. Co.*, 42 Wash. 119, 84 Pac. 635, except in immaterial particulars. It is true, in the *Grim* case there was no fixed schedule of running time, and the motormen themselves arranged the places of meeting; and it is also true there were no conductors in the *Grim* case, and that the motormen had sole charge of their cars. These are the only facts in which the *Grim* case differs from this case in the point at issue. The fact that there was no fixed schedule was ²⁰ one of the facts which was claimed as negligence of the company in the *Grim* case. But, under the circumstances of that case, no fixed time was practicable or could be established. In this case there was a fixed schedule for all cars, and it is not claimed that the motormen were incompetent or inexperienced or that they did not know the time schedule for each car. The number of cars

was not great and the motormen and conductors were required to know, and did know, the schedule time of each car. So the fact that there was a schedule was in favor of the appellant and not against it. While there was a conductor in charge of each car in this case, the conductor's authority over the motorman extended only to starting and stopping of the cars and in collecting fares. In regard to the speed of the car, the handling of the lights, and meeting cars and the like, the duties of the motormen and conductors were co-ordinate. It is conceded that it was the duty of the motorman, when he entered the block, to turn on the light without any order from the conductor. But it was the duty of the conductor to notice the light and see that the motorman did his duty in that respect. If one was negligent, both were. There is, therefore, no question of superior servant in regard to turning on the light, which is conceded to have been the act of negligence which caused the collision and injury.

In *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949, we held that a brakeman was not a fellow-servant with a conductor on his train, because in that case the brakeman was subordinate to the conductor and was not required to place signals except upon orders of the conductor. In that case the superior servant doctrine was, therefore, applicable and was sustained. In *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932, we held that a signalman was not a fellow-servant with the engineer of a logging engine, where the master had furnished no means of communication from the engineer to the signalman. That case can have no controlling influence in this case, because here the master had ²¹ provided means of communication which was sufficient for the purpose and which appliance was not used by either servant. In the case of *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32, this court held that a conductor and engineer on a railway train were not fellow-servants with employes on a work train, but this rule had not been applied to street railway cases. The reasons therefor are given in *Grim v. Olympia Light etc. Co.*, 42 Wash. 119, 84 Pac. 635. A large number of cases are cited where we have permitted one servant to recover from the master by reason of negligence of another servant. But those have been cases where the negligence was the omission of some positive duty of the master. It is unnecessary for us

to cite these cases here, or to review them at length, for, in such cases, as well as cases not cited, we have uniformly recognized the rule that the master is not liable for injuries resulting to a servant by the negligence of a fellow-servant: *Millett v. Puget Sound etc. Works*, 37 Wash. 438, 79 Pac. 980; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999.

The questions usually presented have been whether the facts in particular cases bring the injured party within the rule of fellow-servant. In determining who were fellow-servants, we have said that servants must not only be engaged in a common employment, but must have opportunity to use precautions against each other's negligence: *Grim v. Olympia Light etc. Co.*, 42 Wash. 119, 84 Pac. 635, and cases there cited. In this case the motormen were engaged in the same common employment, that of operating street-cars over the same line. They necessarily met each other every hour of the day, because the time from Seattle to Renton consumed but forty-seven minutes. They took their cars from the same barn, and the same rules were furnished to each. There was such coassociation and co-operation in the same line of employment as that each one necessarily knew the habits and capacity of the other and had opportunity of exercising mutual influence upon the other. This made them fellow-servants within the rule which ^{we} we have heretofore laid down. It is true that one of the allegations of negligence in the complaint was that the master failed to furnish a sufficient block system upon the block where the collision occurred, but the respondent testified that, if the motorman on the southbound car had turned his lights south when he entered upon the block, the accident could not have occurred, because respondent in that event would have seen the lights and remained at Norman street or returned to that point. It was nowhere claimed that the light system was defective in its construction or operation, and the statement that the accident could not have happened if the light had been used indicates that the system was sufficient for the purposes for which it was intended, and was reasonably safe, which is all that is required: *Chicago etc. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921. The respondent knew the system; he had worked under it for about eighteen months, and had made no complaints concerning it. He knew the rules required the motorman to turn on the lights on entering the block. The rules and system were for the protection of the motormen as well

as for the protection of passengers. The appliances were reasonably safe, and it was the duty of the motorman to use them for the purpose of preventing collisions and delays. Under the evidence of respondent above stated, assuming that he was correct in his construction of the rules that it was the duty of the motorman on the southbound car to turn his light, it was the duty of the trial court to take the case from the jury upon the motion of the appellant, upon the ground that the act of negligence directly causing the collision was the act of a fellow-servant. It may be said, in justice to the trial court, that the case of *Grim v. Olympia Light etc. Co.*, 42 Wash. 119, 84 Pac. 635, had not been decided when this case was tried.

The judgment is reversed, with directions to the lower court to dismiss the action.

Crow, Root and Rudkin, JJ., concur.

Fullerton, Hadley and Dunbar, JJ., dissent.

Employés on One Train of a Cable Street Railway are fellow-servants with the employés on the train next preceding: *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216. See, too, *Louisville etc. R. R. Co. v. Dillard*, 114 Tenn. 240, 108 Am. St. Rep. 894; *Mast v. Kearn*, 75 Am. St. Rep. 608.

IN RE HOWARD AVENUE NORTH.

[44 Wash. 62, 86 Pac. 1117.]

MUNICIPAL CORPORATIONS—Assessments for Public Improvements, Liability of School Property for.—Assessments made for the purpose of laying out, widening and extending a public street are enforceable against real property owned by a public school district and used solely for school purposes, where the assessment is by statute to be apportioned on the several lots, blocks, tracts, and parcels of land found to be benefited thereby. (p. 975.)

ASSESSMENT, Exemption from not Implied from Exemption from Taxes.—The provision of the state constitution exempting school districts from taxation does not exempt their property from special assessments made to pay for street improvements. (p. 976.)

Kenneth Mackintosh and R. W. Prigmore, for the appellant.

Scott Calhoun and O. A. Tucker, for the respondent.

⁶³ CROW, J. Under authority of the eminent domain act applying to cities of the first class, chapter 84 of the Laws of 1893, page 189, Ballinger's Code, section 775 et seq. (P. C., sec. 5050), and ordinance No. 10,850, enacted in pursuance thereof, the city of Seattle instituted this proceeding to condemn lands for the purpose of laying off, widening, and extending Howard avenue. An assessment district was created, and an assessment made upon real estate specially benefited, to pay for the property taken and the costs of the proceeding. Objections being regularly heard by the superior court of King county, said assessment was in all respects confirmed. Six lots owned by Seattle School District No. 1, benefited by said improvement, were assessed. The school district filed its objections to said assessment, and now appeals from the order of the superior court confirming the same.

It appears that appellant's lots were used exclusively for public school purposes. Therefore, the controlling question involved in this appeal is whether they were subject to assessment, or, in other words, whether the city of Seattle had power, acting through its commissioners appointed by the superior court, to impose an assessment upon them. The appellant contends (1) that under the constitution and laws of this state, no authority, either express or implied, is conferred upon the respondent city to assess the property of said school district, and (2) that by the express terms of the charter and ordinances of said city, the property of the school district is exempt from such assessments. It must be conceded that the eminent domain act above mentioned, under which the city has proceeded, does not by its express terms affirmatively direct that the school district shall be assessed. Section 2 of said act does direct, however, that if the ordinance enacted by the city shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, the proceedings for making ⁶⁴ such special assessment shall be as in said act prescribed. Section 22 provides: "It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that will be specially benefited thereby, and to estimate what proportion of the total cost of such improvements will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same be-

tween the city and such property, so that each shall bear its relative equitable proportion; and having found said amounts to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement."

These sections and others in the act seem to contemplate that all benefited property located within the assessment district shall be assessed, without expressly excepting any property either public or private. The respondent contends that no such express exception having been made, appellant's property is liable. Appellant contends that, as the statute does not in so many words direct that public school property shall be assessed, authority to make an assessment does not exist, nor can it be implied. Well-considered cases have been cited in the briefs supporting each of these contentions, there being an irreconcilable conflict of authority. Appellant, in support of its position, has cited, with others, the following cases: *Pittsburgh v. Sterrett Subdistrict School*, 204 Pa. 635, 54 Atl. 463, 61 L. R. A. 183; *Clinton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; *Sutton v. School of Montpelier*, 28 Ind. App. 315, 62 N. E. 710; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905; *Harris County v. Boyd*, 70 Tex. 327, 7 S. W. 713.

The respondent cites, with others, the following cases: *Commissioners of Franklin County v. Ottowa*, 49 Kan. 747, 65 22 Am. St. Rep. 396, 31 Pac. 788; *Edwards & Walsh Const. Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006; *Higgins v. Chicago*, 18 Ill. 276; *Scammon v. Chicago*, 42 Ill. 192; *County of McLean v. Bloomington*, 106 Ill. 209; *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; *Sioux City v. Independent School District*, 55 Iowa, 150, 7 N. W. 488; *Hassan v. Rochester*, 67 N. Y. 528.

Our view is that the authorities cited by the respondent are the best founded in reason. We think that said eminent domain act, under which the city authorities have proceeded, must be held to impose upon the commissioners a legal duty to assess the property of the appellant in proportion to the benefits received. There is no contention that the lots have been improperly included within the assessment district, or that they have not been specially benefited by the improvement. Had the legislature in enacting the law of 1893 in-

tended to exempt public school property from its just proportion of the burdens of said special assessment, it is only reasonable to assume that such intention would have been expressly declared in the words of the statute. An exemption of any portion of the benefited property located within the assessment district would necessarily cause an increased burden to be imposed upon other benefited property located therein, and in view of this result we should refrain from adopting a construction of the statute which would relieve appellant's property, especially when there is no good reason for holding that such an exemption was intended by the legislature. In *Edwards & Walsh Const. Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006, the supreme court of Iowa said: "While authority to levy such assessments is traceable to the taxing power, they are nevertheless assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy, and the municipality acts as an agent, merely, in collecting the tax. The district improved ⁶⁶ is never coextensive with the county or city, and it is not true that in paying the assessment the county must raise money to pay over to itself, and that no one would be benefited but the officers employed in the collection of the tax. There is no reason why the county, the city, or the school district should not pay for the benefits received by it the same as any other property owner. Of course, their property may not be sold, but there is no reason why the amount of the tax should not be paid out of the treasuries of these institutions; and, if the governing bodies fail to make payment, mandamus will lie to compel them to do so."

Appellant contends that section 2, article 7 of our state constitution, exempting school districts from taxation, prohibits the respondent city from making such assessment. The word "taxation," as used in said section, does not include special assessments of the character here involved. The law is well settled that exemption from taxation does not mean exemption from special assessments: *Board of Improvement v. School District*, 56 Ark. 354, 35 Am. St. Rep. 108, 19 S. W. 969, 16 L. R. A. 418; *Commissioners of Franklin County v. Ottawa*, 49 Kan. 747, 22 Am. St. Rep. 396, 31 Pac. 788; *Clinton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; *Edwards & Walsh Const. Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006.

In *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552, this court said: "We think the overwhelming weight of authority is that the assessment for benefits in such cases does not fall under the definition of the word 'tax' as used in the constitution—that the word 'tax' has reference to general revenues for the purpose of maintaining and carrying on the government where the benefits are alike enjoyed by all, and where no special benefits, as in the case of the assessment for improvements, are enjoyed. Of course, the idea of compensation is the basis of all theories of taxation, but an element of special benefits enters into the one, and is the distinguishing feature between taxes and assessments for benefits."

In *Edwards & Walsh Const. Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006, at page 381 (117 Iowa), the Iowa court, in summing up a discussion of this distinction between taxes and special assessments and in ⁶⁷ commenting upon the power of a city to levy such special assessments against the property of a county, said: "True, the right to levy these assessments is referable to the power of taxation, but statutes exempting property from general taxation are almost universally held inapplicable to special assessments: See cases heretofore cited. Reduced to its last analysis, the question is one of power in the city to levy the assessment against the county property. The statute giving the power is broad enough to cover lots or lands owned by municipal or quasi municipal corporations, and, if there be any exemption, it is to be implied, unless we hold with those courts which say that county or state property is not to be included unless expressly mentioned or by necessary implication inferred. We are not disposed to apply this last-mentioned rule in construing our statutes. Such property is expressly exempted from general taxation, but no such exemption is made from special assessments. Even without a statute, property devoted to governmental use would not, in the absence of express authority, be taxed, and the fact that it is expressly exempted in one case and not in the other is strong evidence that the legislature did not intend to exempt it from special assessments."

Appellant further contends that subdivision 3 of section 11 of article 8 of the charter of the city of Seattle, and certain ordinances cited in the briefs, expressly exempt school districts from special assessments. We think said section of the

charter and said ordinances do not apply to this case. Here the proceedings instituted by the city and culminating in the assessment complained of are only authorized by the eminent domain act of 1893 above mentioned, while the charter and ordinance provisions relied on by appellant refer only to local improvements of an entirely different character. The statute under which these proceedings have been conducted must control in this case. The proceedings under consideration here were originally instituted before chapter 55 of the Laws of 1905, page 84, was enacted; hence our discussion has been based entirely upon the law of 1893.

⁶⁸ After a most careful consideration of all the assignments of error, and legal questions presented by the appellant, and having examined all the authorities cited by it, including its list of additional authorities supplemental to its opening and reply briefs, we are unable to conclude that any error has been committed by the honorable trial court. The judgment is affirmed.

Mount, C. J., Dunbar, Hadley and Root, JJ., concur.

Fullerton, J., dissents.

The Liability of Public School Property for assessments for street improvements is discussed in *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, and cases cited in the cross-reference note thereto. It is affirmed by some authorities that the exemption of property from taxation does not include its exemption from special assessments for street improvements: *Edwards etc. Construction Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301; *City of Clinton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415.

ATKINSON v. WASHINGTON IRRIGATION COMPANY.

[44 Wash. 75, 86 Pac. 1123.]

PUBLIC LANDS, Right to Construct Water Ditches as Against Persons Initiating Homestead Rights.—After the initiation of a homestead claim, though before the issuing of a patent thereto, no one has the right against the claimant to enter upon the land and construct and maintain a water ditch without making compensation therefor, and the title of the claimant, on his receipt of a patent, relates to such initiation and enables him to maintain a suit to enjoin the maintenance of such ditch until compensation is made. (p. 981.)

ESTOPPEL BY DELAY to Object to the Digging of a Canal.—A homestead claimant, by failing to object to the digging of an irrigation ditch on the lands claimed, is not, on the receipt of his patent, estopped from maintaining a proceeding to enjoin the continuance of such ditch until compensation is made. (p. 981.)

E. F. Blaine and Ira P. Englehart, for the appellant.

William B. Bridgman, for the respondents.

⁷⁵ DUNBAR, J. Excluding all immaterial statements, the plaintiffs brought an action to enjoin the defendant from conducting an irrigation ditch over their land in Yakima county. It appears from the record and the findings of fact that the land in question was government land of the United States on the eighteenth day of June, 1898, and that on that date the plaintiff, who is one of the respondents here, Belgrave R. Atkinson, filed his homestead entry on it, and ⁷⁶ afterward, on the tenth day of July, 1903, made final proof, and patent was issued to him for this land on the thirteenth day of July, 1904. During the year 1902, before the plaintiffs had made final proof on the land and two years before they had received a patent for it, the defendant constructed a lateral ditch across the plaintiff's land. We do not find it necessary or pertinent to mention the other ditches which are discussed in defendant's brief, for the reason that they are not in controversy in this suit. The plaintiffs permitted the defendant to build this lateral ditch across their land in the year 1902; that is, they made no objection, and made no claim against the defendant company prior to the commencement of this action for an injunction. No claim has been made for damages from the defendant, and no damages are asked in this action. The relief prayed for is injunctive relief, the complaint being that the defendant is using plaintiff's property without making compensation therefor and without due process of law. The court found that the plaintiffs were entitled to have a decree entered, enjoining the defendant from using and occupying said strip of land used and occupied by it in the maintenance and operation of the canal described in the complaint; but that the defendant be given thirty days from and after the date of the judgment in which to appear in the action and file an amended answer therein or commence an independent proceeding to condemn a right of way for said canal, and that the injunctive relief be suspended until the expiration of said thirty days; and judgment was entered accordingly. From this judgment the appeal is taken.

The appellant's claim is based upon sections 2339 and 2340 of the Revised Statutes of the United States, which are as follows:

"Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such ⁷⁷ vested rights shall be maintained and protected in the same; and the rights of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured, for such injury or damage.

"Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as have been acquired under or recognized by the preceding section."

It is the contention of the appellant that the irrigation company, having built its lateral canal before patent was issued to the respondents, their patent is subject to the rights of the appellant which had vested before such patent was issued. The principal case relied upon is *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039, and that case does hold that, under the statutes quoted, the patent issues in subjection to the rights of the irrigation company, where the canal had been constructed before the issuance of the patent but after the filing by the homestead applicant. But this case we think stands alone in this extreme construction of the statute. Colorado, no doubt, by reason of its extreme arid condition, has gone further in the protection of water rights to irrigating canals than any other state. But this, it seems to us, is an unnatural construction of sections 2339 and 2340, and the question of when rights have vested and accrued still remains. They had not vested and accrued by priority of possession or otherwise at the time the respondent had filed his homestead claim upon this land, and when a citizen of the United States makes a homestead filing, there is an implied contract that when he meets the requirements of the homestead laws with reference to residence, cultivation, improvements, etc., the government will invest him with the legal title. Certainly, it was not the intention of Congress in the passage of the acts above quoted to allow ⁷⁸ others, pending the consummation of the initiated rights,

to invade the settler's possession, thus rendering nugatory the implied contract upon which the homestead applicant had acted and expended his time and money in making improvements, etc., and make uncertain the final disposition of the soil. And there seems to be no more reason for allowing this invasion of right by an irrigation company than by anyone else. The irrigation of arid lands is important, but the project does not possess exclusive importance.

In the state of California the decisions rendered have been exactly contrary to the Colorado case. There it was held in *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384, which is the leading case in the state and a case most excellently reasoned, that the statutes above quoted do not confer the right upon an appropriator of water on public land to go upon land after its entry by another as a homestead but before the claimant had made final proof, and change the point of diversion or construct new ditches or in any way to interfere with the initiatory rights of the homestead applicant. *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. Rep. 350, 33 L. ed. 761, holds that the filing of a homestead entry of a tract across which a stream of water runs in its natural channel with no right or claim of right to divert it therefrom, confers a right to have the stream continue running in that channel without diversion, which right, when completed by full compliance with the requirements of the statutes on the part of the settler, relates back to the date of the filing, and cuts off intervening adverse claims to the water. The reasoning in this case would apply equally to the relation back of the right of the homestead entryman to the land conveyed to him by the patent. The same principle was laid down by this court in *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062, in construing practically the same kind of a statute. So far as the question of estoppel is concerned, by reason of the respondents having made no objection to the ⁷⁹ digging of a canal, that question was decided adversely to appellant's contention by this court in *Hathaway v. Yakima Water etc. Co.*, 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 896.

The judgment is affirmed.

Mount, C. J., Root, Crow, Hadley and Fullerton, JJ., concur.

A Right of Way for an Irrigating Ditch on public lands vests only upon completion of the work of construction and the application of the water to a beneficial use, although it attaches as fast as the ditch is constructed: *Jarvis v. State Bank*, 22 Colo. 399, 55 Am. St. Rep. 129.

A Parol License to Construct an Irrigating Ditch, when executed by the construction of the ditch, becomes in all essentials an easement for such length of time as the use itself may continue: *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301. Compare, however, *Hathaway v. Yakima Water etc. Co.*, 14 Wash. 469, 53 Am. St. Rep. 874.

BECHER v. SHAW.

[44 Wash. 166, 87 Pac. 71.]

HOMESTEAD, Exemption of Proceeds of Voluntary Sale of from Garnishment.—If the statutes of the state provide that, in case of the sale of a homestead, any subsequent homestead acquired by the proceeds shall be exempt from attachment or execution, the proceeds of a voluntary sale of a homestead which its vendors intend to invest in another homestead are exempt from garnishment. (p. 984.)

Belt & Powell, for the respondents.

A. E. Gallagher and W. J. Thayer, for the appellant.

¹⁶⁷ RUDKIN, J. On the twenty-seventh day of March, 1903, the plaintiff commenced an action against the defendants Henry A. Shaw and wife for the recovery of the sum of \$296.90, with interest at the rate of six per cent per annum from January 24, 1903. At the time of the commencement of such action, a writ of garnishment was sued out and served on the garnishee defendant, Benesh. The garnishee answered that he was conditionally indebted to the defendants in the principal action in the sum of \$500, with interest at the rate of eight per cent per annum from June 2, 1902, on account of the balance due on the purchase price of certain real property purchased by the garnishee from the principal defendants, and in the further sum of \$24 on account of interest paid by the principal defendants on account of a certain mortgage on said real property, subject, however, to a counterclaim in the sum of \$137.50 in favor of the garnishee against the principal defendants. The principal defendants controverted the answer of the garnishee, alleging, among other things, that the money due from the garnishee to the princi-

pal defendants was a part of the purchase price of their homestead, and that they intended to invest the same in another homestead. Judgment was given in favor of the plaintiff in the principal action on the tenth day of October, 1904, in the sum of \$344.42, and \$16.60 costs of suit. At the hearing of the garnishment proceedings, the court found that the defendants in the principal action had occupied the premises theretofore sold to the garnishee for a period of twenty years prior to the time of sale, and that they at all times claimed the same as their homestead.

"That on the 2d day of June, 1902, said Henry A. Shaw and wife sold to the garnishee defendant Frank Benesh said premises for the sum of \$1,600; said premises being at that time mortgaged for the sum of \$600, which mortgage the said Benesh assumed and agreed to pay as a part of the purchase price; and that the money due from the said Benesh to said Shaw and wife is the proceeds of the sale of said ¹⁰⁸ homestead, and that they at all times intended to purchase another homestead with said proceeds; and that the interest in said lands in said Henry A. Shaw and wife at the time of said sale is of the value of \$1,000."

As conclusions of law the court found that the proceeds of the sale of the homestead were exempt from garnishment, and entered judgment accordingly. From this judgment the plaintiff has appealed.

The case comes before us on the findings of the court below, and the sufficiency of these findings to sustain the judgment is the only question for consideration. The appellant contends that a voluntary sale of the homestead is a waiver of the homestead right, and that the exemption does not attach to or follow the proceeds of the sale. In support of this view he cites 15 American and English Encyclopedia of Law, second edition, page 594, as follows: "In the absence of some provision in the statute to the contrary, the voluntary sale of his homestead by a debtor will constitute a waiver or abandonment of his right of homestead exemption, and the right will not follow and attach to the proceeds, but creditors may reach and subject them by garnishment or otherwise. In many states, however, the statute expressly or impliedly allows a debtor to sell his homestead for the purpose of investing in another homestead, and protects the proceeds prior to such reinvestment. In some states the proceeds are thus protected for a limited time only."

Exemptions are, no doubt, creatures of the constitution or the statute, and we accept the foregoing as a correct statement of the law. It only remains to consider whether our statute does, expressly or by implication, exempt the purchase price of the homestead from execution or garnishment, where the homestead claimant intended in good faith to reinvest the proceeds in another homestead. The statutory provisions bearing upon this question are the following: Ballinger's Code, section 5219 (P. C., sec. 5461), provides how the homestead may be conveyed or encumbered; section 5220 (P. C., sec. 5462) provides ¹⁰⁰ how the homestead may be abandoned, viz., by declaration of abandonment or a grant thereof, executed and acknowledged; sections 5222 to 5232 (P. C., secs. 5464-5474) provide for a forced sale of the homestead where the value exceeds the statutory exemption; section 5233 (P. C., sec. 5475) provides that the amount of the homestead exemption must be paid to the claimant; and section 5234 (P. C., sec. 5476), that the money paid to the claimant is entitled to the same protection against legal process and the voluntary disposition of the husband as is the homestead itself. Section 5274 (P. C., sec. 840) provides as follows: "In case of the sale of said homestead, any subsequent homestead acquired by the proceeds thereof shall also be exempt from attachment and execution; nor shall any judgment or other claim against the owner of such homestead be a lien against the same in the hands of a bona fide purchaser for a valuable consideration."

We are inclined to agree with the appellant that section 5233, *supra*, has no application to the proceeds of a voluntary sale, but we are nevertheless of opinion that sections 5219 and 5247, which authorize the sale of the homestead free from all claims or liens and the acquisition of a new homestead exempt from attachment or execution, by implication exempt the proceeds of the sale of the homestead from garnishment for a reasonable time where the homestead claimant intends in good faith to reinvest the proceeds in another homestead. We think that a liberal construction of the statute requires us to so hold, and that any other construction would in a measure defeat the beneficent purpose the legislature had in view. Of what avail would it be to the homestead claimant to sell his homestead free from claims and liens if the proceeds are to become immediately subject to execution or garnishment. If the claimant may ex-

change one homestead for another without forfeiting his exemption rights, why should he not be permitted to accomplish the ¹⁷⁰ same result through the medium of a sale? In *Watkins v. Blatschinski*, 40 Wis. 347, the court said: "The statute further provides that no judgment or decree against the owner shall be a lien upon the homestead for any purpose whatever, except in certain specified cases, which need not be noticed. The policy of the statute cannot be misapprehended. Its obvious design and plain purpose is, to benefit the debtor by securing to him his homestead beyond all liability to forced sale on execution or other process. In case the debtor desires to remove from the homestead for some temporary cause, or to absent himself for a time, the statute permits him to do so (*Jarvais v. Moe*, 38 Wis. 440); and the statute further enables him to sell and convey the homestead to a purchaser, free from all liens by judgment. It is obvious that this legislation is in the interest of the owner of the homestead, and was intended to confer valuable rights. It is not legislation for the benefit of creditors. Now, is it not plain that the right to sell and convey the homestead free from judgment liens is a barren right, so far as the owner is concerned, if the proceeds of the sale cannot be protected until they reach the hands of the vendor, or while in transition from one homestead sold to another purchased? It certainly seems to us to be a valueless right, if the proceeds of the sale are liable to be attached, or are subject to garnishee process, as soon as the homestead is sold. And we hardly think that the legislature would have been to the trouble of enacting that the homestead might be sold and conveyed free from all judgment liens, if the right existed in the judgment creditor at once to attach all securities or garnishee all moneys arising from the sale. Consequently, we must hold the intent of the law to be, to exempt the proceeds of the homestead, which the debtor bona fide intends to use and apply in obtaining another homestead. . . . This undoubtedly is the policy and spirit of the statute to allow a person to sell one homestead and buy another; and the exemption must cover the change, and protect the proceeds while the transfer is being made. Otherwise the beneficent object of the law would often be defeated, and the owner would derive no possible benefit from the provision which enables him to sell and convey his homestead free from all judgment liens except those specified."

¹⁷¹ This decision was prior to the Wisconsin statute exempting the proceeds of the sale of the homestead for the period of two years: See, also, *Cullen v. Harris*, 111 Mich. 20, 66 Am. St. Rep. 380, 69 N. W. 78.

The statute of Iowa authorizes a change in the homestead, and provides that the new homestead shall be exempt to the extent of the value of the old, but does not in terms exempt the purchase money arising from the sale of the homestead. Nevertheless the supreme court of that state has repeatedly held that, where a party sells his homestead with the intention of purchasing another, he will be allowed a sufficient time within which to exercise that right, and during such period the proceeds of the sale are exempt. In *State v. Geddis*, 44 Iowa 537, the court said: "Section 2000 of the Code provides that, 'The owner may from time to time change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or may change it entirely.' Sec. 2001. 'The new homestead, to the extent in value of the old, is exempt from execution in all cases when the old or former homestead would have been exempt, but in no other, nor in any greater degree.' Here is an absolute right given to change one homestead for another, or to sell the homestead and acquire a new one, which shall be exempt to the same extent as the former one. There is no prescribed method as to how this shall be done. The statute does not provide that the sale must be for money in hand, which must be immediately invested in the new homestead; that is, that the selling of the old and purchasing of the new must be simultaneous acts. We must give the statute a reasonable construction so as to effectuate its object. If a homestead be sold and the proceeds applied to some other use there is no doubt that the exemption would cease, but where the sale is made on a credit and with the intention of using the proceeds when collected in purchasing another homestead, and the proceeds are not put to any intervening use, they are exempt while thus in transitu, so to speak, from the old homestead to the new. Any other rule would practically prohibit the changing of homesteads": ¹⁷² See, also, *Schuttloffel v. Collins*, 98 Iowa, 576, 60 Am. St. Rep. 216, 67 N. W. 397, and cases cited. . We are not unmindful of the fact that there are numerous decisions to the contrary of the views here expressed, but as said by the court in *Watkins v. Blatschinski*, 40 Wis. 347, they were mostly from states where

the courts place a strict construction on exemption laws, whereas, this court has uniformly declared that such laws must be liberally construed.

Finding no error in the record, the judgment is affirmed.

Mount, C. J., Fullerton, Hadley, Crow, Root, and Dunbar, JJ., concur.

The Proceeds of the Sale of a Homestead intended for use in the purchase of another homestead may, in some states, be reached by garnishment: *Fred v. Bramen*, 97 Minn. 484, 114 Am. St. Rep. 740, and see the cases cited in the cross-reference note thereto.

SHERIDAN v. MODERN WOODMEN OF AMERICA.

[44 Wash. 230, 87 Pac. 127.]

BENEFIT ASSOCIATION, When not Bound by the Act or Neglect of a Clerk.—The promise of the clerk of a local lodge of the Modern Woodmen of America that he will notify a beneficiary of any assessment that may be levied is not binding, and does not prevent a forfeiture from occurring by his failure to keep such promise and the consequent default in the payment of assessments, which would have been paid had notice thereof been given as promised. (p. 991.)

MUTUAL BENEFIT ASSOCIATIONS.—Insanity of the person insured does not excuse the nonpayment of assessments nor prevent a forfeiture resulting therefrom. (p. 992.)

MUTUAL BENEFIT ASSOCIATIONS—Laches of Beneficiary. Where the beneficiary of mutual benefit insurance knows that the insured is insane, and that the dues and assessments on his policy are payable every three months, and, having made a tender of payment, which is refused, fails to take any further steps during the remaining two years of the life of the insured for his reinstatement, such beneficiary is estopped from maintaining an action on the policy, on the ground that the original cause of forfeiture occurred through the insanity of the insured and the failure of the clerk of a local lodge to keep his promise to give notice of the assessments becoming due. (pp. 993, 994.)

Emery, Rourke & Denny and Ben. D. Smith, for the appellant.

Bostwick & Mulvihill, for the respondent.

²³⁰ CROW, J. Action by the plaintiff, Lulu L. Sheridan, by Tillie Hewitt, her guardian, upon a benefit certificate issued by the defendant to one Hiram D. Sheridan, now de-

ceased. ²³¹ The certificate, which was issued April 19, 1900, named as beneficiary the plaintiff, Lulu L. Sheridan, minor daughter of Hiram D. Sheridan and Tillie Hewitt. At the date of the certificate Lulu's father and mother had been divorced, and her mother had subsequently married. The plaintiff contends that, during the month of December, 1901, while Hiram D. Sheridan was in good standing, he became insane; that in March, 1902, he was committed to an asylum where he remained until his death in June, 1904; that in December, 1901, on discovering such insanity, Tillie Hewitt, the plaintiff's mother, gave notice thereof by letter to the clerk of the defendant's local camp, at Libby, Montana, advising him that, if Mr. Sheridan failed to pay his assessments, she wished to be notified so that she might pay for the benefit of her daughter; that in response, the clerk wrote Mrs. Hewitt that Mr. Sheridan's assessments were then paid in advance, that when further assessments became due he would notify her, and that he regretted to learn of the insanity of Mr. Sheridan; that the clerk afterward failed to notify Mrs. Hewitt of assessment No. 1, for January, 1902; that Sheridan was suspended for its nonpayment; that by reason of the failure of the clerk to notify Mrs. Hewitt, such suspension was void; that no subsequent notice was given Mrs. Hewitt, and that the certificate therefore remained in full force at the date of Sheridan's death.

The defendant claims that due notice of assessment No. 1, for January, 1902, was given to the assured by the clerk of the head camp, in the manner provided by the contract; that he failed to pay the same and became ipso facto suspended on February 2, 1902; that he was never reinstated; that no notice was given the defendant of the insanity of the insured prior to his suspension; that insanity is no excuse for nonpayment of assessments; and that the alleged notice of insanity and the clerk's alleged promise to inform Mrs. Hewitt of nonpayment conferred no rights upon the plaintiff, nor ²³² did they impose any duty upon the defendant. Prior to the commencement of this action, the plaintiff tendered to the defendant all dues and assessments which had matured between January 1, 1902, and June 1, 1904, amounting to twenty-seven dollars and thirty cents. This tender was refused, the defendant denying liability on the certificate. On trial, the jury found a verdict in favor of the plaintiff for one thousand nine hundred and seventy-two dollars and seventy

cents, and from the judgment entered thereon, this appeal has been taken.

The appellant, with other assignments of error, contends that the trial court erred (1) in denying its motion for a nonsuit, and (2) in denying its motion for a directed verdict. The pleadings and evidence show that the appellant is a fraternal mutual benefit association, organized under the laws of Illinois, with its head camp at Rock Island, and with numerous local camps throughout Illinois and other states; that it is organized on the lodge plan, having a ritualistic form of work and certain fraternal, social and indemnity features. Hiram D. Sheridan was a member of the local camp at Libby, Montana. By the terms of his certificate, the appellant agreed in case of his death to pay to the respondent as beneficiary, the sum of two thousand dollars, subject to certain conditions therein stated, one of which was that, if assessments against the assured should not be paid to the clerk of the local camp on or before the first of the month following the date of notice of the same, then the certificate should be null and void.

The by-laws provided that every beneficial member who, after notice, should fail to pay any assessment on or before the first day of the following month, or who should fail to pay dues in advance on or before the first day of April, July, October, or January, should ipso facto become suspended; that during such suspension his benefit certificate should be absolutely null and void; that a suspended member might be reinstated within sixty days upon payment of all arrearages, together with all fines, dues and assessments maturing subsequent ²³³ to default, provided that he was then in good health and furnished the clerk of the local camp a written warranty to such effect signed by himself; that a beneficiary member in suspension for more than sixty days, but less than six months, if in good health, might be reinstated upon furnishing a certificate of good health from the camp physician after medical examination duly approved by the head physician, and upon payment of all arrearages; that no officer of any local camp was authorized or permitted to waive any of the provisions of the laws of the society relating to the contract for the payment of benefits; that no officer of any local camp should have the right or power to waive any of the provisions of the by-laws of the society; that the clerk of the local camp was declared to be the agent of such camp and not the agent

of the head camp; that no act or omission on his part should have the effect of creating a liability on the part of the society or of waiving any right or immunity belonging to it, and that he should not collect or receive assessments or dues from a beneficiary member who has been suspended, except upon reinstatement in the manner above mentioned. All by-laws of the society were, by the express terms of the certificate, made a part hereof.

No payment of any assessments or dues maturing after December 1, 1901, was made by Sheridan, or any other person, at any time prior to his death in June, 1904, nor were any tendered, except on the one occasion hereinafter mentioned. The respondent's witnesses testified that in December, 1901, Mrs. Hewitt wrote a letter to the clerk of the local camp advising him of the insanity of Sheridan, and requesting him to notify her so that she might pay the assessments in the event of the failure of Sheridan to do so; that the clerk, answering this letter, stated the assessments were then paid in advance, and that he would keep her notified; that by reason of the failure of the clerk to give her any further notice, she failed to pay the assessment levied in January, ~~284~~ 1902, not knowing that it had been levied; that in February, 1902, the clerk, by letter, advised her of the suspension of Sheridan, for nonpayment of the January assessment, and sent her a blank certificate of health to be signed by him as a condition precedent to his reinstatement; that in response to this letter, she, on March 8, 1902, wrote the clerk in part as follows: "I have been away a little while and was not here when Lulu, my daughter, got your letter or would have seen to it at once, as Sheridan was here then but he is not here now and the last time I saw him, about three weeks ago, he was well and walking down the street, but as he has left town I cannot get him to sign the paper but will enclose \$3.60 to pay the dues to May 1st, and if it is not all right you can return the money order to me, . . . the reason I wish to keep up these dues is he is a very reckless man now in some ways and as I wrote you a year ago that I would keep up these dues if you would inform me when he failed to pay. . . . I hope you will look on my letter with some favor and make this all right, that is, if his insurance still runs to Lulu, his daughter."

The original of the last-mentioned letter was produced at the trial, but none of the others mentioned by respondent's

witnesses could be found. No further attempt at payment of either assessments or dues was made by the respondent or her mother, nor is it claimed that any further correspondence took place. The three dollars and sixty cents remitted by Mrs. Hewitt was returned by the clerk, he refusing to receive the same without the health certificate. The clerk denies receiving any letter from Mrs. Hewitt, in December, 1901, and also denies that he wrote her the letter which she says she received from him during the same month, in which he promised to notify her of the assessment then levied. As the jury found a verdict in favor of the respondent, they necessarily believed the statements of her witnesses, and we must accept the same as true.

The contention of the respondent is, that the appellant had no right to suspend Sheridan for nonpayment of dues or ²⁸⁵ assessments, he being, to appellant's knowledge, insane and unfit for business; that appellant's agent, the clerk of the local camp failed to notify the respondent of the levy of assessments as agreed, and that, by reason of such failure, the attempted suspension was void. It is not disputed but that notice of the January, 1902, assessment was given to Sheridan by the head clerk, in the manner provided by the by-laws, and the appellant now insists that nonpayment after such notice ipso facto worked a forfeiture of the certificate, and that, even though the clerk of the local camp did agree to notify the respondent's mother of the assessments when levied, such agreement was not binding upon the appellant by reason of the restrictions upon his authority contained in its by-laws.

We think these contentions should be sustained upon the authority of *Modern Woodmen of America v. Tevis*, 117 Fed. 369, 54 C. C. A. 293, and cases therein cited. In the *Tevis* case, the United States circuit court of appeals construed and passed upon the legal effect of the identical by-laws now before us, and we fully indorse and adopt its reasoning as controlling this case, this being the sole instance in which it is shown that the clerk in his course of dealing with members or beneficiaries violated any by-law of the society, and it not appearing that his action was the result of any customary course of procedure adopted by him toward members or beneficiaries. A single act of transgression cannot arise to the dignity of a custom so as to be impliedly ratified by the appellant. Had it been pleaded and shown that the clerk

habitually violated appellant's by-laws in this or kindred matters, a different rule might possibly be applied in determining the relative rights of the parties; but that question is not now before us, as no showing of any such state of facts has been made.

The appellant further contends that the insanity of the assured is no excuse for nonpayment under the contract, and ²³⁶ in support of such contention cites, with others, the following authorities, which we think are in point: *Pitts v. Hartford Life & Annuity Co.*, 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95; *Wheeler v. Connecticut Mut. Life Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594; *Carpenter v. Centennial Mut. Life Assn.*, 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456. In following these cases, we are not unmindful of the case of *Buchanan v. Supreme Conclave etc.*, 34 L. R. A. 436 (178 Pa. 465, 56 Am. St. Rep. 774, 35 Atl. 873), cited by respondent, and which we regard as being against the weight of authority.

The respondent most vigorously contends that, as she was misled by the act of the clerk of the local camp, the appellant had no right to forfeit the certificate, and that it should be estopped from pleading such forfeiture. Were we to concede that the clerk had power to bind the appellant when he agreed to notify respondent's mother of assessments as levied, and should we also hold that the beneficiary was entitled to notice of assessments by reason of the insanity of the insured, of which appellant was advised, still we think no recovery can be permitted herein, as the respondent and her mother, who was acting in her behalf, must be held by their subsequent conduct, covering a period of more than two years, to have acquiesced in such alleged irregular forfeiture of the certificate. At all times after March 8, 1902, they failed to make any further tender of dues or assessments, nor did they take any further steps to secure relief from such suspension and forfeiture.

In *Lavin v. Grand Lodge*, 104 Mo. App. 1, 78 S. W. 325, cited by respondent, it was contended that the wife of the beneficiary had twice tendered payment of assessments which were due, but that the clerk of the local lodge had declined to accept the same for the reason that, as he alleged, the tender was insufficient in amount. No further payments were made or tendered during the life of the assured, who died some six months later. On trial, judgment was entered in favor of the

²³⁷ beneficiary, which the appellate court reversed, ordering a new trial. Upon investigation, we find that on the second trial, the beneficiary again recovered judgment, and that the case again came to the court of appeals, being reported in 112 Mo. App. 1, 86 S. W. 600. On this last hearing, the appellate court enters into a very elaborate and able discussion of the rights and duties of an assured when a certificate issued by a fraternal society has been forfeited without just cause, and announces the doctrine that it is essential for the preservation of the rights of the beneficiary under the certificate that, notwithstanding such forfeiture, the assured or his representative should offer to fully perform the contract upon his part. The court, reviewing numerous authorities, points out a clear distinction between the principles applicable to old line life insurance companies which carry on business for profit, and those which are applicable to fraternal societies. Under appellant's by-laws and the terms of the certificate, Sheridan was required to pay quarterly dues in advance, without notice of the same. There is no showing that either he or any other person ever offered to make such payments within the two years and a half that the assured lived after January, 1902. Yet the respondent and her mother, who had the certificate in her possession, must have known that nonpayment of these dues would ipso facto forfeit the rights of the assured, without regard to the assessments. There is no showing that, after the tender, made in March, 1902, was returned by the clerk, the assured, the respondent, or her mother ever attempted to take any steps, either in the order or in any court of justice, to compel a reinstatement of the policy, or to have the alleged forfeiture declared to be void. The appellant contends that, under the by-laws of the society, the respondent should have appealed from the action of the clerk, and that having failed to do so, she is now estopped from claiming under the certificate. Respondent, however, calls attention to the fact that the by-laws by their express terms give ²³⁸ the right of appeal to members only. This is true. Yet were we to hold that the respondent, by reason of her father's insanity, was, prior to his death, entitled to any vested right in the certificate as against the appellant, she certainly should have taken some action to protect herself from the loss which would necessarily result from the forfeiture alleged to be void, and should have done so without unreasonable delay. Accepting her theory of this case, we are unable to escape the conclu-

sion that a duty was imposed upon her to at least direct the attention of the local camp to the action of its clerk, so that it might be afforded an opportunity for correcting his mistake in refusing the tender, either by taking action itself, or by causing the head camp to act. If the respondent and her representatives could be permitted to remain quiet and allow the suspension of Sheridan and the forfeiture of the certificate to continue unquestioned for the period of more than two years, without even tendering any payment of dues which necessarily matured, and could then successfully prosecute this claim against appellant, there is no reason why they could not have continued such inactivity for a period of ten years, or even longer. Such a construction of the certificate would be absurd, to say nothing of its being unjust. We think the respondent acquiesced in the decision and action of the clerk, that she is now bound thereby, and is not entitled to recover.

The motion for a directed verdict in favor of the appellant should have been granted, and the trial court erred in denying the same. It is ordered that the judgment of the superior court be reversed, and that the cause be remanded with instructions to dismiss the action.

Mount, C. J., Fullerton, Hadley, Dunbar and Rudkin, JJ., concur.

The Insanity or Illness of an Insured is held by some authorities to be no excuse for not paying the premiums on his policy as they fall due: *Thompson v. Fidelity Mut. Life Ins. Co.*, 116 Tenn. 557, 115 Am. St. Rep. 823; *Pitts v. Hartford Life etc. Ins. Co.*, 66 Conn. 376, 50 Am. St. Rep. 96. But see *Buchanan v. Supreme Conclave I. O. H.*, 178 Pa. 465, 56 Am. St. Rep. 774.

BIRD v. WINYER.

[44 Wash. 264, 87 Pac. 259.]

RES JUDICATA.—A judgment in a suit to quiet title to one part of a tract of land is conclusive in a subsequent suit involving the balance of the tract depending on the same title and between the same parties or their privies. (pp. 996, 997.)

Charles Bedford, for the appellants.

George T. Reid and James J. Anderson, for the respondent.

²⁶⁴ Per CURIAM. The complaint in this action alleges that the plaintiff was formerly a member of the Puyallup tribe or band of Indians, residing on the Puyallup Indian reservation in this state; that on the thirtieth day of January, 1886, there was allotted and patented to him, as the head of a family consisting of himself and wife, certain lands particularly described in the complaint; that such allotment was made and patent issued pursuant to the sixth article of the treaty between the United States and the Puyallup and other Indians, concluded on the twenty-sixth day of December, 1854; that said land is timber land, wholly unfit for cultivation, and is unoccupied; that the plaintiff and Mary Bird, his wife, resided on other lands embraced in said patent until the death of the latter on the fifteenth day of August, 1887; that said Mary Bird left surviving her two sons by a former marriage, ²⁶⁵ both of whom were adults at the time of the issuance of the aforesaid patent, and lived with their families on allotments of their own; that the defendants herein are the heirs at law of the said Mary Bird, deceased, and as such claim an interest in the lands and premises described in the complaint; that such claim is without warrant or authority of law, and that the restrictions upon the alienation of the lands described in said patent were removed on the third day of March, 1903. A copy of the patent is attached to the complaint, and the prayer is for judgment removing a cloud and quieting title.

The answer denies that the claim of the defendants is without right, and alleges affirmatively that the Interior Department of the United States, in dealing with the Puyallup Indians under the above treaty, has always construed said treaty, and the patents issued thereunder, as conveying the

legal title to the lands described in each patent to the individuals therein mentioned as a family, in equal portions, the husband and wife taking their portion as community property; that pursuant to said treaty and the act of March 3, 1893, the President of the United States appointed a commission of three persons, whose duties and instructions under the law were to ascertain and determine the ownership of the above lands and other lands on said reservation; that said commission did proceed to ascertain and determine the ownership of said lands and found and determined that the defendant Henry Winyer was the owner of a one-fourth interest therein, that Frank Winyer, for whose estate the defendant McDonald is administrator, was the owner of a one-eighth interest therein, that one Lilly Winyer, since deceased, was the owner of a one-eighth interest therein, and that the plaintiff herein was the owner of a one-half interest therein, that such finding and determination was reported to the Secretary of the Interior and by him approved, and that a large portion of the lands on said reservation have ²⁰⁰ been sold, and more than one hundred thousand dollars in money paid out and distributed under said treaty and patents construed as aforesaid. The court sustained a demurrer to the affirmative defense in the answer, found the facts as alleged in the complaint and the affirmative defense, and entered judgment according to the prayer of the complaint. From this judgment the defendants appeal.

The case of *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178. is decisive of this case, but the appellants maintain that the case cited was overruled in part by *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, and should now be overruled in its entirety. They further maintain that the judgment in the former action is not *res adjudicata* in this. The only difference in the two cases lies in the fact that the former action was brought to quiet title to that portion of the land described in the patent, which was in Pierce county at the time that action was commenced; whereas, the present action is brought to quiet title to that portion of the land, described in the same patent, which was in King county at the time the former action was commenced, but is now in Pierce county by reason of a change in county lines. The subject matter of the two actions was, therefore, not the same, and the former judgment is not *res adjudicata* here. However, the parties were the same, the issues were the same, and the evidence that

would sustain or defeat the former action would also sustain or defeat the present. It was adjudged in the former action that Mary Bird, the deceased wife of the respondent, had no interest in the lands described in said patent at the time of her death, and that the defendants in said action as her heirs at law took nothing and could claim no interest therein; and under all the authorities such former judgment operates as an estoppel against the claim of title asserted by the defendants in this action, they being the same or in privity with the defendants in the former action: *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. ed. 195; *Freeman on Judgments*, 4th ed., sec. 253 et seq.

²⁶⁷ We recognize the fact that the judgment in the former action is not technically before us, as it was not pleaded, but the appellants have directed our attention to it and ask us to overrule it. Should we overrule that case, reverse the judgment in this, and remand the cause for further proceedings, it would only be necessary for the respondent to bring the former judgment properly to the attention of the trial court in order to defeat any conclusion we might reach. It may be claimed that we should direct a final judgment in favor of the appellants on reversal, but, inasmuch as the respondent was justified in relying upon the former opinion of this court in preparing and submitting his case, we would not be justified in adopting such a course. If the case should be reversed at all, it should be remanded for further proceedings in the court below. The only effect of a reversal would be to establish a rule affecting the rights of parties not now before the court, and this we decline to do.

The judgment in this case is therefore affirmed, on the authority of *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178, without expressing any opinion on the questions presented and discussed in the appellants' brief.

For Authorities bearing upon the decision in the principal case, see *Pereles v. Gross*, 126 Wis. 122, 110 Am. St. Rep. 901; *Watson v. Richardson*, 110 Iowa, 698, 80 Am. St. Rep. 331; *Scottish-American Mtg. Co. v. Bunckley*, 88 Miss. 641, 117 Am. St. Rep. 763.

ANDERSON v. SNOWDEN.

[44 Wash. 274, 87 Pac. 356.]

TENANTS IN COMMON in the Purchase of Real Property—Forfeiture.—Where two persons have made a purchase of real property as tenants in common, and paid part only of the purchase price, one cannot, by notifying the other of the time when the balance must be paid, and that unless he furnishes his share at that time, his interest in the property will be forfeited, acquire the right, on such share not being furnished, to pay the whole, and then claim all the property on receiving a conveyance thereof from the vendor. The one making the whole payment is, however, entitled to hold the interest of the other as security for the repayment of the sum so advanced from him. (pp. 1001, 1002.)

TENANT IN COMMON in Purchase of Real Property, Rights of Where He has not Paid His Share of the Purchase Price.—If two persons purchase, as tenants in common, real property, and one not advancing his share of the unpaid purchase price, the other pays the whole, the former is not entitled to a decree quieting his title to the undivided one-half of the property, he not having paid his share of the purchase price, but the court, in a suit between them to quiet title, may ascertain the amount due from the one cotenant to the other and declare that if the payment is made within a time specified, the party paying shall be the owner of the undivided one-half of the property, and if he fails to make such payment, then a decree may be entered against him quieting title in favor of the one who has made payment of more than his share. (pp. 1002, 1003.)

Hudson & Holt and H. P. Burdick, for the appellants.

Fogg & Fogg, for the respondents.

²⁷⁶ **RUDKIN, J.** This is an action to quiet title. The material facts occurring prior to the fifth day of December, 1904, are recited and embodied in a written memorandum of that date, prepared by the plaintiff James J. Anderson, and signed by him and the defendant C. A. Snowden. The memorandum is as follows:

“This memorandum witnesseth, that, heretofore, in the month of September, 1904, the undersigned entered into three contracts of purchase of thirty-two acres of land, being all of the N. E. quarter of S. E. quarter, Section Two, Township 20 North, Range 3 East of W. M., excepting a strip of eight acres off the east side of said forty-acre tract belonging to James Alexander, from James Brewer, David ²⁷⁷ Brewer and Louisa Jackson, the whole purchase price of said thirty-two acres to be \$4,800.

“That towards the purchase price of said lands the undersigned C. A. Snowden furnished the sum of Two Hundred

Dollars in cash, and has further paid the sum of Seven Dollars as interest upon one of the notes hereinafter mentioned.

"That the undersigned James J. Anderson has paid towards the purchase price of said lands the sum of One Hundred Dollars in cash and has further paid on account of said lands the following sums: For abstract of title, \$12.50; for surveying, \$6.00; for recording contracts and deeds, \$6.50; for interest on notes hereinafter mentioned, \$19.00.

"That the undersigned have borrowed from the Pacific National Bank \$650, evidenced by two notes, one being for \$350.00 and one being for \$300.00, the proceeds of which notes were paid on account of said lands.

"That in order to complete the purchase of said lands the undersigned obtained from E. E. Cushman the sum of \$1,450 and as security for same, had a portion of said lands deeded to said E. E. Cushman, taking back from said Cushman a contract for the reconveyance of said portion of said lands upon payment to him of \$1,812.50; and also obtained from George P. Wright and Mrs. Mary Johnson the sum of \$2,400, and had a portion of said lands deeded to said Mrs. Johnson and said George P. Wright as security for same, taking back from said Mrs. Johnson and Geo. P. Wright a contract for reconveyance of said lands on payment to them of \$3,000.

"That the undersigned, C. A. Snowden and James J. Anderson, have each an equal share in the contracts for reconveyance of said lands by said Cushman, Wright and Johnson, subject to the contribution and payment by each of one-half of all moneys heretofore paid or to be paid on account of the purchase of said lands, the intention being that they shall each bear an equal share of the sums above mentioned as having been paid out, and an equal share of amounts to be paid in satisfaction of said notes when same are to be paid, the various sums so paid out to be adjusted between them that each shall bear an equal part of the same in the aggregate.

"That the said contracts of reconveyance have been made in the name of James J. Anderson for convenience, this ²⁷⁸ memorandum being made to evidence the fact that said C. A. Snowden has an equal share in same on the conditions above stated.

"Dated, December 5th, 1904.

"Made in duplicate.

"JAS. J. ANDERSON.

"C. A. SNOWDEN."

Some time thereafter, and prior to the first day of September, 1905, Anderson paid to the Pacific National Bank the two promissory notes referred to in the memorandum, and on the latter date served on the defendant Snowden the following written notice:

“Tacoma, Washington, September 1st, 1905.

“Mr. C. A. Snowden, Dear Sir: Referring to a certain written memorandum or agreement signed by you and myself, of date December 5th, 1904, with regard to a certain option or contract with George P. Wright and Mrs. Mary Johnson, and also with regard to a similar contract with E. E. Cushman, I write this to notify you that the time limit under the contract with George P. Wright and Mrs. Mary Johnson expires today, September 1st, 1905; and to further notify you that the amount necessary to be paid by you in order to protect any right or interest that you may have under or in said contract, is the sum of Sixteen Hundred and Ninety Dollars (\$1,690.00), which said sum you are hereby notified to contribute towards the payment to said George P. Wright and Mrs. Mary Johnson, according to said contract with them, on this day; and in case of your failure to contribute said sum on this day for said purpose, any and all right or interest that you may have in or to said contract will be at once forfeited.

“Further referring to contract with E. E. Cushman mentioned in said agreement between you and myself, I notify you that the time limit for the performance of said contract with Mr. Cushman has been extended to and including October 1st, 1905; and further, that the amount necessary to be paid by you on or before that date in order to protect any right or interest that you may have in or to said contract with Mr. Cushman, is the sum of Ten Hundred and Thirty-six and 25-100 Dollars (\$1036.25); and in case of your failure to contribute said sum towards the payment to said Cushman on or before October 1st, 1905, according to the terms of ²⁷⁹ said contract, all right or interest that you may have in or to same will at once be forfeited.

“You are further notified that in case of your failure to meet your portion of the amount necessary to complete the payments under the said option contracts or either of them as above set forth, and in case I shall elect to and do, at my own cost and expense, make said payments or either of them,

I shall then refuse to recognize any claim that you or any one claiming through you, may make under and by virtue of said agreement between you and myself as to the land so purchased by me. This notice is given in order to give you every opportunity to protect any rights that you may have in the matters referred to should you see fit to do so.

"Yours very truly,

"JAS. J. ANDERSON."

Snowden failed to comply with the requirements of the notice, and thereupon Anderson paid the several amounts due Cushman and Wright and Johnson, and took from them conveyances of the property referred to in the memorandum. Since the service of this notice and the payments to Cushman, Wright and Johnson, Anderson has refused to recognize Snowden as having any interest in the property, and on November 15, 1905, brought the present action to quiet title.

On the foregoing facts, the plaintiffs contend that the defendants have forfeited any and all interest they may have had in the property, by failure to pay their portion of the purchase price. The defendants, on the other hand, have filed a cross-complaint, and ask that they be declared the owners of an undivided one-half interest in the property, subject to the payment of their portion of the purchase price. The court below found the facts substantially as above set forth, and dismissed the action, without granting any relief to either party. From this judgment, both parties have appealed, and will hereafter be referred to as designated in the court below.

The plaintiffs contend, if we understand them correctly, that the relationship existing between themselves and the defendants ²⁸⁰ was that of vendors and purchasers, and that by failure to pay the purchase price on demand, the defendants forfeited all rights under their contract. If their premise is correct, the conclusion might follow; but we think this is a mistaken idea as to the relationship created and existing between the parties. There is no more reason for holding that the defendants acquired their rights by purchase from the plaintiffs, than for holding that the plaintiffs acquired their rights by purchase from the defendants. Under the testimony, the findings of the court, and more especially the written memorandum prepared by one of the plaintiffs, the parties to this action were joint purchasers, or tenants in common, and their rights and obligations must be determined

by the law governing that relation rather than the law applicable to the relation of vendor and purchaser. Their common property was held under deeds to secure a common indebtedness. Each tenant in common was a surety for the other. The only remedy of either was to pay the common indebtedness, and be subrogated to the rights of the creditors against the common property. The remedy of the plaintiffs was by contribution and not by forfeiture. One tenant in common cannot forfeit the rights of his cotenant in their common property by notice or demand. The claim of the defendants does not appeal very strongly to a court of equity, and it may well be that they are endeavoring to speculate on the capital of others, but this was one of the incidents of the bargain the plaintiffs entered into, against which a court can grant no relief. As said by the court in *Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103, "The conduct of the defendant, Steinbach, as evidenced by his answer, does not commend itself to a court of equity, but it has not worked a forfeiture of any of his interests in the lands in question. He is bound to the plaintiff for such proportion of the redemption money, with interest, as his interest in the lands bears to the whole thereof; and as security for payment of such sum, plaintiff holds an equitable lien ²⁸¹ upon all of the interest of Steinbach in the property. To enforce the relative rights and obligations of the respective parties, it is necessary that this amount be judicially ascertained, a day fixed within which it be paid, and a decree to the effect that, in default of such payment, defendant be forever foreclosed of all right or interest in the lands."

The plaintiffs were, therefore, not entitled to the relief demanded in their complaint; nor were the defendants entitled to the relief demanded in their cross-complaint. They could not appeal to a court of equity to declare them the owners of an undivided one-half interest in the property without first paying or tendering their portion of the purchase price. But while neither party was entitled to the relief demanded, nevertheless, the court had jurisdiction of the parties and the subject matter of the action, and should have granted to the parties such relief as they were entitled to under the facts.

The judgment is therefore reversed, and the cause remanded to the court below, with directions to ascertain the amount the defendants should pay to make up their one-half of the purchase price, and any other sums the plaintiffs may have paid

on account of the common property, with interest from date of payment, and to enter a decree declaring the defendants the owners of an undivided one-half interest in the premises in controversy upon the payment of the sums thus ascertained within ten days from the date of the decree, and if they fail to make payments within that time, to enter a decree quieting the plaintiffs' title as prayed in their complaint. Neither party will recover costs on this appeal.

Mount, C. J., Fullerton, Hadley and Dunbar, JJ., concur.

Root and Crow, JJ., took no part.

Each Cotenant is Bound to Preserve Common Estate in good faith for the equal benefit of all. If he pays off a lien on the property, or pays more than his share of the purchase price, he is entitled to contribution from his co-owners, and can assert the title to compel contribution, but not to oust the other cotenants: *Rippe v. Badger*, 125 Iowa, 725, 106 Am. St. Rep. 336; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; note to *Hoyt v. Lightbody*, 116 Am. St. Rep. 367.

STATE v. PARSONS.

[44 Wash. 299, 87 Pac. 349.]

ROBBERY, Force and Fear Essential to.—Whenever the elements of force and being put in fear enter into the taking and are the cause inducing the owner of personal property to part with it, the taking is robbery, no matter how slight the act of force, or the cause creating the fear may be, nor by what other circumstances the taking may be accomplished. (p. 1005.)

ROBBERY—Obtaining Money by Impersonating Policeman and Threatening an Arrest.—If two persons, finding a third in an intoxicated condition, announce themselves as policemen, threaten him with arrest for drunkenness, tell him he must go to jail and that they must search him, and thereupon go through his pockets and take money from him, he not resisting because he believes them to be policemen and that they will inflict personal injury on him unless he keeps still, they may be convicted of robbery. (pp. 1005, 1006.)

ROBBERY—Force, Instruction Concerning.—It is not error to charge the jury in a prosecution for robbery that the degree of force used is immaterial as long as it was sufficient to compel the prosecuting witness to part with his property. (p. 1007.)

CRIMINAL TRIALS—Jury, Failure to Instruct Where There is No Request.—If a request is made in a criminal trial for an instruction respecting the lesser offense involved in the offense charged and no exception taken because an instruction thereon is not given, and the defendant is convicted, he is not entitled to a reversal or new trial because of not giving the instruction. (pp. 1007, 1008.)

W. H. Abel and E. A. Philbrick, for the appellants.

E. E. Boner, for the respondent.

²⁰⁰ FULLERTON, J. The appellants were convicted on an information charging them with robbery, and appeal from the judgment and sentence pronounced upon them. The acts constituting the offense charged took place at Hoquiam on the morning of February 14, 1906, between the hours of 12 and 2 o'clock. The evidence on the part of the state tended to show that the prosecuting witness, sometime between those hours, entered a restaurant at that place and ordered a meal. He had been drinking the night before, ³⁰⁰ and had not as yet fully recovered from its effects. While his meal was being prepared, he leaned over the counter at which he was sitting and went to sleep. When the meal was ready he was awakened by the waiter, and began eating, but seemingly did not become fully awake and gradually dosed off to sleep again. The appellants came into the room in the meantime, ordered a meal, and while eating it jested with the waiter and restaurant cook over the prosecuting witness' condition. After they had finished, one of them turned to the cook to settle for their meal, when the other took the witness by the shoulder and aroused him, telling him that he must pay for his meal and get out of doors as that place was not a lodging-house. The witness then paid for his meal, when the appellant, still holding him by the shoulder, led him out of the door of the restaurant and there told him that he and his companion were policemen, and were going to take him to jail for being drunk.

The other appellant, who had remained talking with the cook until this time, then joined them and the two took the witness down an alleyway into a saloon, where they told him to sit down. No one was in the saloon at the time except the bartender. After seating the witness in a chair, the appellants approached the bartender and held with him a whispered conversation, whereupon he took some keys from a hook and went out into a room a short distance away. While the bartender was out of sight, the appellants again took hold of the witness, raised him up and told him he must now go to jail, and that it was necessary to search him before going. They thereupon went through his pockets, taking from him such money as he had, some twenty-eight dollars, and then led him back through the alleyway to the main street where they let him go, telling him to go to a certain

saloon, and not let himself be seen on the street until morning. The witness went to his boarding-house, where he announced that he had been robbed by the night policeman of the town. His complaint caused an inquiry to be made, which resulted ³⁰¹ in the arrest of the appellants within a few hours afterward. The witness testified that he made no resistance or outcry for the reason that he believed the appellants to be policemen, and would "lick him" if he resisted or made an outcry; that they told him while searching him that he must keep still. The prosecuting witness was a Finlander by birth, who had been in the United States less than four years, and spoke the English language brokenly.

The statute, 3 Ballinger's Code, section 7103 (P. C., sec. 1610), defines robbery to be the forcible and felonious taking from the person of another, or from his immediate presence, any article of value by violence or putting in fear, and it is contended by the appellants that the evidence here fails to show such use of force and violence, or such putting in fear, in taking the property as is necessary to constitute robbery under the statute.

The courts generally hold that it is not robbery to merely snatch from the hand or person of another, or to surreptitiously take from another's pocket, money or some other thing of value, as such taking lacks the element of force, or putting in fear; one or the other of which being essential to constitute the crime of robbery. It is also generally held that, where the property is obtained by some artifice or trick, intended to and which does allay resistance and not arouse fear, such as inducing one to part voluntarily with his money or property under the belief that the taker has a lawful right to it, does not constitute robbery. But, on the other hand, it is generally held that whenever the elements of force or putting in fear enters into the taking, and is the cause that induces the owner of the property to part with it, the taking is robbery, no matter how slight the act of force or the cause creating the fear may be, nor by what other circumstance the taking may be accompanied. It is enough that the force, or the putting in fear employed, is sufficient to overcome resistance on the part of the person ³⁰² from whom the property is taken and is the moving cause inducing him to part unwillingly with his property.

It seems to us that there was in the case before us both the element of force and putting in fear. There was a forcible

seizure of the prosecuting witness, his forcible taking to a place where he had no desire to go, a command to keep silent, and a forcible taking against his will of his money from his person. True, these acts were accompanied by the false representations to the effect that the appellants were officers of the law having authority to compel him to accompany them, and to take from him his property, but these representations did not induce the prosecuting witness to part with his money—they were still compelled to take it from him. Nor was the mere false impersonation sufficient to enable them to thus obtain the property of the prosecuting witness; they were compelled to exercise their assumed authority by such threats of violence as to put him in fear. It may be that a man of more intelligence and resolution than the witness exhibited would have seen through the very flimsy pretexts the appellants were making, and would have successfully resisted such an attempt as was here successful. But this is beside the question. The law must protect the weak and irresolute as well as those of stronger wills, and it is enough that the person assaulted was intimidated and yielded up his property because of the force used and threatened, be the same ever so slight.

The courts usually hold it robbery to obtain the property of another by means of the ruse used by the appellants in this instance. In *McCormick v. State*, 26 Tex. App. 678. 9 S. W. 277, the proof showed that the defendant met the prosecutor at night, and summoned him to throw up his hands, stating at the same time that he was an officer of the law and would arrest the prosecutor for being drunk and noisy. On the prosecutor's yielding to him he took from him a roll of bills. This was held to constitute robbery. In *Williams v. State*, 51 Neb. 711, 71 N. W. 729, defendants, three in number, ³⁰³ conspired to unlawfully extort money from the prosecuting witness, pursuant to which one of them, falsely pretending to be an officer, took the prosecutor into custody for an alleged misdemeanor, and demanded money, at the same time taking hold of the prosecutor's collar. The prosecutor thereupon handed him twenty dollars, because, as he testified, he was so scared he did not know what he was doing. This money was immediately handed by the person receiving it to his associates. It was held that all three of the persons were guilty of robbery by putting in fear. In *Bussey v. State*, 71 Ga. 100, 51 Am. Rep. 256, the facts were

that the defendant, who pretended to be marshal of the town, having on a star designating the office, seized the prosecutor, to whom another was showing a trick at cards, and upon the exclamation of that other, "there's the marshal," pushed him against the wall and threatened to put him in jail unless he paid money. The prosecutor, to keep from going to jail, and because he "did not want to be bothered," paid him eight dollars. This was held robbery: See, also, *Sweat v. State*, 90 Ga. 315, 17 S. E. 273; *Thompson v. State*, 61 Neb. 210, 87 Am. St. Rep. 453, 85 N. W. 62; *Seymour v. State*, 15 Ind. 288.

The appellant has cited cases which maintain that it is not robbery to obtain the property of another by artifice or trick, or by falsely impersonating a police officer, where no element of force or putting in fear enters into the taking, and it may be that one or two of the cases so cited cannot be distinguished in their facts from the facts of the cases above cited or the facts in the case at bar. But we think the better rule is with the cases we have cited.

There was no error in the charge of the court to the effect that the degree of force used was immaterial, as long as it was sufficient to compel the prosecuting witness to part with his property; nor was it error for the court to refuse to give, as part of his charge, the requested instructions submitted by the appellants. These, in so far as they were proper, were substantially included in the charge given.

²⁰⁴ Finally, it is urged that the court erred in failing to charge the jury on its own motion as to the lesser offenses included in the offense charged in the information. It is conceded that no request was made to the court to give such an instruction as part of his charge, and that no exception was taken because such an instruction was not made a part of the charge. There are well-considered cases which sustain the appellants' contention, but we think the weight of authority is the other way: See, also, 11 Ency. of Pl. & Pr. 217; 12 Cyc. 639, 640.

Mr. Thompson states the rule in the following language: "It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that mere nondirection, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation

for an assignment of error, that it is indefinite or incomplete. The rule rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is, therefore, their duty to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate suppletory instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no ³⁰⁵ connection whatever with the merits": Thompson on Trials, sec. 2341.

The judgment is affirmed.

Mount, C. J., Rudkin, Hadley, Dunbar, Root and Crow, JJ., concur.

The Crime of Robbery is the subject of a note to *State v. McCune*, 70 Am. Dec. 178. For recent decisions bearing upon the question involved in the principal case, see *Colbey v. State*, 46 Fla. 112, 110 Am. St. Rep. 87; *Thompson v. State*, 61 Neb. 210, 87 Am. St. Rep. 453; *Verberg v. State*, 137 Ala. 73, 97 Am. St. Rep. 17.

STATE v. KNIFFEN.

[44 Wash. 485, 87 Pac. 837.]

WITNESS, Wife Against Husband on a Prosecution for Bigamy. The first wife is not competent as a witness against her husband on a prosecution for bigamy. (p. 1010.)

EVIDENCE—Public Records, What are and How must be Certified as.—A license and marriage certificate, being a public record of a county of a sister state, do not appertain to the court, and must, to be admissible as evidence, be certified as required by section 906 of the Revised Statutes of the United States. Nor is a copy of the record of such license and certificate admissible because it is made by a clerk of the circuit court, if he does not certify in that capacity nor annex the seal of the court, but, on the contrary, certifies as a deputy clerk of the county and attaches its seal. (p. 1011.)

BIGAMY—Burden of Proof as to Matters of Confession and Avoidance.—In a prosecution for bigamy, if it is proved that the accused and his first wife were married according to the laws of the state wherein the marriage took place, it is not necessary for the prosecution to show that she was competent to enter into the marriage relation, nor that there were no impediments to the marriage. (pp. 1011, 1012.)

W. B. Presby, for the appellant.

E. C. Ward, for the respondent.

⁴⁸⁵ MOUNT, C. J. The appellant was convicted of the crime of bigamy. He alleges on this appeal that the court erred in permitting Nellie Kniffen, the alleged first wife of the appellant, to testify as a witness on the part of the state over his objection. The question is, whether the first wife, under the statute, is a competent witness against the accused ⁴⁸⁶ on trial for the crime of bigamy. The statute reads as follows: "The following persons shall not be examined as witnesses: (1) A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterward, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other": Bal. Code, sec. 5994; P. C., sec. 940.

It has been held, under similar statutes, in Iowa and Nebraska, that bigamy is a crime committed by one spouse

against the other, and that therefore one was a competent witness against the other: *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *Hills v. State*, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155; *State v. Bennett*, 31 Iowa, 24; *State v. Hazen*, 39 Iowa, 648; *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516.

On the other hand, it has been held in Minnesota, Texas, Michigan, California, South Dakota, and by the supreme court of the United States, that such crimes are not committed by one spouse against the other, and therefore one spouse is incompetent as a witness against the other, under such statutes: *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762; *State v. Burt*, 17 S. Dak. 7, 106 Am. St. Rep. 759, 94 N. W. 409, 63 L. R. A. 172; *People v. Langtree*, 64 Cal. 256, 30 Pac. 813; *People v. Quanstrom*, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723; *Overton v. State*, 43 Tex. 616; *Compton v. State*, 13 Tex. App. 271, 44 Am. Rep. 703; *State v. Armstrong*, 4 Minn. 335.

In *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762, the supreme court of the United States considered the cases cited above from Minnesota, Texas, Iowa, and Nebraska, and concluded that a statute similar to our own was but an affirmation of the common-law ⁴⁸⁷ rule, and that polygamy was a crime against the marriage relation, and not one committed by one spouse against the other. While much may be said in favor of the position that bigamy, adultery and kindred crimes are committed by one spouse against the other, yet the weight of authority seems to be opposed to that rule: 30 Am. & Eng. Ency. of Law, 2d ed., p. 956. We therefore feel bound to hold that in this case the court erred in permitting the first wife to testify against her accused husband.

Upon the trial the court received in evidence a marriage license and certificate of marriage from the state of Michigan, purporting to be a copy of the records of Bay county, Michigan, showing the marriage of Bert Kniffen and Mrs. Nellie Nickelson. This evidence was received over the objection of appellant that it was not competent because it was not certified as required by law. The certificate is as follows:

“State of Michigan, County of Bay,—sa.

“I, H. Duffer, deputy clerk of said county of Bay, and clerk of the circuit court of said county, do hereby certify

that I have compared the foregoing copy of the original record of marriage license and certificate of marriage with the original record thereof now remaining in my office, and that it is a true and correct transcript thereof and of said original record.

"In testimony whereof I have hereunto set my hand and affixed the seal of said county this second day of May, 1905.

"(Seal)

H. DUFFER, Depty. Clerk."

The license and marriage certificate do not appear to be the record or proceeding of any court of the state of Michigan which, under Ballinger's Code, section 6040 (P. C., sec. 1013), may be authenticated by the clerk "or other officer having charge of the records of such court, with the seal of such court annexed." They appear to be a public record of Bay county, Michigan, not appertaining to a court, and must therefore be certified as required by section 906 of the Revised Statutes of the United States: *James v. James*, 35 Wash. 650, 77 Pac. 488 1080. It is true the officer making the certificate says therein that he is clerk of the circuit court of Bay county, Michigan. But he does not certify in that capacity, nor is the seal of such court annexed. He certifies as deputy clerk of Bay county, and attaches the seal of that county. The court therefore erred in receiving the evidence.

It is next argued that the court erred in refusing certain questions on cross-examination of the witness, Nellie Kniffen. We have held above that this witness was disqualified to testify against her husband. It is therefore unnecessary to consider this assignment, because she cannot be permitted to testify on another trial.

The court instructed the jury in substance that, if they found that the accused and his first wife were married according to the laws of Michigan, it was not necessary for the prosecution to go further and show that the wife was competent to enter into the marriage relation, and that there were no impediments to the marriage; that such facts would be presumed in the absence of proof to the contrary, and that the burden of showing the illegality of the marriage, or that the same was void, rested upon the accused. Appellant contends that these instructions were erroneous. In this class of cases the rule seems to be that the defendant must show all matters of confession and avoidance: 4 Am. & Eng. Ency. of Law, 2d ed., p. 45. The rule is stated in 5 Cyclo-

pedia, at page 700, as follows: "The prosecution must prove a valid first marriage contracted by defendant and that the lawful spouse of defendant was living at the time the second marriage was contracted by him. Where the defense is that the first spouse was at the time of his or her marriage to defendant incapacitated to marry, because he or she was at that time a party to a valid marriage then subsisting, that marriage must be proved by defendant. The burden of proof also rests on him in all cases where he relies upon any statutory exception, or to rebut any presumption of the existence of the former spouse ⁴⁸⁹ at the time of the second marriage, where such presumption has been raised by the evidence of the prosecution": See authorities there cited; *Hoch v. People*, 219 Ill. 265, 109 Am. St. Rep. 327, 76 N. E. 356. We think the instructions complained of were not erroneous.

For the errors above stated, the judgment is reversed and the cause remanded for a new trial.

Crow, Rudkin, Fullerton and Hadley, JJ., concur.

The Competency of a Wife to Testify against her husband on a charge of bigamy is discussed in Hoch v. People, 219 Ill. 265, 109 Am. St. Rep. 327; note to State v. Burt, 106 Am. St. Rep. 768.

On the Proof of Former Marriage in prosecutions for bigamy, see the notes to Hiller v. People, 47 Am. St. Rep. 228; Pittinger v. Pittinger, 89 Am. St. Rep. 200.

On Presumptions in Favor of the Validity of Marriages, see the note to Pittinger v. Pittinger, 89 Am. St. Rep. 198.

GROVER v. ZOOK.

[44 Wash. 489, 87 Pac. 638.]

MARRIAGE, Promise of, What Implied Therefrom.—Unconditional promises of marriage exchanged between a man and a woman imply that each is physically, morally and legally competent to enter the status of matrimony and capable, in so far as he or she knows or has reason to believe, of effectuating the principal purposes of the marriage relation. (p. 1015.)

MARRIAGE Between Consumptives, Right to Refuse to Keep Promise of.—If a man having the hereditary taint of consumption enters into an engagement of marriage with a woman already afflicted with that disease, their contract of marriage is against public policy, and he should withdraw from it, and if he does so, he is not liable to an action for damages. (p. 1025.)

John E. Humphries, George B. Cole and William E. Humphrey, for the appellant.

John B. Hart, for the respondent.

⁴⁸⁹ ROOT, J. This is an action by respondent to recover damages against appellant for breach of contract of marriage. From a judgment in favor of respondent, the case comes here on appeal.

The principal defense urged by appellant is that respondent, at the time of the mutual promise of marriage, was ⁴⁹⁰ afflicted with pulmonary tuberculosis (commonly called consumption), in an incurable form, and has ever since been physically incapable of entering into the marriage relation. It was the contention of the respondent, in the trial court and here, that this condition of respondent constitutes no defense to her action, for the reason that appellant knew thereof at the time he promised to marry her. It is admitted by respondent that she was afflicted with this disease at the time the engagement of marriage was entered into, although she claims that she did not know at that time that the malady affecting her was consumption. There is a conflict in the evidence as to whether or not appellant knew of the character of her illness at the time of the engagement. He swears that he did not. The question of whether or not he did turns upon the question as to when the engagement took place. He claims that they became engaged on the evening of the 6th of January, 1904. She and her mother and stepfather claim that the engagement did not take place until the 10th of January, 1904. It appears that they had some talk about the matter on the evening of January 6th, and it is admitted that she at that time took from her finger a ring and gave it to him to take to the jeweler's to be used as a measurement for an engagement ring. He took the ring, used it for that purpose, and presented her with the engagement ring on the next Sunday, January 10th. Her mother and stepfather testify that, on the latter date, they informed appellant that the ailment from which respondent was suffering was consumption; that this information was given him while she was not present; that he said he would marry her notwithstanding this; that it was then planned by them that she should be sent to Arizona, where it was believed that the climate would cure or ameliorate her diseased condition.

Appellant denies that he knew of the character of her ailment until after she had gone to Arizona. Her mother testified that she informed respondent of the nature of the malady after she reached Arizona. A correspondence was maintained ⁴⁹¹ during the time she was there, between herself and appellant, he making her many suggestions as to taking care of herself and as to the character of treatment she should follow, and sending her books and pamphlets giving such information and directions. She returned in the following April much improved, as she believed. However, she had an attack of appendicitis, necessitating an operation, which seriously weakened her. She was in the hospital sixteen days on account of this operation, leaving there on the sixteenth day of May. It was understood between them that their marriage was to take place in June. On account of her physical condition in June, it was mutually agreed that the marriage should be postponed until autumn. When the latter season arrived, she and her parents requested appellant to carry out his promise of marriage. It seems that there had been an understanding between them that they would get married and attend the World's Fair in St. Louis, in September or October. She and her parents requested appellant to carry out this plan. He insisted that she was physically unable to be married, but that he would marry her when she recovered. The controversy growing out of the matter occasioned strained relations between the parents and appellant, and he visited their home seldom thereafter. Finally, in December, 1904, he wrote respondent a letter in effect expressing a desire to terminate the engagement.

Upon the trial there was some indefiniteness in the evidence as to the seriousness of her condition. She admitted upon the witness-stand that, for about a year prior to the time of the trial, she had been sleeping out of doors on the porch at the side of the house, in order to have the benefit of the open air; that while in Arizona she had lived most of the time in a tent, being much of the time confined to her bed and having night sweats and a cough, and having had several "fainting spells"; that since her return she had been free from the night sweats, but still had the cough; that she had continuously ⁴⁹² followed, and was then following, the directions and treatment recommended by appellant and the books he had furnished her; that she was taking cod-liver oil and practicing the "breathing exercises." The doctors who attended

her at the hospital made an examination and found that she was at that time afflicted with pulmonary tuberculosis. One physician who examined her a few days before the trial, at the request of her attorney, testified that she at that time had the disease. In fact, it was not disputed that she had never recovered since the engagement; ut she believed herself to be much improved over her condition as it was when she started for Arizona. Her stepfather testified that their family physician had said that he did not deem it advisable for her to get married. Appellant testified that his father and mother had died from this disease, and that he had for many years practiced "breathing exercises" for self-protection therefrom. He urged that, by reason of the diseased condition of respondent and of the taint in himself, the proper functions of marriage could not be consummated, and that their marriage would be detrimental to the health of her, himself, and any issue they might have, and in contravention of public policy.

As to the question of the date of the engagement, and as to whether or not he knew of her having consumption at the time he became engaged to her, while the evidence would seem to make his version reasonable, yet as the jury evidently reached the other conclusion, we will accept their findings as correct. The trial court ruled upon the evidence, and instructed the jury, upon the theory that the appellant was liable for a breach of the agreement if, at the time of the making thereof, he knew the character of appellant's ailment. Proper exceptions, in different form, questioned the correctness of this view.

The question presented to this court is this: Did appellant, under the circumstances, have a legal right to disregard ⁴⁰³ the promise of marriage he had given respondent? In the domain of morals it is a maxim that a bad promise is better broken than kept. Moral considerations must have a predominating influence upon such a question as now confronts us. In fact, they constitute the reason, the basis and the life of the law applicable in a case of this character. The most profound philosophers join with the wisest statesmen in maintaining the proposition that the home is the unit of the state, and that the character of a people and the stability and welfare of the nation must largely depend upon the healthful and wholesome influence of the home life. By reason of this, we find the home and the members thereof, espe-

cially the young and dependent, sheltered by the protecting care of various statutes, all being evidences and expressions of that public policy which deems the home and its inmates appropriate objects of the solicitude and care of the state.

The paramount consideration involved in the determination of this case is not that appertaining solely to the parties to this action—although as to each of them it is of great importance—but it is as to the community, the state, and to humanity in general. Here we have a man and a woman engaged to be married. The man is of a family several members of which have died with pulmonary consumption. The woman is afflicted with the same disease to such an extent that it becomes necessary for her to go to a distant portion of the country to recuperate, which she does, returning with the affliction still upon her and with small, if any, assurances of recovery. Under these circumstances, if the marriage were to be consummated, what would be the natural consequences to be anticipated? Unconditional promises of marriage, exchanged by a man and woman, imply respectively that each is physically, morally, and legally competent to enter the status of matrimony, and capable, in so far as he or she knows or has reason to believe, of effectuating the principal purposes of the marriage relation. One of the most important functions of wedlock is the procreation of children. Offspring ⁴⁹⁴ are the natural result and oftentimes the chief purpose of marriage. That the thought of bringing a child into the world should be one of the most serious that can engage the mind of a human being needs but to be suggested. Born amidst the most favorable environment, there lies before every babe a life of uncertainty so great that no worthy parent may contemplate it without a tremor of apprehension. Thus launched upon the sea of time and eternity, what parent can dwell upon the birth of his child without the keenest sense of anxiety and responsibility? If the child born in health and with a body of vigor be a matter of deep concern to a parent, what must be said of the advent of a babe burdened with the hereditary plague of consumption? That pulmonary tuberculosis is both contagious and hereditary, as these terms are understood (although possibly not in a strictly technical and professional sense), as well as infectious, admits of little, if any, doubt. That a mother seriously ill with that disease and a father with a hereditary taint thereof in his blood would bring forth a child exempt therefrom is un-

believable. For parents thus afflicted to bring into the world a child would be not only detrimental to the welfare of the state and an offense to the instincts of humanity, but it would be, as against the innocent babe, a moral wrong most abhorrent. Such a child must of necessity be a burden to itself and others and devoid of the joys and blessings that make life endurable. In declining to carry out his promise of marriage, it may be presumed that appellant apprehended the natural and legitimate consequences of such a union. In addition to the thought of progeny, there would be also that of the aggravation of the disease as to both himself and prospective wife, the medical expert evidence showing that the intimate association of married life would tend to augment the ravages of the malady upon each.

The apprehension felt by the people of this state from the disease under consideration is evidenced by a statute enacted ⁴⁰⁵ by the legislature in 1899, entitled "An act to prevent the spread of tuberculosis," etc.: Laws 1899, p. 117. Section 5 of that statute reads as follows: "It is hereby made the duty of every person having tuberculosis and of everyone attending such person, and of the authorities of public and private institutions, hospitals or dispensaries, to observe and enforce the sanitary rules and regulations prescribed from time to time by the boards of health of such cities and of the state for the prevention of the spread of pulmonary tuberculosis."

Other statutes exist having for their purpose the prevention of the spread of this and other contagious and infectious diseases. The enforcement of certain rules and the distribution of literature giving information as to the prevention and treatment of such cases is enjoined upon boards of health and others. Such a document is the "Circular of Information to Prevent the Spread of Consumption," which is now before us. Besides much other information and many directions, it contains the following items: "Consumption is the most common and the most fatal of all diseases. It is a disease of the lungs caused by a germ which is breathed into the lungs or gets into the body with food. This germ of consumption comes only from some other person or animal that has the disease. . . . A consumptive should never sleep in the same bed with another person. . . . A consumptive mother should never nurse her baby; it is bad for the mother and dangerous for the baby. A consumptive should not cook or prepare foods for others. . . . When a consumptive moves to another house,

notify the health authorities by phone or card, so that they can see that the old home is properly disinfected according to law. Do not share a consumptive's bed, or use the personal property, including dishes, belonging to one."

In the face of legal restrictions and requirements of this character, it is difficult to understand how a man or woman afflicted with this plague may legally insist upon the fulfillment of a promise of marriage which, if consummated, would endanger the health and life of both and blight the life of ⁴⁹⁶ any offspring that might be born. Any person entering marriage, knowing himself to be seriously afflicted with pulmonary tuberculosis, violates the spirit, if not the exact letter, of the statutes enacted to prevent the spread of that disease. The same is true of one who marries another knowing him or her to be thus afflicted. An agreement which, if executed, would thwart the beneficent purpose of such statutes, ought not to be held binding. The principles we believe controlling here have been recognized and enunciated by the courts in several of our sister states. The supreme court of appeals of Virginia, in the case of *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581, made use of the following expressions: "Under the expression 'the act of God' is comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. Hence it is held that 'illness,' being beyond the power of man to control or prevent, is the act of God: *Story on Bailments*, secs. 25, 511; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Gleason v. Virginia M. R. R. Co.*, 140 U. S. 435, 11 Sup. Ct. Rep. 859, 35 L. ed. 458. It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with peculiar force to a marriage contract, the performance of which, owing to causes subsequently intervening, and altogether independent of any default of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is ex-

cusable: *Allen v. Baker*, 86 N. C. 91, 40 Am. Rep. 444; *Shackleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166, 19 S. W. 5, 15 L. R. A. 531; *Bishop on Marriage and Divorce*, sec. 219. In the case at bar the evidence, as to which, in our opinion, there is no real conflict, shows that there was a predisposition, in the defendant's family, to physical trouble of the kind that had developed ⁴⁹⁷ with him; that his father had died with a similar disease, and a brother with urinary trouble; that after his engagement with the plaintiff, and before the time fixed for the marriage, the defendant had, without fault on his part, developed and was suffering with a grave malady, involving the urinary organs, . . . and that an indulgence in sexual intercourse would aggravate his disease, and likely shorten his life; and that it would be not only a wrong and injustice to the defendant, but also to the plaintiff for him to marry in his condition of health. Marriage is assumed by law to be made for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation, . . . Our conclusions upon the law and upon the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of contract to marry the plaintiff."

What was there said becomes particularly pertinent to the case at bar, the evidence of the medical experts here being to the effect that copulation would be exceedingly detrimental to one afflicted as was respondent. Applicable in principle, also, is the case of *Shackleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166, 19 S. W. 5, 15 L. R. A. 531, which was based upon facts about as follows: Applicant, prior to his engagement to respondent, had contracted syphilis, but believed at the time of his engagement that he was thoroughly and permanently cured thereof. Some time after his engagement to respondent the effects of this disease again manifested themselves in so serious a form that physicians said it was doubtless incurable. Thereupon appellant informed respondent that he could not marry her. She declined to release him from his promise and instituted an action for damages. The supreme court of Kentucky, in passing upon the case, said: "When the marriage contract is consummated, the parties taking each other for better, for worse, for richer, for poorer, and agree to cherish each other in sickness and in ⁴⁹⁸ health, the fact that the social standing of the one party

or other or their pecuniary condition was not as represented, will afford no ground for relief; still, when there is a mere agreement to marry, there may be such a condition of the one party or the other as to health or other bodily infirmity arising subsequent to the agreement as would authorize either party to decline to enter into the marriage relation, and to hold otherwise would be to place such a contract upon the same footing with cases of mere personal chattels. . . . The text-books establish the doctrine that 'without sexual intercourse the ends of marriage, the procreation of children and the pleasures and enjoyments of matrimony, cannot be attained.' The first cause and reason of matrimony, says Ayliffe, 'ought to be the design of having offspring; so the second ought to be the avoiding of fornication. And the law recognizes these two as its principal ends, namely: a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence': 1 Bishop on Marriage and Divorce, 6th ed., 322. . . . It is impossible for the defendant to fulfill his contract. His disease renders him incapable of marriage without actual damage to the life of the woman he marries by communicating to her and through her to their offspring a loathsome disease that is now, from the testimony in the case, gradually destroying this unfortunate man. . . . No greater crime in law or morals could have been committed by the appellant than a performance of his agreement. The purity of our social system, the interests of the public in preserving sacred the marital relation, the protection of those whose existence may spring from such an unholy alliance, as well as the future welfare and happiness of the parties themselves, require that such a construction should be given this class of contracts; and if there was no precedent for the recognition of the doctrine announced, we would not hesitate to make one."

The same court, in a subsequent case, *Gardner v. Arnett*, 21 Ky. Law Rep. 1, 50 S. W. 840, approved the decision and reasoning of the case just cited, and, as to the case before it, observed: "He [defendant] owed it to the plaintiff and to society to refuse to enter into marriage relations with her, and he had ⁴⁹⁹ the right to abandon the contract and refuse to marry her at any time before their marriage was solemnized."

In *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029, the supreme court of Vermont annulled a marriage because the wife had a venereal disease endangering the health of her husband and any children she might bear. To the same effect, in principle, were the decisions in *Smith v. Smith*, 171 Mass. 404, 68 Am. St. Rep. 440, 50 N. E. 933, 41 L. R. A. 800, *McMahon v. McMahon*, 186 Pa. 485, 40 Atl. 795, 41 L. R. A. 802, *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120, and *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120. In the case of *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242, the supreme court of Michigan said: "While it is the policy of the law to encourage marriage, it is not the policy of the law to encourage unhappy marriages," and the court then, with express approval, quotes from Mr. Schouler, in 7 South. Law Rev. 65, the following: "The marriage state ought not to be lightly entered into. It involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred. . . . From such a standpoint, we view the marriage engagement as a period of probation, so to speak, for both parties—their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, and incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off."

In the case of *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444, the supreme court of North Carolina spoke as follows: "We cannot understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself. . . . It is likewise true, that whenever the main part of an executory contract ~~500~~ becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible in toto. Why should not the same principle apply to a contract the fulfillment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them?

. . . . The usual, and we may say legitimate, objects sought to be attained by such agreements to marry are, the comfort of association, the consortium vitae, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then the law will excuse a noncompliance with the promise—the main part of the contract having become impossible of performance the whole will be considered to be so.”

In *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302, 59 S. W. 79, 51 L. R. A. 854, the supreme court of Missouri employed this language: “Marriage is a contract, but it is not merely a civil contract, for it can only be entered into in a manner recognized by law, and can only be dissolved in a like manner. The state is the third party to every such contract, and has a direct interest therein: *Blank v. Nohl*, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350; *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325, 11 L. R. A. 587. Certain marriages are prohibited by law because of their detrimental effects upon society and the human species. Every contract of marriage implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences. . . . If the disease is of a temporary character, such as was the case here, and could be easily cured, the defendant is entitled to postpone the marriage until he is cured; and if the disease is of a permanent character, such as was the fact in the *North Carolina*, *Kentucky*, and *Virginia* cases cited, the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so.”

⁵⁰¹ In the case of *Gring v. Lerch*, 112 Pa. 244, 56 Am. Rep. 314, 3 Atl. 841, the supreme court of Pennsylvania spoke as follows: “It is a mistake to suppose, as was assumed in the point, and affirmed by the court, that the impediment must be of such a nature as would be a ground of divorce after marriage. We are not now dealing with a question of divorce. That is a subject that is regulated by statute, and has no necessary relation to the case in hand. We are considering a contract to marry; a contract which calls for the

richest good faith on both sides, and which neither party has the right to enforce against the other, if incapable of performing the full marital duties. A man does not contract to marry a woman for the mere pleasure of paying for her board and washing. He expects and is entitled to something in return, and if the woman with whom he contracts be incapable, by reason of a natural impediment, of giving him the comfort and satisfaction to which, as a married man, he would be entitled, there is a failure of the moving consideration of such contract, and no court ought to enforce it by giving damages for its breach."

In the early case of *Atchinson v. Baker*, 2 Peake N. P. 103, Lord Kenyon said: "It would be most mischievous to compel parties to marry who could never live happily together"; and he cites *Lord Mansfield* as having held, in the case of *Foulkes v. Sellway*, 3 Esp. 236, that a defendant was not liable in damages for breach of promise where the character of the woman turned out to be different from what he had reason to believe it, and that an infirmity, either bodily or mental, would excuse fulfillment of the marriage agreement.

It is a fundamental proposition that a contract contravening the provisions or policy of a public law is void or voidable: *Macintosh v. Renton*, 2 Wash. 121, 3 Pac. 830; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Bowman v. Gonegal*, 19 La. Ann. 328, 92 Am. Dec. 537. *Bishop on Contracts*, enlarged edition, section 470, reads: "No agreement between parties to do a thing prohibited ⁵⁰² by law, or subversive of any public interest which the law cherishes, will be judicially enforced." And at section 473, the following appears: "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibited by a statute, termed a contract against public policy (or sound policy), is likewise void."

9 *Cyclopedia*, 481, says this: "If an agreement binds the parties or either of them, or if the consideration is to do something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. If the court should enforce such agreement it would employ its functions in undoing what it was created to do. It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law

which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it has sometimes been, the policy of the law or public policy in relation to the administration of the law. Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not its actual injury to the public in a particular instance." To the same effect, 15 Am. & Eng. Ency. of Law, 2d ed., p. 933.

Counsel for respondent cite us to cases where a man, promising to marry a woman whom he knew to have been formerly unchaste, was held to be bound by such promise. Such a case and this are not analogous. There the man by his promise overlooks the former shortcomings of the woman, and it is a matter concerning him only. She would have the ability to, and presumably would, reform and become a good wife and worthy mother. This is to the advantage of ^{sos} society, and not inconsistent with sound public policy, and the law should interpose no hindrance thereto. But a consumptive woman is physically incapable of becoming a healthful companion or the mother of healthy issue. It is not a condition that she voluntarily created or can change at will. The evils to follow her marriage could not be confined to herself and husband, but must of necessity concern and injuriously affect others. The nature and natural sequences of a contract of marriage are such that the state is of necessity a third party to, and interested in, every such agreement. Its interests forbid the enforcement of such a contract between parties physically incapable of making the married state beneficial to themselves or society.

We are not disposed to take into consideration any matters personal only to the appellant. If he knew of the nature of respondent's ailment when he agreed to marry her, and agreed to make her his wife notwithstanding the same, he ought not to escape responsibility by reason of any inconvenience affecting only himself. But the interests of the

community and state step in and, with dictates of humanity, demand that no human compact shall be upheld that has for one of its principal objects the bringing into the world of helpless, hopeless, plague-cursed, innocent babes. We can sanction the breaking of a promise and relieve from the terms of a deliberate agreement only when the alternative involves results more deplorable. Had these parties married, it is inconceivable that any of the important ends of marriage could have been attained. It is morally certain that sickness, grief and sorrow must have been the sequence of such a union. These considerations, with the possibility and probability of issue afflicted with this terrible malady, constrain us to hold that the marriage agreement was not binding—that it was the privilege of either party to withdraw therefrom. Rule 126 of Greenhood on Public Policy reads as follows: "No one can estop himself from proving facts which will ⁵⁰⁴ show a contract to be opposed to public policy." It having been the privilege and, as we believe, the moral and legal duty of appellant to decline to carry out the agreement, he cannot be held responsible in damages for so doing.

The following authorities bear on some of the questions here involved: *Turnbull v. Farnsworth*, 1 Wash. 444; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. Rep. 960, 62 Pac. 145, 51 L. R. A. 889; *Graves v. Johnson*, 156 Mass. 211, 32 Am. St. Rep. 446, 30 N. E. 818, 15 L. R. A. 834; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Ralston v. Boady*, 20 Ga. 449; *Mabin v. Webster*, 129 Ind. 430, 28 Am. St. Rep. 199, 28 N. E. 863; *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029; *Gulick v. Gulick*, 41 N. J. L. 13; *Kantzler v. Grant*, 2 Ill. App. 236; *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; *Miller v. Rosier*, 31 Mich. 475; *Sprague v. Craig*, 51 Ill. 288; 4 Am. & Eng. Ency. of Law, 2d ed., pp. 893, 894, and note; *Wharton on Contracts*, 324; *Pollock on Contracts*, 337; 2 *Addison on Contracts*, 7138; *Gould & Pyle's Cyclopedia Medicine and Surgery*; *Story on Contracts*, sec. 675; *Anders' Practice of Medicine*, 268, 270-272; *Beach on Modern Contract Law*, secs. 1498, 1499.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to dismiss the action.

Mount, C. J., Dunbar, Crow, Hadley, Fullerton and Rudkin, JJ., concur.

The Existence of Disease as a Defense to a Breach of Promise to marry is discussed in *Shackleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166; *Trammell v. Vaughn*, 158 Mo. 214, 81 Am. St. Rep. 302.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

IDEMA v. COMSTOCK.

[131 Wis. 16, 110 N. W. 786.]

APPEAL.—Decision of Referee Confirmed by the circuit court on a pure matter of fact must be given the same dignity on appeal as is required by the established practice as to any conclusion of fact made by a trial court. (p. 1028.)

PARTITION.—Sale Should not be Made for the purposes of partition unless necessary in order to protect the parties from serious loss. (p. 1028.)

PARTITION OR SALE—Test.—The established test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole. (p. 1028.)

PARTITION OR SALE.—Burden of Proof to establish the necessary requisites to a sale of land rather than a partition in kind is on the party alleging the necessity and advisability of such sale. (p. 1029.)

Suit for partition in which the only question was whether the property could be partitioned between the parties without a sale, plaintiff claiming that it could and the defendant that it could not. The referee reported to the court that the premises were so situated that a partition thereof could not be made without great prejudice to the owners otherwise than by a sale. Upon this point the report was excepted to by the defendant, but sustained and confirmed by the court, and the defendant appealed.

E. G. Comstock and J. H. Roemer, for the appellant.

A. W. Sanborn, for the respondent.

18 MARSHALL, J. The sole question here is this: Is the finding of the referee that neither the premises nor any distinct portion thereof is so situated that a partition thereof can be made without great prejudice to the owners, against the clear preponderance of the evidence?

The subject with which the referee had to deal was a pure matter of fact, therefore his decision, confirmed by the circuit court, must be given the same dignity on appeal as is required by the established practice as to any conclusion of fact made by a trial court.

True, as argued by counsel for appellant, the judicial rule of long standing is that a sale should not be made for the purposes of partition unless that is necessary in order to protect the parties from serious loss. That rule was developed and established in equity: 4 Pomeroy's Equity Jurisprudence, 3d ed., secs. 1387, 1390. We need not investigate the decisions in that field, because the equitable rule has been made a matter of written law providing for a sale for the purposes of partition only when a partition in kind would result in "great prejudice to the owners": Stats. 1898, sec. 3119. The term "great prejudice to the owners" refers to pecuniary loss. That was the view taken in *Vesper v. Farnsworth*, 40 Wis. 357, where a guide is found for administering the statute, phrased thus: The court should "ascertain whether, if the premises be partitioned, the value of the share of each owner will be materially less than his or her probable share of the purchase money in case the premises are sold. If so, a sale will be proper, for the injury which will warrant a sale we understand to be a pecuniary injury." So the established test of whether a partition in kind would result in "great prejudice to the owners" is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole.

An examination of the evidence satisfies us that the referee,¹⁹ and the trial court in confirming the former's report, applied the law as above indicated. The evidence was directed to the situation of the property and its physical characteristics, necessarily controlling the question of whether it was practicable to divide the same between the parties according to their respective interests, giving to each his share, quantity and quality relatively considered, without materially lessening the money value of the several interests. Our examination of the evidence also satisfies us that the referee and the court appreciated the rule that the burden of proof to establish the statutory requisite to a sale was on the party alleging the same. So, as indicated at the outset, the case comes down to the simple proposition of whether the decision complained

of has sufficient support in the evidence that it cannot be rightly said to be contrary to the clear preponderance thereof.

It does not seem that we should recite the evidence in detail in this opinion for the purpose of demonstrating the correctness of the conclusion to which we have arrived. Such demonstration, it is thought, should be avoided where there are no special circumstances calling therefor. There are none in this case. Several witnesses were examined and cross-examined. All of them were called by the respondent. The general effect of their evidence is that the two forties of land are located at a considerable distance from any settlement; are chiefly valuable for the timber thereon; that a partition between the parties would result in one becoming the owner of one and a fraction of a forty-acre tract, the other the possessor of a small fraction of such a tract; that such fraction would not be, under the circumstances characterizing the land in question, ordinarily salable at the full value which it would represent as a part of a considerable body of land; that large bodies of land are more salable than small ones; and that a mere small fraction of a government subdivision, except in special circumstances, is not salable at all. The evidence in the whole has been carefully examined, and though, it is true,²⁰ the necessity for a sale is not as definitely established as one would like to see in such a case, it is not without merit to an extent warranting us in holding that the finding complained of is against the clear preponderance of the evidence.

By the COURT. The judgment is affirmed.

Timlin, J., took no part.

Partition by Sale may be decreed, rather than a division in kind, when obviously to the advantage of the parties: *Rutherford v. Rutherford*, 116 Tenn. 383, 115 Am. St. Rep. 799; *Gilman v. Boden*, 136 Mich. 125, 112 Am. St. Rep. 356; *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 918, and cases cited in the cross-reference note thereto. In fact, partition by sale is a matter of right when the conditions prescribed by statute to authorize a sale exist: *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929.

BAUTZ v. ADAMS.

[131 Wis. 152, 111 N. W. 69.]

MORTGAGE, Discharge of by a Mortgagee Who has Ceased to be the Owner of the Indebtedness.—Though the indebtedness to secure which a mortgage was given has been transferred, the release of the mortgage of record by the original mortgagee protects a bona fide purchaser or encumbrancer having no notice of the assignment, it not having been filed for record. (p. 1032.)

MORTGAGE—Payment to the Original Mortgagee Who has Ceased to be the Owner of the Mortgage Indebtedness.—The maker of a negotiable note secured by mortgage is not protected by the recording act in paying the mortgage indebtedness to the original mortgagee and taking a release from him, where he has not possession of the note secured nor authority from the real owner thereof to receive payment. (p. 1034.)

APPEAL—Presumption Against Error.—On appeal, the presumption is against error, and in testing the sufficiency of the record to support the judgment, it must be affirmed unless error appears with reasonable clearness. (p. 1035.)

APPEAL—Ambiguous Findings, Construction of.—If the findings of a trial court are ambiguous, that one of two reasonably probable meanings will be adopted that will support the judgment, rather than the one which will defeat it. (p. 1035.)

PAYMENT of a Note Secured by a Mortgage Made to the Agent of the Original Mortgagee after he had assigned the indebtedness is nevertheless good, if the assignee permitted such agent to represent himself as having authority to do what he did, and he had for many years acted as the agent of such assignee in receiving payment of principal and interest on loans made by him. (p. 1035.)

PRINCIPAL AND AGENT—Authority to Receive Payment of Mortgage Note.—If a person is not the owner or possessor of a note and mortgage, authority to him to receive payment of the indebtedness is essential to extinguishing the security. This authority may be established by circumstances showing its existence with reasonable certainty, and need not be expressed in writing or otherwise directly established. (p. 1036.)

APPEAL—Absence of Finding, When not Fatal.—If a fact essential to support a judgment in a case in equity does not appear to have been found by the trial court, but does appear from the record with reasonable certainty to exist, it may be found on appeal, and judgment directed accordingly. (p. 1037.)

Suit to foreclose a mortgage made by Mary N. Adams to Wilhelm Woldt, December 5, 1891, due in four years. When the mortgage was executed, C. W. Milbrath was authorized by power of attorney, duly recorded, to act as attorney in fact of the mortgagee, and under such power, on January, 1892, he assigned and delivered the note to the plaintiff, who thereafter continued in possession thereof, but the assignment

was not recorded until August 30, 1905. The mortgagor conveyed the premises to Milbrath April 2, 1892, and the latter conveyed to Gustav C. Mueller June 3, 1904, who, in turn, on March 4, 1905, conveyed to George M. Hinkley. The latter purchased the premises subject to the mortgage and the indebtedness therein described, and was furnished an abstract showing the mortgage to be still outstanding. He was informed that Milbrath, acting under his power of attorney, could receive payment of the principal and interest and discharge the mortgage, and on April 6, 1905, Hinkley, by his personal check, paid to said Milbrath as attorney for the original mortgagee the whole amount of the mortgage indebtedness, and received from Milbrath a satisfaction and discharge of the mortgage, and the latter was duly recorded April 7, 1905. The payment so made by Hinkley was without any knowledge of the assignment of the mortgage or that the plaintiff in this suit had any interest therein, while, as a matter of fact, though plaintiff was the owner and holder of the note, he permitted Milbrath to represent himself as authorized to receive payment and to satisfy the mortgage. The amount received was placed to the credit of the plaintiff on the books of C. E. Milbrath Company, of which said Milbrath was president, but the plaintiff in fact received no money.

The court held that the mortgage had been extinguished, and rendered judgment in favor of the defendants. The plaintiff appealed.

J. T. Drought and L. A. Olwell, for the appellant.

E. L. Wood, for the respondent.

¹⁵⁴ MARSHALL, J. So far as the findings are concerned, to the effect that Hinkley paid the mortgage indebtedness to C. W. Milbrath on the faith of the mortgage appearing of record in the name of Wilhelm Woldt, and a power of attorney thus appearing authorizing Milbrath to loan money upon mortgages and to release, satisfy or assign all notes and mortgages owned by Woldt, and to collect all rents and lease, sell and convey all real estate and personal property, and to perform other acts for and in the name of said Woldt, whether they are open to successful attack as contrary to the clear preponderance ¹⁵⁵ of the evidence is not deemed ma-

terial. Therefore, we will not follow in detail the argument of counsel for appellant on that branch of the case.

The evidence is undisputed that the official records, at the time Hinkley paid the money to Milbrath, showed that the mortgage was outstanding in the name of Woldt and that C. W. Milbrath was his attorney to do the things heretofore mentioned. It is also undisputed that interest on the note, as the same became due, was for many years paid to Milbrath and by him paid to the one entitled thereto on production of the paper, and that Hinkley and his agent, supposing from the state of the record that Milbrath possessed authority to receive payment of the principal of the note and to discharge the mortgage, made such payment and received a release of the mortgage, as stated in the findings. Whether Hinkley was warranted in relying on the record as he did is the first question to be determined.

Counsel for respondents, in support of the affirmative of the proposition stated, cite *Marling v. Nommensen*, 127 Wis. 363, 115 Am. St. Rep. 1017, 106 N. W. 844, 5 L. R. A., N. S., 412; *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924, 104 N. W. 997, 1 L. R. A., N. S., 891; and *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884. A brief analysis thereof will suffice to show that they do not apply to the situation before us.

In *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884, the discharge of the mortgage was made by the plaintiff pending foreclosure thereof after he had transferred his interest to another who concealed the transaction. The court held that, under the statute permitting an action after the transfer of the plaintiff's interest to be continued in his name or in the name of the assignee, in case no substitution is made, as to persons having no notice of the transfer, the plaintiff is to be regarded as possessing authority to deal with the subject of the litigation as owner thereof. No comment is necessary to show that such doctrine does not rule this case.

In *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924, 104 N. W. 997, 1 L. R. A., N. S., 891, the plaintiff dealt with the real estate ¹⁵⁸ by taking an assignment of a mortgage thereon and a note secured thereby, relying on a release of a prior mortgage by the person having title thereto of record. On that branch of the case the question of whether one is warranted in paying a mortgage indebtedness to the record owner relying wholly on the record, the securities not being in possession of such owner, was not involved. The precise

point decided is indicated by the following language used in the opinion: "A person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage have been assigned, but he may rely upon the record, as showing title in his mortgagor."

On the question of whether the mortgage discharged was extinguished as between the owner thereof and the payor the case turned on whether the record, but not the real, owner who made the release had possession of the securities with authority to collect the indebtedness at the time payment was made.

In *Marling v. Nömmensen*, 127 Wis. 363, 115 Am. St. Rep. 1017, 106 N. W. 844, 5 L. R. A., N. S., 412, the person claiming that effect should be given to a release of a mortgage by the record owner dealt with the real estate by purchasing the same on the faith of such release. That involved the question decided in the first branch of *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924, 104 N. W. 997, 1 L. R. A., N. S., 891. The mortgage indebtedness had been paid to such record owner after he had assigned the note and mortgage and parted with possession thereof to another, who failed to record his assignment, as in this case. These contentions were made: 1. The debt secured by the mortgage is paid and the mortgage therefore extinguished; 2. The defendant is entitled to protection by the recording act in dealing with the realty, as he did, in the belief that the release of the mortgage was duly authorized. The court said as to the first proposition, it "is fully negatived by our former decisions. The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money ¹⁵⁷ is not actually authorized, the payment is ineffectual unless induced by unambiguous direction from the owner or justified by actual possession of the note": Citing *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801; *Kohl v. Beach*, 107 Wis. 409, 81 Am. St. Rep. 849, 83 N. W. 657, 50 L. R. A. 600; *Loizeaux v. Fremder*, 123 Wis. 193, 101 N. W. 423. On the second point the court held that the assignee of the mortgage, by allowing the assignor to appear of record as owner, was estopped from claiming want of authority of the latter to discharge the mortgage as to the person who purchased the land on the faith of such discharge. Thus a clear distinction was drawn between the status of one as regards the owner, under an

unrecorded assignment, of a mortgage on his land, who has paid the mortgage indebtedness to the record owner of such mortgage and obtained a release from him, and his status as regards a person who, relying upon the record of such a release, has dealt with the land by taking a mortgage thereon or deed thereof.

From the foregoing it seems plain that Hinkley was inexcusably negligent in paying the mortgage indebtedness to Milbrath, relying for the latter's authority solely on the condition of the record as regards the ownership of the securities and the authority of Milbrath. If the payment had been made to the record owner himself after he parted with the title and possession of the securities, it would not, as we have seen, have worked any prejudice to the appellant as regards the maker of the note or person liable for the indebtedness. Payment of the indebtedness, to be sufficient to extinguish the mortgage, could only be made to the owner of the securities or his authorized agent, and authority of the agent could not be implied except from possession by him of the securities. In *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801, the court thus declared the law to be: "The importance of protecting the holders of commercial paper is so great that to warrant finding that a person who assumes to have authority to receive payment of the principal ¹⁵⁸ sum on any such paper has such authority, possession of the paper itself by such person, or proof aliunde of express authority, is indispensable. . . . If money be due on a written security, it is the duty of the debtor to see that the person to whom he pays it is in possession of the security. . . . The payor is negligent if he relies on anything less, and must abide the event of being able to establish, by clear and satisfactory evidence, an express agreement between the holder of the security and the supposed agent, authorizing the latter to represent the former in the transaction."

So it will be seen that implied authority of Milbrath to receive the money from Hinkley for the owner of the note and mortgage could be based only on possession by him of the securities and capacity to deliver the same upon payment being made. It being conceded that he did not have possession, payment to him did not affect the right of appellant, as to the payor, unless the appellant expressly authorized Milbrath to receive the money for him.

Whether the learned trial court grounded the judgment wholly on the theory that Hinkley was, by the recording act, warranted in treating Woldt as owner of the securities and Milbrath as entitled to represent him does not appear with absolute clearness. After finding in detail all the facts bearing on that phase of the case, the court found that plaintiff permitted Milbrath to represent himself as having authority to do what he did, and that he and his company had for many years acted as plaintiff's agent in loaning money upon notes and mortgages and receiving payment of principal and interest thereon, a regular account being kept between them of the transactions, and that payment was received from Hinkley by Milbrath and credited by him to appellant on his company's books, but without appellant's knowledge. If that means no more than that appellant permitted Milbrath to represent himself as authorized to do what was done because of neglect to put the assignment on record, it is immaterial, as we have seen. The finding is somewhat ambiguous, as we read it. ¹⁵⁹ If, as a whole, it means that Milbrath was expressly permitted by appellant to receive money, principal or interest, as the same became due on notes and mortgages obtained by the latter through the former's agency, including the one in suit, and to pay the money over to appellant upon production of the securities, then the judgment complained of is right, if there is evidence warranting the finding.

The presumptions are rather against the existence of error than in favor thereof: *Edwards v. Smith*, 48 Wis. 254, 3 N. W. 758; *Heer v. Warren-Scharf A. P. Co.*, 118 Wis. 57, 64, 94 N. W. 789. Error must clearly appear to be efficient to disturb the decision of a trial court. So we should approach the consideration of such a question as that in hand from the viewpoint that the leaning should be toward supporting rather than defeating the judgment, while not hesitating to do the latter for prejudicial error efficiently appearing.

In construing an ambiguous finding the same rule should prevail as in the construction of a contract or a law. That one of two or more reasonable probable meanings of the language used should be adopted which will make the same material and will support the judgment rather than one which will defeat it, and in solving the matter resort should be had to the evidence dealt with by the finding.

Here, as before indicated, all facts relating to the record and the question of whether the situation in that regard gave

Hinkley good ground to make the payment to Milbrath as agent of Woldt, were covered before reaching the finding in question. There was left to be considered the evidence tending to show that Milbrath was authorized by appellant to act for him in receiving payment of the mortgage indebtedness. Now, the indications are pretty strong that the court did not intend to go any further by the finding under discussion than to decide that appellant held Milbrath out as having authority to do what he did. Whether the language used would admit, reasonably, of a different construction under ¹⁶⁰ the rules before stated we have concluded to resolve in the negative, since counsel for respondent freely concedes that "no finding was made by the court below as to the authority to collect the principal upon this mortgage so as to constitute a payment of the debt." Whether such authority existed or not was really the turning question in the case, and should have been passed upon. Possibly the learned court intended to do so by the language of the ninth finding.

It is contended that authority in fact for Milbrath to receive the money from Hinkley for appellant was shown by the evidence. So we should examine the record and determine, under the established practice whether the case can be finally disposed of upon the appeal, even if the vital question was not passed upon below. In such situation, if the record discloses with reasonable and satisfactory certainty a preponderance of evidence in favor of the existence of the fact essential to support the judgment, it may be found here accordingly, and the litigation terminated the same as if there were a finding on the point by the trial court: *Brown v. Griswold*, 109 Wis. 275, 85 N. W. 363.

While express authority from appellant to Milbrath to receive the money from Hinkley is essential to defeat the former's claim, it is not necessary that such authority should appear in writing or be established by direct evidence. There is evidence undisputed to the effect that appellant obtained several notes and mortgages from Milbrath or his company besides the one in question, and that in all such cases both the principal and interest had customarily been paid to Milbrath or said company as collector for appellant, and the money then paid over to him when he called therefor and produced his papers. The evidence is also all one way that interest on the note in suit was, during a period of over ten years, collected and paid over in that way, and that business between

Milbrath and his company and the appellant was carried on in such way for some twelve or fifteen years. Milbrath testified substantially ¹⁶¹ as follows: I do not remember that I ever had authority from Bautz to collect principal. There was never anything said about it. I do not think we had any understanding about the collection of the principal upon his mortgages. No talk of any specific authority that I remember. The company had an account with Bautz on its books. It will be seen that Milbrath failed to deny, directly, that he and his company did have authority, generally, from Bautz to collect the principal on his mortgages as had been done from time to time. Bautz testified that he thought Milbrath or his company collected several mortgages for him; that he did not tell them to do so, but closed the subject by saying, when a mortgage was due and the parties wanted to pay, I expected Mr. Milbrath would receive the money for me. All those that were paid that I know of he did receive the money and handed it over to me. I always had the notes and mortgages in my possession. In addition there is the significant circumstance that Milbrath, in the particular transaction and, apparently, in all the others, was designedly left to appear as the proper person to discharge the mortgages upon the indebtedness being paid, and it fairly appears that, in general, when the principal of a mortgage was paid, all appellant did in the matter was to deliver his papers to Milbrath, leaving the latter to clear the record and to transmit such papers to the persons entitled thereto. Such evidence, circumstantial and direct, points so strongly to the existence of actual authority in Milbrath to receive the money from Hinkley as appellant's agent that a finding to that effect certainly could not be disturbed as against the clear preponderance of the evidence. We are constrained to hold, without further discussing the evidence in detail, that it clearly and satisfactorily preponderates in favor of the theory that Bautz expected, when anyone desired to pay off any mortgage he had obtained from Milbrath or his company, that the money would be received as it was in the instance in question, and that such expectation was based on ¹⁶² general authority, authority in fact, from him to so transact the business.

The result of the foregoing is that the mortgage in suit was extinguished by the payment made by Hinkley's agent to Milbrath, and that the judgment should be affirmed.

By the COURT. So ordered.

On the Effect of the Payment of a Mortgage to the record owner and a discharge by him, when there is an outstanding unrecorded assignment of the mortgage, see Marling v. Nommensen, 127 Wis. 363, 115 Am. St. Rep. 1017, and cases cited in the cross-reference note thereto.

FREEMAN v. MORRIS.

[131 Wis. 216, 109 N. W. 983.]

WILLS—Agreement to Make—Consideration.—The privilege of naming a child given to a testator by its parents is a sufficient consideration to support a contract to bequeath property to such child. (p. 1038.)

CONTRACTS—Privilege of Naming Child.—The privilege of naming a child may be waived by its parents and bestowed upon another, and when so bestowed in a contract with a third person, it rests on such privity between the parent and child as to enable the child to ratify the transaction and enforce the contract. (pp. 1038, 1039.)

WILLS—Agreement to Make—Indefiniteness.—A contract to bequeath something to a person named without specifying any certain property or sum of money is void for indefiniteness and uncertainty, and it is not rendered valid by statements made to third persons by the testator that he was going to bequeath to the person named a certain sum of money, nor by wills executed by him bequeathing such sum, if such wills are revoked by a later will wholly omitting such bequest. (pp. 1039, 1040.)

Morris & Hartwell, for the appellant.

W. S. Borroughs, for the respondent.

²¹⁸ **SIEBECKER, J.** It is not seriously contested but that the privilege of naming plaintiff, given the testator by her parents, was a valuable one in the eye of the law, and that it has been treated as a sufficient consideration to support a contract in respect to it. This subject was considered, and such privilege held a valid consideration for a contract based on it, in the following decisions: Babcock v. Chase, 36 N. Y. Supp. 879; Parks v. Francis' Admr., 50 Vt. 626, 28 Am. Rep. 517; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Eaton v. Libbey, 165 Mass. 218, 52 Am. St. Rep. 511, 42 N. E. 1127; Daily v. Minnick, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840. These and other authorities cited therein also support the proposition that, though the privilege of naming a child may be one which is regarded as belonging to the parents as the natural guardians of the child, they may waive it and bestow the benefit derived from it on the child, and when so bestowed

in a contract with a third person, it rests on such privity between the parent and child as to enable the child to ratify the transaction and enforce the contract in its favor: See cases cited above.

It is contended that the court erred in finding the contract between plaintiff's parents and the testator was a sufficient and enforceable one. In support of the claim it is averred that the terms of the agreement shown by the evidence were so indefinite and uncertain that they cannot be ascertained and enforced. The agreement proven and found by the court is that testator promised and agreed with the plaintiff's parents that, if he were accorded the privilege of naming the child, he would in consideration thereof leave her something at his ²¹⁹ death, and that this was understood by the parties that he would give, devise, or bequeath to her some of his property. It is undisputed that testator named plaintiff pursuant to this arrangement and at various times stated to third persons that he was going to leave her some of his property for having had the privilege of bestowing on her the name Martha. He provided for a bequest of five hundred dollars to her in three wills made by him; but these were revoked before he made and executed his last will, wherein she is wholly omitted as a beneficiary. From an examination of the terms of the agreement upon which plaintiff predicates her claim, it is apparent that they wholly omit to specify any amount or particular property as agreed upon to be left to plaintiff by testator. This leaves absolutely indefinite and uncertain what plaintiff was to receive. It is true the agreement specified that he would leave plaintiff something, but what that something was to be it is simply impossible to ascertain, and, if it be claimed to apply to money, then we approach no nearer to definiteness, and are still as to the particular amount within the field of uncertainty. The terms give us no standard, either expressly or by necessary implication, by which the performance of the agreement can be measured.

It is contended, however, that testator removed this difficulty by fixing five hundred dollars as the amount he would leave plaintiff under his agreement, and that this made it a definite and certain consideration. This claim is based upon the facts that he made such declarations to third persons and in wills which he revoked before his death. The terms of the agreement, however, are not that plaintiff was to receive such property or sum of money as testator might suggest to third

persons or specify in a will made by him. The agreement contains nothing to show that any such designation was to bind testator and make such specification the amount agreed upon by the parties. Its terms wholly fail to determine the amount or to provide a means by which it can be ascertained or measured. We ²²⁰ receive no such aid from testator's conduct or declarations as removes the infirmities inherent in the contract, and must hold it invalid for indefiniteness and uncertainty: *Adams v. Adams*, 26 Ala. 272; *Wall's Appeal*, 111 Pa. 460, 56 Am. Rep. 288, 5 Atl. 220; *Daily v. Minnick*, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840.

By the COURT. Judgment reversed, and the cause remanded with directions that the circuit court award judgment dismissing the complaint.

Timlin, J., took no part.

A motion for a rehearing was denied April 9, 1907.

An Agreement to Make or not to Make a Will is valid: *Teske v. Dittberner*, 70 Neb. 544, 113 Am. St. Rep. 802; *Russell v. Sharp*, 192 Mo. 270, 111 Am. St. Rep. 496; *Jones v. Abbott*, 228 Ill. 34, 119 Am. St. Rep. 412. But the evidence to sustain such a contract must be clear, positive and convincing: *Laird v. Vila*, 93 Minn. 45, 106 Am. St. Rep. 420; *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471.

The Privilege of Naming a Child is a Sufficient Consideration to support a promise to pay him a designated sum: *Eaton v. Libbey*, 165 Mass. 218, 52 Am. St. Rep. 511.

GIBLIN v. NORTH WISCONSIN LUMBER COMPANY.

[131 Wis. 261, 111 N. W. 499.]

JUDGMENTS—County Orders—Failure of Consideration.—If county orders are adjudged void, there is a total failure of consideration for a prior sale of them. (p. 1044.)

COUNTY ORDERS—Sale of—Implied Warranty.—In a sale of county orders there is an implied warranty that the seller has title and that such orders are not spurious, false or counterfeit. (p. 1044.)

JUDGMENTS—Tender of Defense.—If suit is brought to declare certain county orders void and to enjoin their payment, the fact that the assignee of such orders did not notify and tender the opportunity to the assignor, as indorser of the orders, to defend the action does not prevent the judgment in that action from being conclusive, if the assignor actually defended such suit. (p. 1044.)

JUDGMENTS—Privity Between Defendants.—The assignee of county orders who with the assignor thereof is a defendant to an action, in which such orders are declared void, is in privity with such assignor, and the judgment in such suit is binding as between them. (p. 1044.)

JUDGMENTS—Res Judicata.—If plaintiff makes a claim hostile to each and every defendant in a suit asserting that an instrument for the payment of money in which each of the defendants claims an interest, either as present holder or as privy to the present holder, by reason of being a transferrer of the present holder, is fraudulent and void, and obtains a decree affirming his claim against such instrument, it must be held fraudulent and void in any subsequent litigation between the same parties however they are arrayed against each other in such subsequent litigation. (p. 1045.)

JUDGMENTS—Cancellation of Void County Orders.—A judgment in an action canceling and declaring void certain county orders is a decree quasi in rem, and establishes prima facie as against all persons the status of such orders. (pp. 1047, 1048.)

CONTRACTS Against Public Policy.—A contract to transfer county orders and take chances on the result of an action expected or threatened to be brought to have them declared void and their payment enjoined, made on behalf of a corporation through its general manager, who is also chairman of the county board of supervisors, is opposed to public policy and void. (p. 1048.)

F. B. Lamoreux and H. B. Walmsley, for the appellant.

Wickham & Farr and F. L. McNamara, for the respondent.

262 TIMLIN, J. The appellant brought this action at law upon contract for the sale of county orders of Sawyer county aggregating \$2,500, and at the close of the testimony, the trial judge directed a verdict in favor of the defendant, and from the judgment thereon dismissing the complaint the plaintiff appeals.

The county orders and the contract sued on came into existence as follows: The plaintiff was sheriff of Sawyer county in the years 1901 and 1902, and in August of the latter year made and presented to the county board of supervisors of that county a claim for "compensation and expenses incurred in pursuit of Albert Thompson, \$975; A. G. Lewis, \$890; J. H. Wagner, \$875; Peter Wirleck, \$725; Peter Olson, \$350; traveled to arrest Charles S. Johnson, 4,000 miles, \$400; subpoenaing witnesses in Johnson case, \$150; traveled to subpoena six witnesses in Johnson case, 1000 miles, \$100; conveying John Helms, charged with selling liquor without license, \$500"; some smaller items more definitely described—the whole aggregating \$5,036.60. No dates of performing the alleged services were given, and the claim was not itemized further than shown. In his testimony in this action plaintiff

admitted facts showing that the claim for the most part was false and fraudulent. This claim was certified by the then district attorney and verified by the plaintiff. The county board of supervisors of Sawyer county consisted of three members, among them a Mr. Peck, chairman of the board, who was strongly opposed to the allowance of the claim. On November 6, 1902, Mr. Peck resigned and Mr. Robert L. McCormick was elected in his place and held until the next spring election, when he was defeated for election. McCormick, at the time he held the office of supervisor, and prior to that time, was an officer and general manager of the defendant corporation. The other two members of the county board were James Erickson, a farmer, and Oscar Holstrom, a saloon-keeper.

After McCormick became a member of the county board, ²⁶³ and on or about December 20, 1902, the plaintiff and his attorney had a conversation with Mr. McCormick concerning the allowance of this claim at \$2,500, and it was substantially agreed outside of the session of the board and between McCormick and the plaintiff that the board would allow the bill at \$2,500, and that McCormick would take the county orders to be issued thereon and use them in the payment of taxes. The plaintiff suggested that if the claim were allowed at \$2,500 he would not get that much money because the county orders were at a discount, and that if the bill were allowed somebody might stop it, and McCormick thereupon informed the plaintiff that he would take the orders at their face because he had taxes to pay, and that he did not think anybody would stop the issue of the orders, because \$2,500 was a reasonable sum, and if they did he (McCormick) would take care of it and take his chances. The claim was again presented to the county board and allowed at \$2,500 on or about January 5, 1903, McCormick not voting. The county orders in question were issued in payment of said claim and delivered to an employé of the defendant corporation, and some days thereafter the plaintiff called at the office of the defendant and indorsed the county orders by signing his name on the back, leaving them in the possession of the defendant. The defendant corporation delivered the county orders to the town treasurer, one Skogstad, in payment of part of its taxes then payable to the town treasurer. The plaintiff and McCormick were expecting that some of "their enemies" might bring in injunctions against the payment of these county orders or the

allowance of this claim and recognized that haste was necessary or at least desirable.

While matters were in this condition A. M. Carpenter and the Chippewa Farm Land Company on or about February 25, 1903, began a taxpayers' suit against Sawyer county, its treasurer, the said three members of its county board, the plaintiff, the defendant, and others for the purpose of enjoining ²⁰⁴ the payment of said county orders or the receipt of the same for taxes, or the recognition of the same in any manner as evidence of indebtedness of Sawyer county. This suit was also directed against other county orders besides those involved in this action. Skogstad, who was a defendant and who had received the county orders in question in payment of defendant's taxes, served an answer and cross-bill asking for affirmative relief against the defendant corporation, to the effect that such corporation be required to pay him in money the taxes which they had attempted to discharge by delivery of said county orders. The plaintiff appeared and answered in the taxpayers' suit and the defendant corporation and the three supervisors defaulted therein. That suit was prosecuted to judgment, whereby "it was ordered, adjudged, and decreed that the following orders issued by the county clerk of Sawyer county on the county treasurer of said county are, and each of them is, wholly illegal and void . . . to wit: . . . county orders issued . . . in favor of the defendant, William Giblin, and numbered 12,085 to 12,091, inclusive." There was also a perpetual injunction decreed against paying said orders or any of them, or receiving the same for taxes, or in any manner recognizing the same as evidencing valid indebtedness of said Sawyer county. On the cross-bill of Skogstad the defendant corporation was required to repay to the county the amount of taxes attempted to be paid by the defendant by means of the illegal county orders in question, with interest from January 5, 1903, and it did so.

²⁰⁵ If we assume as most favorable to the appellant that there was evidence tending to show that the defendant, through Mr. McCormick, purchased these county orders from the plaintiff and agreed to pay \$2,500 therefor, there still remain many insuperable legal obstacles to the plaintiff's recovery. One is that, the county orders so sold having been adjudged in the taxpayers' suit fraudulent and void, there was a total failure of consideration: 1 Parsons on Contracts, 9th ed., 462, 463, and cases; Rowe v. Blanchard,

18 Wis. 441, 86 Am. Dec. 783. Another is that in the sale of such non-negotiable choses in action there is an implied warranty that the seller has title and that the chose is not spurious, false, or counterfeit: *Giffert v. West*, 33 Wis. 617; *Scott v. Hix*, 2 Sneed, 192, 62 Am. Dec. 458, and cases in note; *Roehl v. Volckmann*, 103 Wis. 484, 79 N. W. 755. The decree in the taxpayers' suit having been offered in evidence, it was competent evidence not only against the parties actually named in said suit, but also against all the taxpayers and citizens in said county: *State v. Rainey*, 74 Mo. 229; *Clark v. Wolf*, 29 Iowa, 197; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190, 4 South. 525; ²⁶⁶ *Bear v. Board of Co. Commrs.*, 122 N. C. 434, 65 Am. St. Rep. 711, 29 S. E. 719; *Scotland Co. v. Hill*, 112 U. S. 183, 5 Sup. Ct. Rep. 93, 28 L. ed. 692. Both the plaintiff and defendant in this cause were parties to that taxpayers' suit brought by Carpenter and another to enjoin payment of the county orders in question.

The appellant seeks to avoid the effect of the foregoing by two propositions: First, he contends that in an action brought by a plaintiff against several defendants the judgment or decree therein is not conclusive upon two or more of said defendants in a subsequent controversy between themselves over the same subject matter; second, that where a judgment or decree is not conclusive it is not evidence at all—citing to the first proposition 24 Am. & Eng. Ency. of Law, 2d ed., 731, 733, and cases there referred to; and citing to the second proposition *Pioneer S. & L. Co. v. Bartsch*, 51 Minn. 474, 38 Am. St. Rep. 511, 53 N. W. 764, which declares that the rule is familiar that, "as against anyone except the parties and their privies, a judgment is evidence only of the fact of its recovery." We are reminded that the lumber company, defendant, did not tender the defense of the taxpayers' action to the plaintiff, and it is asserted that there was no privity between the defendants in that action, the North Wisconsin Lumber Company and William Giblin. Upon these last two propositions we are convinced that no tender of the defense of the taxpayers' suit to Giblin was necessary; he was himself a defendant therein and controlled his own defense, and had every opportunity to prove the county orders in question valid if he was able to do so, and that in such case the requirement of tendering the defense of an action to one liable over to a defendant has no application. Giblin was also in privity with the North Wisconsin Lumber Company. He was its vendor.

The very action that he has now before the court assumes and is based upon privity by contract. But the rule that an adjudication in favor of a plaintiff against two or more defendants is not binding upon such defendants is rather an exception to the rule that all parties to a decree are concluded thereby, than a rule itself. ²⁶⁷ This exception relates to matters between codefendants which are not in themselves necessarily involved in the plaintiff's contention against each and all of the defendants, or matters which are not the main object and purpose of the plaintiff's suit. But where the plaintiff makes a claim hostile to each and every defendant in the suit, asserting that an instrument for the payment of money in which each of the defendants claims an interest or has an interest, either as present holder or as privy to the present holder by reason of being a transferrer of the present holder, is fraudulent and void, and obtains a decree affirming his claim against such instrument, that instrument must be held fraudulent and void in any subsequent litigation between the same parties however they are arrayed against one another in such subsequent litigation. In *Louis v. Brown Tp.*, 109 U. S. 162, 3 Sup. Ct. Rep. 92, 27 L. ed. 892, the plaintiff brought an action at law against Brown township on bonds and interest coupons of the defendant township and the defendant filed two pleas of former adjudication. By the first of these pleas it was averred that in an action brought by one Hiram Hipple, the owner of real estate encumbered by mortgage given to secure the payment of these bonds, which action was against the trustees of Brown township, Richard B. Hopple and others, and in which Richard B. Hopple filed a cross-bill alleging the bonds and mortgage to be valid and praying that said bonds and mortgage might be declared to be valid and for a decree of foreclosure, it was adjudged that these bonds were void for want of authority in the trustees of Brown township to issue the bonds. It was also averred that the plaintiff claimed under Richard B. Hopple. With reference to the first plea the court said:

"But if there had been no cross-bill, the fact that both Hopple and the trustees were placed as defendants in the suit of Hipple does not impair the conclusive character of the decree in that case as between those parties. The present case is precisely analogous to that of *Corcoran v. Chesapeake & Ohio C. Co.*, 94 U. S. 741, 24 L. ed. 190."

²⁶⁸ It would be a rather extraordinary condition if county orders, municipal bonds overdue, or other non-negotiable choses

in action which have been by proper decree of a court of equity declared fraudulent and void could be dealt in and bought and sold thereafter, and in every case the purchaser would have to prove over again the fraudulent character or invalidity of such choses in action, and could not use the decree declaring the paper invalid and fraudulent to establish *prima facie* such claim. This would make judicial investigation of that proposition interminable, facilitate fraud, and result in many cases that the things in action would be held void in one lawsuit and valid in another, according as evidence was available or unavailable or the fortunes of litigation fluctuated. It may be answered, all this could be obviated by requiring the instruments to be surrendered up and canceled by the original decree. But the complainant in that case is usually satisfied if he obtains an adjudication which protects him or the corporation for which he sues and is not apt to be concerned in the protection of the general public. Where the instruments are negotiable the complainant will usually have this inserted in his decree. Where they are non-negotiable he is apt to be indifferent. In *Simonton on Municipal Bonds*, section 119a, it is said that the doctrine of *lis pendens* has no application to negotiable paper, and the holder of negotiable bonds is not therefore affected by any litigation to which he is not a party, and a decree or judgment in such suit will not bind him; but if he purchase such paper after maturity and after it has been adjudged void, he is bound by the judgment. He also refers to *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866, which is worth considering in this respect. Coupon bonds of the town of Lansing in New York were by commissioners executed to a railroad company pursuant to an order of the county judge acting under authority of a statute. Certain taxpayers of the town procured a writ of *certiorari* to be issued from the supreme court to the county judge for a review ²⁰⁹ of this determination, and the supreme court reversed, and in all things held for naught, the judgment of the county judge appointing commissioners and authorizing the issue of the bonds. Pending this proceeding, however, the commissioners issued the bonds to the railroad company, and it disposed of them to various persons, among others to Stewart, the plaintiff. The supreme court said: "As between the railroad company and the town, the judgment of the supreme court reversing and annulling the order of the county judge invalidated the bonds. The judgment of reversal was equiva-

lent between these parties to a refusal by the county judge to make the original order. The next inquiry is whether, on the evidence, Stewart occupied in this suit a better position than the town. That depends on whether the testimony was such as to make it the duty of the court to submit to the jury, under proper instructions, the determination of the question whether he was in a commercial sense the bona fide holder of the coupons sued for. . . . Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a bona fide holder before he could recover."

After holding that there was sufficient evidence tending to show that Stewart was not a bona fide holder, it was ruled that it was not error to direct a verdict in favor of the town. In this case the invalidity of the bonds as against Stewart was proven by the judgment of the supreme court to which Stewart was not a party, it having been ascertained that he was not in a commercial sense the bona fide holder of the coupons sued on. There is some conflict and uncertainty with reference to the admissibility of judgments in evidence against persons not parties to the judgment or privy to such parties. And the rule is by no means settled, and by no means without exception, that a judgment is not evidence in any case in which it is not conclusive evidence. It is said that "a record may be used to establish the fact of such judgment and the legal effect thereof, and cannot be collaterally attacked, even by strangers. The rule is stated by Sir James ²⁷⁰ Stephen as follows: 'All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually affect when the existence of the state of things so affected is a fact in issue or is or is deemed to be relevant to the issue.' So, verdicts and judgments on questions of a public nature, where evidence of a general reputation would be received, have been admitted, although the parties were not the same nor in privy, but not as conclusive evidence; and, as will hereafter be shown, judgments in actions in rem, in so far at least as they fix the status of the particular subject matter, may not only be admissible, but may also be conclusive in a proper case, even against strangers to the record": 2 Elliott on Evidence, sec. 1525, and cases; State v. McDonald, 108 Wis. 8, 81 Am. St. Rep. 878, 84 N. W. 171.

Certain decrees in equity are classified as quasi in rem, and such decrees may be offered as evidence as against any person

with respect to the particular property described therein for the purpose of establishing *prima facie* the status of that property: *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. ed. 918; *Fry v. Taylor*, 1 Head, 594; *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613. A decree declaring invalid, fraudulent, or spurious municipal obligations which are non-negotiable but readily assignable is of this latter class. Consequently the decree in the taxpayers' suit mentioned canceling and perpetually enjoining payment of the county orders in question was binding upon the plaintiff and defendant in this action as determining that said county orders were invalid and worthless, first, because they were both parties to the taxpayers' suit and the matter of the invalidity and illegality of these county orders was a direct issue in that action between the plaintiff and each defendant therein; second, because they were residents and inhabitants of the county for and in whose behalf the taxpayers' action was carried on; third, because the plaintiff and defendant were in privity in said action with respect to the invalidity of said county orders; and fourth, because the decree in such case is quasi in rem, and establishes *prima facie* as against all persons the ²⁷¹ status of the chose in action canceled up and declared fraudulent and invalid.

The appellant next contends that there was an agreement on the part of the defendant, through McCormick, to take these county orders for better or worse; that is to say, to take them and pay \$2,500 therefor, and take its chances on the taxpayers' action which was expected or threatened. We do not think there is any sufficient evidence to establish *prima facie* such an agreement on the part of the defendant, but if we assume that there was sufficient evidence for that purpose, then we would have a case where the chairman of the county board of supervisors and general manager of the defendant corporation, having notice that the taxpayers' suit to cancel up the county orders in question or to enjoin the collection by the plaintiff, Giblin, of his claim filed with the county board for allowance was threatened, agreed to purchase said claim and pay \$2,500 therefor and take his chances on the litigation, which means that he would place himself in an attitude of hostility to the suit brought in behalf of the county by its taxpayers and defeat such suit if possible. Such an agreement, if made by the corporation through the county chairman acting for it, would be *contra bonos mores*

and void. In whatever way we look at this case the judgment of the circuit court must be affirmed.

By the COURT. The judgment of the circuit court is affirmed.

The Assignor of a Non-negotiable Instrument such as a town order, warrants, by implication, that it is a valid and subsisting debt, and that the maker of the instrument is solvent, or will be when it becomes due: *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828.

As to Who are Bound by a Judgment for or against a municipal or other governmental body or its officers, see the note to *Henderson v. Henderson Bridge Co.*, 105 Am. St. Rep. 204. The general rule is that a judgment against a county or its legal representatives is a matter of general interest to all its citizens, and is binding upon them, although they are not made parties thereto, unless it is impeached for fraud or mistake: *Bear v. Board of County Commissioners*, 122 N. C. 434, 65 Am. St. Rep. 711; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190.

WILLIAMS v. KIMBERLY AND CLARK COMPANY.

[131 Wis. 303, 111 N. W. 481.]

MASTER AND SERVANT—Fellow-servant's Negligence—Assumption of Risks.—An employé is relieved from his ordinary assumption of the risks of his fellow-servant's negligence upon the promise of the master to remove that danger only for a time reasonably required to perform that promise, and when such reasonable time has expired, the master's promise is broken to the knowledge of the employé, and he can no longer be considered as relying thereon. What is such reasonable time depends upon the circumstances of each particular case. (pp. 1051, 1052.)

MASTER AND SERVANT—Fellow-servant's Negligence—Assumption of Risks.—The fact that one suing to recover for injuries caused by the negligence of a fellow-servant shows by his complaint that such servant was retained in the service for ten days after the promise of the master to remove him, without any allegation of an excuse for such delay, does not necessarily negative its existence nor show that the ten days' period in question was unreasonable, so as to deprive the plaintiff of the right to rely on the promise of the master. (p. 1052.)

MASTER AND SERVANT—Negligence of Master—Removal of Incompetent Servant.—The master owes the duty of immediate removal of an incompetent employé whenever he acquires knowledge of such incompetence. Hence, he is guilty of negligence in failing so to remove in the sense, at least, of conduct subjecting him to liability to other employés. (p. 1052.)

MASTER AND SERVANT—Incompetent Fellow-servants—Promise to Remove—Assumption of Risks.—The rule justifying an em-

ployé in temporary exposure to known risks upon the employer's promise to remove the danger applies to risks arising from the incompetence of fellow-employés as well as those arising from dangerous machinery, and there is no distinction because the danger results from the incompetence of a fellow-servant using complicated machinery, instead of simple tools and implements, or none at all. (p. 1053.)

Classon & Frank, for the appellant.

Vilas, Vilas & Freeman, for the respondent.

³⁰⁴ DODGE, J. The appeal is from an order sustaining demurrer to a complaint setting forth a cause of action for personal injuries to the plaintiff, an employé of the defendant, resulting from the incompetence and negligence of a fellow-servant. The complaint sets forth that the plaintiff was engaged in putting blocks of wood into a barking machine, which process engrossed his attention closely; that it was the duty of another employé, known as a block-piler, to cast the blocks of wood into a rack placed near the barking-machine so as to be convenient to plaintiff's hand; that the block-piler at the time in question was one Van Haund, a Hollander, who is alleged to have been incompetent by reason of being careless and reckless in not taking sufficient time to place the blocks in the rack, but, on the contrary, was accustomed to throw them carelessly upon and into said rack so that they frequently came over the same, endangering the plaintiff while engaged in his work. It is specifically alleged that the barking machine engrossed plaintiff's attention so that he could not perform his work and watch the block-piler at the same time or know that there was danger of being struck by a negligently ³⁰⁵ thrown block so as to avoid the same. Also, that Van Haund understood no English and the plaintiff no Dutch, so that he could not expostulate with or give directions to the piler. It is further alleged that the defendant, well knowing the ignorance and incompetence of the block-piler, continued him in his employ until, on the third day of February, by his negligence of the kind described, a block of wood was thrown over and against the plaintiff when engaged in his work and he received serious injury. It is further alleged that prior to the time of injury plaintiff had repeatedly protested to the master against the incompetence of this block-piler, explaining the characteristics of such incompetence and the character of the peril therefrom, and that, especially about ten days prior to the injury, he had "entreated" that the block-piler be discharged and a compe-

tent one employed; that thereupon the defendant, by its foreman, agreed that it would discharge the block-piler and would employ a competent person to act, whereupon plaintiff, relying upon such promises and believing they would be fulfilled and a competent person employed, remained in his employment until the day of the injury. Other averments generally necessary to the cause of action are not involved in the discussion and need not be stated. The defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by order July 21, 1906, from which plaintiff appeals.

1. The first ground of attack upon the complaint is predicated upon the contention that on its face it shows that the plaintiff continued his exposure to the known risk from his fellow-servant's incompetence and negligence³⁰⁶ for more than the time reasonably necessary to enable the master to perform its promise to substitute a competent and careful workman. The law on this subject is nowise in dispute. The employé is relieved from his ordinary assumption of the risks of his fellow-servant's negligence upon the master's promise to remove that danger only for a time reasonably required to perform that promise: *Heathcock v. Milwaukee-Platteville L. & Z. M. Co.*, 128 Wis. 46, 107 N. W. 463; *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568; *Erdman v. Illinois S. Co.*, 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993; *Ferriss v. Berlin M. Works*, 90 Wis. 541, 63 N. W. 234; *Stephenson v. Duncan*, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337. When such reasonable time has expired the master's promise is broken to the knowledge of the employé, and he can no longer be considered as relying thereon. What such reasonable time may be will, of course, vary very much with the circumstances. An engineer or a head sawyer in a sawmill, remote from a settlement, might be much more difficult to replace with a competent substitute than a mere common laborer in a vicinity where laborers were numerous; or the defect in a machine might be of such character as to necessitate sending for new parts to a remote place of manufacture. Hence, ordinarily, the question is one for the jury. Nevertheless, the situation presented may be so clear that reasonable minds could not differ with reference to the inference from all the circumstances, and in such case it may well be the duty of the court, with all the facts before it, to hold as matter of law that the reasonable time has been exceeded. This we did in the recent case of *Heathcock v. Mil-*

waukee-Platteville L. & Z. M. Co., 128 Wis. 46, 107 N. W. 463, where it was held that seven days, under the circumstances there presented, transgressed the reasonable time necessary to guard the mouth of a mine by a railing. Upon the authority of that case there could be little doubt that ten days exceeded the time required either to procure a common laborer in the place of one whose incompetence was complained of or to substitute some ³⁰⁷ other common laborer already in defendant's employ, in the absence of very clear showing of serious obstacles to so doing. But it is not at all essential to good pleading that the evidence of such excuse, if any there be, should be pleaded, hence the failure of such facts to appear in the complaint does not necessarily negative their existence; and, while we confess that it is difficult to conceive of any circumstances which could protract for so long a period the time requisite, we are not prepared to say that none could exist, and therefore must hold that the mere allegations of the complaint, construed of course with broad liberality in favor of the cause of action, do not necessarily show that the ten days' period in question was unreasonable.

Our attention is urged to *St. Stephenson v. Duncan*, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337, where it was held that the complaint itself showed a similar period of ten days to be unreasonable for protecting a dangerous saw. That case, however, turned upon an express allegation of the complaint that, before the injury and after the promise to repair, the defendant had ample time and opportunity to make the repair but neglected to do so. Indeed, the court expressly said that but for such allegation it could not be said, as matter of law, that ten days was so unreasonable a period as to exclude expectation that the defendant would make good his promise to repair. In the complaint before us we find no such allegation, except, perhaps, that the defendant negligently continued the block-piler in its employ after said promise to remove him. We cannot say that this allegation must be construed as denying plaintiff's cause of action. It must be remembered that the master owes the duty of immediate removal of an incompetent employé whenever he acquires knowledge of such incompetence; hence he is guilty of negligence in failing so to remove, in the sense at least of conduct subjecting him to liability to other employés: *Kamp v. Coxe Bros. & Co.*, 122 Wis. 296, 99 N. W. 366.

³⁰⁸ 2. Certain other radical grounds of attack upon the complaint are presented, though not with perfect clarity as to either the principle contended for or their application to the situation. One of these positions taken by the trial court, and apparently still sought to be sustained by respondent, is thus stated by the trial court: "That the rule where the danger is known and appreciated by the servant, and he remains in the employment upon the promise of the master to remedy, he does not assume the risk, applies only in cases of dangerous machinery where the master is presumed to have a better knowledge of the danger than the servant. In other words, that it has no application to ordinary labor which requires only the use of implements with which the servant is as familiar as the master. This seems to be a tolerably well-settled rule according to the authorities."

If by this is meant that the rule justifying an employé in temporary exposure to known risk upon employer's promise to remove the danger has no application except to risks from dangerous machinery, it is directly antagonized by several of our own decisions, holding that it does apply to risks arising from incompetence of fellow-servants which, but for such promise, the employé would be held to assume: *Maitland v. Gilbert P. Co.*, 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124; *Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377; *Kamp v. Coxe Bros. & Co.*, 122 Wis. 206, 99 N. W. 366. True, there is an expression of doubt whether it applies to a defective place of work, such as a caving ditch, in *Showalter v. Fairbanks M. & Co.*, 88 Wis. 376, 60 N. W. 257, but no attempt at decision to that effect was there made. That doubt would seem to have been resolved in favor of the application of the rule in *Yerkes v. Northern P. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33, where it was applied to a place of work rendered unsafe by a slanting footboard, and in *Heathcock v. Milwaukee-Platteville L. & Z. M. Co.*, 128 Wis. 46, 107 N. W. 463, where the danger arose from an unguarded excavation in proximity to plaintiff's place of work. The argument against the liability of a ³⁰⁹ master pending a promise to repair or remove the danger that the peril is open and obvious and as well known to the servant as the master indicates complete oversight of the real principle involved. Such fact indeed leads in some cases to a presumption that the servant assumes the risk in absence of protest, but the very principle at the foundation of the rule now under considera-

tion is that the servant rebuts that presumption by a protest and reliance on the master's promise to remove the peril; which assumes, to start with, that the danger is open and obvious, at least to the servant, or he would have no reason to protest. To hold that a rule which in its very nature can have no application unless the danger is obvious does not apply where it is obvious, is a contradiction in terms, and the negation of the existence of any such rule. The true principle is that a servant may, and in law is presumed to, assume a risk of which he has knowledge, but that he avoids such assumption if he protests and is induced by the master's promise to remove the danger to incur that risk for a time reasonably requisite for its removal. It is not at all bottomed upon upon any assumed superiority of knowledge in the master, as is the general duty to furnish reasonably safe tools and appliances (*Stork v. Chas. Stolper C. Co.*, 127 Wis. 318, 106 N. W. 841), but upon the right of the employé to refuse to assume the risk of a peril which he knows as well, or even better, than his employer. Obviously, there is no distinction in reason because the danger results from the incompetence of a fellow-servant using complicated and dangerous machinery instead of simple tools and implements, or none at all. The peril from negligence in swinging a sledge or a pick is as much, and no more, assumed than if he were running a saw or an engine. The coemployé has as much right to refuse to submit to the one peril as to the other, and may as well be induced to continue by promise of speedy removal of the incompetent fellow-servant. Indeed, the simplicity of the operation would seem to enhance the probability that he might ³¹⁰ do so consistently with reasonable care. Thorough search discloses no authority for any distinction between such cases. The respondent's citations all refer to promised repair of tools, appliances, or place of labor and not to removal of incompetent fellow-servants. Whether a promise to repair is any less effective to relieve a workman from assumption of risk from a simple tool than in case of complicated ones has not been decided in Wisconsin and need not be now, for the question is not presented. We are convinced that no distinction in that respect exists between different incompetent fellow-servants by reason of the relative simplicity or complexity of the work in which they are engaged.

There is, of course, an exception to the rule we have been discussing where the peril of injury is so obvious, imminent,

momentary, and constant, and so unavoidable by any precaution, that no reasonably prudent person would expose himself to it even temporarily: *Erdman v. Illinois S. Co.*, 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993; *Maitland v. Gilbert P. Co.*, 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124; *Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377; *Jensen v. Hudson S. Co.*, 98 Wis. 73, 73 N. W. 434; *Yerkes v. Northern P. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33; *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568. This is really the point decided in several of the foreign cases cited by counsel which dwell upon the open and obvious character of the peril. It is hardly contended that the facts stated in the complaint bring plaintiff within this exception as matter of law. We are clear that under this complaint facts may appear fairly supporting an inference that an ordinarily prudent person might reasonably believe that, temporarily, he could, by special watchfulness and caution, escape injury from the negligence of his fellow-servant in piling blocks in the adjoining rack. Indeed, the fact that the plaintiff did escape for so long a period as ten days is not without weight on that subject: *Maitland v. Gilbert P. Co.*, 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124; *Yerkes v. Northern P. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 33.

³¹¹ Our conclusion is that the direct allegation of the defendant's negligence and plaintiff's freedom from contributory negligence are not so conclusively refuted by other facts appearing in the complaint that proof admissible thereunder might not sustain a cause of action.

By the COURT. Order sustaining demurrer is reversed, and cause remanded for further proceedings.

The Liability of an Employer to an employé injured by defective appliances, when he has remained at work after a promise on the part of the master to repair the defects, is discussed in the note to *Modern Frog and Crossing Works v. Fries*, 119 Am. St. Rep. 434.

GOOD LAND COMPANY v. COLE.

[131 Wis. 467, 110 N. W. 895.]

CORPORATIONS—Married Woman as Incorporator.—Under a statute providing that “three or more adult persons, residents of this state, may form a corporation,” a married woman may be an incorporator, although two of the three incorporators of the corporation are husband and wife. (p. 1057.)

CORPORATIONS—Married Woman Incorporator—Effect on Separate Property.—The investment by a wife of her separate property in a corporation in which she and her husband are incorporators gives the husband no control over it by reason of their relation to the corporation. (p. 1058.)

R. A. Cole, for the appellant.

Barry & Barry, for the respondent.

⁴⁶⁶ **SIEBECKER, J.** In this case appellant raises all of the questions presented in the case of *Van Ostrand v. Cole*, 131 Wis. 446, 110 N. W. 891. We find the facts bearing on these questions are the same in the two cases, and the decision upon them in the companion case rules this one in respect to all the questions so presented.

Appellant, however, raises the question that plaintiff has no corporate existence and hence cannot maintain this action. Section 1771 of the Statutes of 1898 provides that “three or more adult persons, residents of this state, may form a corporation” in the manner and for the purposes therein provided. The claim is made that married women are not empowered within the provisions of this law to exercise the rights of an “adult” person, and that, if a married woman is empowered to exercise the rights of an “adult” person under the provisions of this statute, still plaintiff’s alleged incorporation is invalid because two of the three “adult” persons who attempted to incorporate were at the time of its organization husband and wife. The act of forming a corporation as provided by this statute, as between the parties to the undertaking, is in its nature contractual. In this view it seems a natural consequence that any three adult persons having the power to contract may form a corporation upon compliance with and in ⁴⁷⁰ the manner prescribed by the statute. Appellant suggests that a married woman’s common-law disabilities to contract persist as to the exercise of this right. The acts involved in forming a corporation and in becoming a stock-

holder in it are alike in their character, and no valid reason is suggested why the statutes removing the common-law disabilities of married women should not apply with equal force to both, and if she is empowered to make contracts respecting the purchase and ownership of stock in a corporation, it seems but a logical inference that she may be a corporator of a proposed corporation. The right to acquire, own, and transfer property and to conduct her separate business as if she were unmarried involves the exercise of privileges in their nature like those involved in acquiring the right to exercise the corporate powers and privileges bestowed by the statute. We are cited to no authority, and from our investigation it seems this question has but seldom called for judicial determination.

In *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. Rep. 242, 32 L. ed. 396, the competency of a married woman to become a shareholder in a corporation was involved, and it was held that the statute of Arkansas removing the common-law disabilities of a married woman as to contracts respecting her separate property and business enabled her to assume such obligations. In an opinion of the attorney general of Pennsylvania, reported in 18 Pa. Co. Ct. Rep. 492, the qualification of a married woman to become a corporator of a proposed corporation under the Pennsylvania statute was presented, and the conclusion reached that the married woman's act of that state, removing the common-law disabilities by reason of coverture, enabled her to become a corporator of a corporation upon the ground that such a right grew out of the contractual capacity bestowed upon her by such enabling laws: 10 Cyc. 166, F, 4; *Witters v. Sowles*, 38 Fed. 700. The power of a married woman to exercise the right to contract concerning her separate property and business is fully established by the law of this state and needs no further discussion: See *Kriz v. Peege*, 471 119 Wis. 105, 95 N. W. 108; *Citizens' L. & T. Co. v. Witte*, 116 Wis. 60, 92 N. W. 443, and cases there cited. We are of the opinion that the term "adult persons," as used in section 1771 of the Statutes of 1898, includes a married woman, and that she has the right to be a corporator of a corporation under the laws of this state.

It is urged that the decision in *Fuller & F. Co. v. McHenry*, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 912, where it is held that a husband and wife cannot form a copartnership, because the legislature did not intend that such relations as flow from a copartnership in trade should exist between them, controls

the situation presented here. The question there involved was whether the common-law disability of a wife to form a copartnership with her husband had been removed, and it was held that the married woman's act did not contemplate the removal of this particular disability. The decision went upon the ground that the legislation upon this subject contemplated "that the gains the wife should make in the exercise of her limited business powers should be her sole and separate property, and not be in any way subject to the interference, control, or disposal of her husband." The decision places stress upon the point that the partnership relation would enable the husband to exercise control over a wife's property contributed to a partnership such as the statutes seek to prevent, and thus frustrate the objects of these enabling statutes. These reasons do not, however, apply to the case before us. The investment by a wife of her separate property in a corporation in which she and her husband are incorporators gives the husband no control over it by reason of their relation to the corporation. A stockholder does not hold the relation of a copartner to the corporation or to the other holders of stock in the corporation. Ownership of stock or an interest in the corporate property by a married woman gives her husband, though he may also own stock in the corporation, no right to control her separate property or to manage her separate business: 1 Cook on Corporations, 5th ed., secs. 10, 11; ⁴⁷² 10 Cyc. 373. We must hold that the fact that Anna A. Van Ostrand was a corporator of the plaintiff corporation does not affect its legal existence.

By the COURT. Judgment affirmed.

A motion for a rehearing was denied April 30, 1907.

The Legal Disabilities Under Which Married Women labored at the common law have been almost entirely removed in many states: See O'Day v. Meadows, 194 Mo. 588, 112 Am. St. Rep. 542; Estate of Deaner, 126 Iowa, 701, 106 Am. St. Rep. 374; Hoaglin v. Henderson, 119 Iowa, 720, 97 Am. St. Rep. 335; Snell v. Snell, 123 Ill. 403, 5 Am. St. Rep. 526. That they are capable of acquiring stock in a national bank, and being stockholders therein, see Kerr v. Urie, 86 Md. 72, 63 Am. St. Rep. 493; note to Thompson v. Reno Sav. Bank, 8 Am. St. Rep. 867.

YAZDZEWSKI v. BARKER.

[131 Wis. 494, 111 N. W. 689.]

MASTER AND SERVANT—Safe Place and Appliances.—It is the duty of the master to furnish his employé with a reasonably safe place to work in, and a reasonably safe appliance to work with. This duty is absolute and cannot be delegated. (pp. 1061, 1062.)

MASTER AND SERVANT—Place and Appliances in General Use.—If a master furnishes his servant such a place to work in or appliance to work with as is in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances, he has discharged his duty to furnish a reasonably safe place or appliance. (p. 1062.)

MASTER AND SERVANT—Place and Appliances—"Obviously" Dangerous.—The master does not discharge his duty to his servant by furnishing him the ordinary place to work in, or appliances in general use to work with, if such ordinary place or generally used appliance is "obviously" dangerous. The word "obviously," as here used, does not mean that the danger should be obvious to any person, however unskilled or ignorant, but that it should be obvious to the ordinarily careful employer, or to a person having equal skill and judgment and opportunity for examination. (p. 1062.)

Lamoureux & Shea, for the appellants.

Eaton & Eaton, for the respondent.

⁴⁹⁵ **WINSLOW, J.** This is an action to recover for personal injuries. It appeared upon the trial that the plaintiff on the 29th of July, 1902, was a common laborer about forty-one years of age and was employed by the defendants in their lumber-mill at Ashland, where he had been continuously working since May 10th of the same year. His work was to take the lumber cut by a bandsaw on the east side of his position and also that cut by a resaw on the west side and place the same on certain live rollers which carried it some twenty feet to an open edger. When the lumber reached the edger it was taken by another employé called the edgerman and put through that machine. The edger was seven feet wide and had six circular saws set on a shaft or arbor, the two outside saws being stationary and the others being movable by means of a lever. The edger had no safety devices to prevent boards being thrown back by the saws. It was claimed by the plaintiff that there were three devices which might have been used to prevent boards from being thrown back, viz.: (1) A spiked roller behind the saws with a press roll above; (2) a guard composed of long iron teeth or fingers fastened to a rod

above the saws, which teeth or fingers rested lightly upon the boards behind the saw as they passed through at such an angle that if the board started back they would gouge into it and stop it; and (3) a press roller immediately in front of the saw resting firmly upon the board and preventing it from wobbling.

On the day first named a two-inch Norway plank ten ⁴⁹⁸ inches wide and eighteen feet long was being passed through the edger and was cut into two pieces, one four inches and the other six inches wide. The larger strip passed out in the usual manner, but the other was caught by one of the saws and was split in two, and both pieces were shot or thrown with great velocity backward, one of them penetrating the plaintiff's body and inflicting very serious injuries. The following verdict was returned by the jury:

"(1) Did August Yazdzewski, the plaintiff, receive injuries while in the employment of the defendants Christopher C. Barker and Hiram C. Stewart at the time and place alleged in plaintiff's complaint? A. (Answered by the court.) Yes. (2) Was the edger in defendants' sawmill at which plaintiff was employed when injured a reasonably safe machine as it was then operated by defendants? A. No. (3) Did the defendants fail to provide at the time plaintiff was injured any suitable swing press roll, teeth, fingers, spikes, or guards, as alleged in plaintiff's complaint, for the protection of their employes while at work on or about said edger? A. Yes. (4) If you answer question No. 3 by 'yes,' could defendants, without impairing the usefulness of said edger, have provided an appliance to protect their employes while at work on or about said edger? A. Yes. (5) If you should find the defendants were guilty of a lack of ordinary care in failing to provide an edger with reasonably safe appliances for their employes while at work on or about the same, was said negligence of defendants the proximate cause of plaintiff's alleged injuries? A. Yes. (6) Was plaintiff guilty of any negligence which in any manner contributed toward his said injuries? A. No. (7) If from your answers to the foregoing questions the court is of the opinion that the plaintiff should have judgment herein, at what sum do you assess his damages? A. Five thousand dollars (\$5,000)."

Judgment for the plaintiff was rendered on the verdict, and the defendants appeal.

497 It is strenuously contended by appellants that a verdict for the defendants should have been directed because (1) no negligence on the part of the defendants was shown; (2) it appeared that the injury resulted from the negligence of a coemployé; and (3) the plaintiff assumed the risk. In support of the first proposition it is said that the evidence conclusively showed that open edgers of the kind in question without guards were in general use in the lumber-mills of northern Wisconsin, and hence that there can be no finding of negligence based on the failure to provide guards. While there was much evidence tending to show that such unguarded edgers were in general use in other mills, this is not a conclusive test upon the question of negligence, as we shall endeavor to demonstrate later on in this opinion in discussing the alleged error in the instructions relating to the second question of the special verdict. As to the second and third propositions, we think it clear from the evidence that the court would not have been justified in directing a verdict for the defendants on either ground.

A far more serious question is raised, however, by the exceptions to the instructions given by the court with reference to the second question of the verdict. In submitting this question the court said: "If you find from the evidence that open edgers and edging machines in which there were neither press rollers nor fingers nor any other appliance, device, or contrivance in front of the saws were in general use in the sawmills of northern Wisconsin at the time plaintiff sustained the injuries described in the complaint, you may answer the question No. 2 'Yes,' but if you find that such open edgers were not reasonably safe to the employées operating the same you will answer the question by 'No.' "

The question submitted was whether the machine was reasonably safe, and the substance of the instruction was that if such machines were in general use then they were reasonably safe unless the jury concluded that they were not reasonably ⁴⁹⁸ safe; in other words, the fact of general use cut no figure in answering the question. In the last analysis the instruction says that the machine was not reasonably safe if you conclude that it was not, whatever be the fact as to the general use of such machines. We cannot approve this instruction. The rule of law undoubtedly is that when an employer furnishes to his employé a place to work in, or an appliance to work with, it is his duty to furnish a reasonably safe

place or appliance. This duty is absolute and cannot be delegated: *Howard v. Beldenville L. Co.*, 129 Wis. 98, 108 N. W. 48. The general rule is also that if the employer furnish such a place or appliance as is in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances, he has discharged the duty imposed on him. The place or appliance so furnished is in a legal sense "reasonably safe": *Guinard v. Knapp-Stout & Co.*, 95 Wis. 482, 70 N. W. 671; *Prybiski v. Northwestern C. R. Co.*, 98 Wis. 413, 74 N. W. 117; *Sladky v. Marinette L. Co.*, 107 Wis. 250, 83 N. W. 514. Many courts apply this rule without exception or limitation: 4 *Thompson's Commentaries on Negligence*, secs. 3991-3993; *Delaware etc. Shipbuilding Works v. Nuttall*, 119 Pa. 149, 13 Atl. 65. This court, while approving this general rule, has adopted a limitation thereon in consonance with what seems to us a more just and enlightened policy. That limitation is that the employer will not discharge his duty by furnishing the ordinary place or appliance, if such ordinary place or appliance be obviously dangerous: *Innes v. Milwaukee*, 96 Wis. 170, 70 N. W. 1064; *Boyce v. Wilbur L. Co.*, 119 Wis. 642, 97 N. W. 563. The word "obviously" as here used does not apply to any person, however unskilled or ignorant, for in such case the employé would always assume the risk, and the exception would be no exception at all, but "obviously" to the ordinarily careful employer who is charged with the duty of furnishing the place or appliance, or "obviously" to a person possessing equal skill and judgment and opportunity for examination ⁴⁰⁰ as such an employer. Doubtless this was the limitation on the general rule which the trial judge had in mind when he added the last clause to the instruction quoted, but it is evident that the clause does not convey the idea, but rather eliminates the rule entirely.

A number of other rulings are complained of by the appellants, but we have found no prejudicial error save that above named. The claim that the question of the negligence of a coemployé, to wit, the edgerman, should have been submitted to the jury cannot be sustained. We find no evidence tending to show that the edgerman was guilty of any negligence. Apparently he was performing his duties in the usual manner. The verdict was undoubtedly necessarily long. The only material disputed questions were: (1) Whether the edger was a reasonably safe machine. (2) If not, was the failure to furnish a reasonably safe machine the proximate cause of the

plaintiff's injury? (3) Was the plaintiff guilty of contributory negligence by way of assumption of the risk? (4) What damages has the plaintiff suffered?

By the COURT. Judgment reversed, and action remanded for a new trial.

Kerwin, J., dissents.

Authorities upon the Doctrine announced in the principal case will be found in the notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884; Welliston Coal Co. v. Smith, 87 Am. St. Rep. 557; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289.

KING v. APPLE RIVER POWER COMPANY.

[131 Wis. 575, 111 N. W. 668.]

MALICIOUS PROSECUTION—Probable Cause When Question of Law.—In an action for malicious prosecution the question as to whether there was probable cause is one solely of law, if the facts are undisputed. (p. 1065.)

MALICIOUS PROSECUTION—Probable Cause—Advice of Counsel—Statement of Facts.—If a person takes the advice of reputable counsel based upon a full, fair and honest statement of all the facts and information within such person's knowledge before making a criminal complaint, honestly believing the one charged to be guilty, he has probable cause as matter of law for his action, and is not subject to an action for malicious prosecution. The term "full, fair and honest statement of all the facts," as here used, does not mean all the facts discoverable, but all the facts within the knowledge of the person making the statement. (p. 1066.)

W. F. McNally, for the appellants.

J. A. Frear and A. J. Kinney, for the respondent.

575 MARSHALL, J. The appeal is from an order granting a new trial in an action for malicious prosecution.

Defendants, according to the allegations of the complaint, maliciously and without probable cause swore out a warrant before a justice of the peace in St. Croix county, Wisconsin, falsely charging plaintiff with the offense of maliciously disturbing, interfering with, and injuring the wires and poles of the defendant company, used in its business of operating an electric power plant in such county, and procured plaintiff to be arrested on such warrant and imprisoned till she gave

bail for her appearance to answer the complaint. Further, as alleged, plaintiff was duly tried upon such charge and acquitted. Other allegations were made as part of plaintiff's cause of action bearing on the question of damages.

Defendants answered, among other things, that the complaint was made in good faith, without malice, and with probable cause to believe plaintiff was guilty.

⁵⁷⁶ On the trial there was substantially undisputed evidence to this effect: Defendant Epley was president of the defendant company, which owned, controlled and operated an electric power plant. The pole line was located along the highway in front of plaintiff's premises. In the latter part of November, 1904, her son, assuming to represent her and to be under the guidance of a lawyer, called upon Epley and demanded a removal of the poles from in front of his mother's place, threatening, if the demand was not complied with, to cut the poles down. No attention was paid to such demand. December 2d, thereafter, an employé of the company who had been in its service for several years and was regarded by it and by Mr. Epley to be trustworthy informed the latter by telephone that plaintiff's son was cutting the poles down and that he was acting under her direction. A short time afterward Epley was informed a second time as before by one of the company's employés, who said: "They are chopping the poles and the current is on." Thereupon Epley went to the office of a justice of the peace, who was a lawyer, and stated to him the situation. He suggested seeing Mr. McNally about the matter. The latter was a reputable lawyer of twenty years' experience and more. Epley related to Mr. McNally all the facts aforesaid, which were all that were within his knowledge. He believed plaintiff's son, under her direction, had actually disturbed the company's property, as he stated. On such statement Mr. McNally advised Epley that he was justified in making the complaint, and to do so was the only way to proceed. Thereupon McNally prepared the complaint and the warrant. They were taken to the justice of the peace, the complaint being duly sworn to and filed, and the warrant then issued and executed. The complaint charged both the plaintiff and her son with being guilty of unlawfully disturbing the company's property. Upon the hearing before the justice the plaintiff was discharged, but it was proved that her son actually did unlawfully disturb the company's property. ⁵⁷⁷ At the close of the evidence each of the defendants separately, and they

jointly, by counsel, moved for the direction of a verdict. The motion was denied and the cause submitted to the jury for a special verdict, resulting in the following findings: (1) Defendant Epley, in procuring the warrant to be issued, did not act without probable cause. (2) Before commencing the criminal prosecution he made a full, fair and honest statement of all the material facts known to him bearing upon the question of plaintiff's guilt of the offense alleged against her to W. F. McNally for the purpose of procuring his legal advice thereon. (3) Said McNally honestly and in good faith advised Epley that upon the facts so stated to him plaintiff was guilty of the offense for which she was arrested. (4) Epley at the time he swore to the complaint did not have knowledge or information such as would lead a man of ordinary prudence and caution to believe plaintiff was guilty of the offense charged. (5) Epley, before he swore to the complaint, did not use the same prudence and caution an ordinarily prudent and cautious man would have exercised in ascertaining the facts concerning the commission of the crime charged. (6) He sincerely and in good faith believed when he swore to the complaint that plaintiff was guilty of the offense charged. (7) He swore to the complaint in good faith and without malice against the plaintiff. (8) Plaintiff suffered actual damages by reason of her arrest in the sum of one thousand dollars. (9) We do not assess any exemplary damages to be recovered by plaintiff in case she is entitled to judgment.

The defendants moved for judgment on the verdict and plaintiff moved for an order setting the same aside and for a new trial. The former was denied and the latter granted upon the ground that the answers were inconsistent and that error was committed in the instructions; the error supposed to have been so committed not being specified. The defendants appeal.

⁵⁷⁸ Whether there was a probable cause in a case of this sort is solely a question of law for the court where the facts are undisputed. The province of the jury is to deal ⁵⁷⁹ with the controversy as to facts where there is a dispute in that respect but such controversy being settled the ultimate question is for the court: *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116.

Generally speaking, in order for a person to have probable cause to believe another guilty of a crime warranting institution of proceedings for his punishment, such person must

have such knowledge or information as would lead an ordinarily prudent man to such belief, and it is ordinarily a question of fact for the jury under the circumstances of the given case as to whether there was such knowledge. But it is a settled rule of law that if a person takes the advice of reputable counsel in making the complaint, honestly believing the one charged to be guilty, he has probable cause as a matter of law for his action, or in other words his conduct is consistent with that of a man of ordinary prudence, if the advice of counsel is based upon a full, fair, and honest statement of all the facts and information within such person's knowledge.

In this case the court submitted to the jury by the first question whether defendant Epley was possessed of such knowledge and information as would produce an honest belief in the mind of an ordinarily prudent man that the respondent was guilty; the form of the question being such as to require the jury to find whether there was probable cause or not under the legal test suggested, and the answer was, in effect, in the affirmative, though by the form of the question the jury were compelled to express the finding in a negative form; the language of the question being: "Did the defendant, F. W. Epley, in procuring the warrant in question to be issued, act without probable cause for so doing?"

The court instructed the jury that in order to warrant them in finding that Epley did not act without probable cause they must find that he had knowledge and information such as would have caused an ordinarily prudent person to believe the persons charged to be guilty. In the fourth and fifth questions ⁵⁸⁰ the legal test given to enable the jury to properly answer the first interrogatory was embodied to be found as matter of fact. The result of thus doubly placing the subject before the jury was that they found probable cause in answer to the first question, and, in effect, want of probable cause later. Manifestly, if the fourth and fifth findings, embodying as aforesaid the instruction given as to the first question, have any materiality in the verdict, in view of the evidence and other findings, the court did right in setting it aside for inconsistency and granting a new trial.

We are unable to discover any difficulty in the verdict other than the one referred to, unless it be in that the jury found that Epley in swearing out the warrant acted in good faith under the advice of reputable counsel given after a full, fair, and honest statement to him of all the facts within his knowl-

edge in respect to the transaction. There is no serious difficulty at that point if the findings on the subject covered all the matters essential in law to probable cause, and the fourth and fifth questions were erroneously submitted and answered upon the theory that notwithstanding such matters Epley might yet not have acted consistently with the conduct of an ordinarily prudent man.

It seems that findings 2, 3, 6, and 7 are in accordance with the undisputed evidence. As indicated in the statement, the evidence is substantially uncontroverted that Epley stated all the facts within his knowledge with the source of his information to a reputable lawyer of large experience, whom he had every reason to believe would advise him properly, and that he made such statement for the purpose of having respondent and her son dealt with according to law; that he was advised by such attorney after such statement to do as he did, and that he followed such advice sincerely and honestly believing the respondent to be guilty as charged. We see nothing in the record to indicate but what the court might well have found those facts without the aid of the jury.

⁵⁸¹ The theory of counsel for respondent is that the findings referred to are not sufficient as matter of law to show probable cause in that a full, fair and honest statement to reputable counsel of all the facts and information within Epley's knowledge was not sufficient unless grounded on such an investigation as to satisfy the standard of ordinary prudence under the circumstances, the advice of counsel not being the test. On that matter, it is conceded, as the fact is, that there is considerable confusion in judicial expressions, some holding that the advice of counsel covers the subject of whether the statement is based upon adequate knowledge and information as well as the subject of whether upon the facts and information disclosed a cause of action probably exists, and others holding to the contrary. It does not seem advisable to review the numerous adjudications that can be found bearing on the matter and endeavor to reconcile them, or to demonstrate which side of the conflict is supported by the weight of authority, since this court has spoken plainly in respect to the matter, laying down the rule regarded upon careful consideration to be the sound one.

It is stated in the text-books that an ordinarily prudent man is expected to take the advice of a person learned in the law and a reputable member of the profession before institut-

ing a criminal prosecution, and if he does so, placing all the facts before his counsel, and acts honestly upon his opinion, such facts constitute probable cause as a matter of law: *Cooley on Torts*, 2d ed., 212. That was adopted here in *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414, and affirmed in *Billingsley v. Maas*, 93 Wis. 176, 67 N. W. 49. That is the doctrine of the federal supreme court: *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116.

The term "full and fair statement of all the facts" does not mean all the facts discoverable, but all the facts within the knowledge of the person making the statement. If he knows facts enough, either personally or by credible information,⁵⁸² which, when fairly and fully stated to reputable counsel for the purpose of obtaining legal guidance, results in advice which is honestly followed in commencing the criminal proceedings, that is sufficient. That was distinctly recognized in the most recent decision of this court on the subject: *Brinsley v. Schulz*, 124 Wis. 426, 102 N. W. 918. There it was said: "One of the most efficient ways of negating a prima facie showing in that regard and establishing affirmatively probable cause is to prove that the prosecution was commenced under the advice of counsel, . . . after a full statement to him of all the facts known to the defendant. It makes no difference in such a case whether the facts supposed to exist do so or not; if there is an honest belief in such existence and the supposed facts are fully and fairly stated to counsel to obtain proper guidance in the matter, and upon his advice as to the sufficiency of the same the prosecution is in good faith commenced, that is enough. Such circumstances when fully established show, as a matter of law, absence of malice and presence of probable cause, precluding any liability for malicious prosecution."

That is laid down as elementary in 19 *American and English Encyclopedia of Law*, second edition, at page 661, in these words, supported by numerous authorities: "The rule is undoubted that it is not necessary, in order to constitute probable cause for a prosecution, that the party instituting it should have acted on his own personal knowledge of the facts. If the prosecutor has acted in good faith, upon credible information from reliable sources, he will not be liable."

In harmony with that this court in *Messman v. Ihlenfeldt*, 89 Wis. 585, 62 N. W. 522, said, substantially, if the prosecutor fairly imparted to counsel all the knowledge of the

facts he possessed, and honestly followed such counsel's advice, then such advice is a complete defense. It stands for probable cause because it shows that he acted honestly. Whether there was in any given case a full and fair statement ⁵⁸³ of all the prosecutor's knowledge to reputable counsel, if the matter be disputed, is for the jury, but the facts appearing uncontroverted, or found by the jury, the legal result follows as a matter of course.

The real basis for the doctrine that the advice of counsel under the circumstances stated stands for probable cause is that it covers the subject of whether the statement made is sufficient without further investigation as to the facts. Counsel is supposed to pass upon that question, and his advice honestly given and honestly acted upon to preclude any successful claims of negligence or imprudence on the part of the prosecutor as held in the cases cited to our attention by the learned counsel for appellant and others: *Johnson v. Miller*, 69 Iowa, 562, 58 Am. Rep. 231, 29 N. W. 743; *Dunlap v. New Zealand F. & M. Ins. Co.*, 109 Cal. 365, 42 Pac. 29; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Gillispie v. Stafford*, 4 Neb. (Unof.) 873, 96 N. W. 1039; *Hess v. Oregon B. Co.*, 31 Or. 503, 49 Pac. 803.

The conflict as to whether the statement to counsel of facts known to the prosecutor, either personally or by credible information, is sufficient in order that he may be shielded from liability if he honestly follows counsel's advice, is recognized with citations of authority on both sides of the controversy in 19 *American and English Encyclopedia of Law*, second edition, 688, where it is said: "A number of cases hold that a failure to make a full disclosure of all material facts will render the defense of advice by counsel inoperative unless the defendant shows that not only were all known facts communicated, but also all such as reasonable diligence in making inquiries would have discovered. Other authorities, however, declare that it is not necessary that diligence in making inquiries should be shown, provided facts within defendant's knowledge, or in the existence of which he had reasonable ground to believe, were communicated to counsel in good faith."

As we have seen, our court, contrary to the contention of counsel for respondent, is committed to the doctrine last stated.

584 It follows necessarily, not only from the undisputed evidence, but from the verdict, that defendants were entitled to judgment. It was not proper for the jury to say that the advice of counsel, under the circumstances proved and found, was not sufficient to warrant Epley as a man of ordinary prudence in commencing the prosecution of respondent, because as a matter of law the contrary is the fact.

What has been said renders it unnecessary to discuss any other questions than those referred to. Defendants were entitled to judgment. The jury evidently did not intend to find anything inconsistent with the second, third, and sixth findings. They were misled by the way the case was submitted into the belief that such findings did not necessarily make out a course of action consistent with ordinary prudence.

By the COURT. The order is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Timlin, J., dissents.

The Malicious Prosecution of civil actions is the subject of a note to McCormick Harvesting etc. Co. v. Willan, 93 Am. St. Rep. 454, and the malicious prosecution of criminal actions is the subject of a note to Ross v. Hixon, 26 Am. St. Rep. 127. One instituting a criminal prosecution upon the advice of a reputable attorney to whom he makes a full disclosure of the facts known to him cannot, ordinarily, be held guilty of malicious prosecution: Tryon v. Pingree, 112 Mich. 338, 67 Am. St. Rep. 398; Yenger v. Phillips, 195 Pa. 214, 78 Am. St. Rep. 810; Kansas etc. Coal Co. v. Galloway, 71 Ark. 351, 100 Am. St. Rep. 79. But to make the advice of counsel a defense, it must be shown that it was sought and acted upon in good faith after a full disclosure of material facts: Davis v. McMillan, 142 Mich. 391, 113 Am. St. Rep. 585.

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4. **APPEAL—Exceptions.**—Unless the bill of exceptions shows to the contrary, the certificate of the presiding justice in the lower court that the exceptions are "allowed" is conclusive of their being rightfully allowed. (Me.) *State v. Intoxicating Liquors*, 504.

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5. **APPEAL—Ambiguous Findings, Construction of.**—If the findings of a trial court are ambiguous, that one of two reasonably probable meanings will be adopted that will support the judgment, rather than the one which will defeat it. (Wis.) *Bantz v. Adams*, 1030.

6. **APPEAL—Absence of Finding, When not Fatal.**—If a fact essential to support a judgment in a case in equity does not appear to have been found by the trial court, but does appear from the

record with reasonable certainty to exist, it may be found on appeal, and judgment directed accordingly. (Wis.) *Bantz v. Adams*, 1030.

Review of Decrees.

7. **APPEAL AND ERROR**—Conclusiveness of the Decree of a Single Justice.—The decree of a single justice who has heard the witnesses is not to be set aside unless plainly wrong, but this rule is limited to those cases in which the decision is dependent on the credibility of witnesses, and does not apply when the uncontradicted evidence shows that the decree is wrong. (Mass.) *Old Corner Book Store v. Upham*, 532.

8. **APPEAL**—Decision of Referee Confirmed by the circuit court on a pure matter of fact must be given the same dignity on appeal as is required by the established practice as to any conclusion of fact made by a trial court. (Wis.) *Idema v. Comstock*, 1027.

Grounds for Reversal.

9. **APPEAL**—Presumption Against Error.—On appeal, the presumption is against error, and in testing the sufficiency of the record to support the judgment, it must be affirmed unless error appears with reasonable clearness. (Wis.) *Bantz v. Adams*, 1030.

10. **APPEAL**—Pointing Out Errors.—The appellate court will not search the record for alleged errors, and unless the page and line where such rulings may be found are cited in the brief, they will not be considered. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

11. **APPEAL AND ERROR**—Partly Incompetent Answers to Questions.—If the answer of a witness to a proper question is partly incompetent and partly competent, it does not require a reversal, unless the incompetent matter is prejudicial and was duly objected to. (Ark.) *St. Louis etc. Ry. Co. v. Dupree*, 74.

12. **APPEAL**—Reversal of Judgment.—A judgment may be reversed for lack of the character and degree of evidence required to support it. (Colo.) *Laesch v. Morton*, 106.

13. **APPEAL**—A Party cannot Complain of an Error which he induced the court to make, or to which he consented, in refusing to allow the amendment of a bill of particulars. (Ill.) *McKinnie v. Lane*, 338.

14. **APPEAL AND ERROR**—Nonprejudicial Exclusion of Evidence.—If the court refuses to permit the asking of a question, but afterward the fact sought to be proved is proved and must be and it is assumed to be the fact in dealing with the cause, the error becomes harmless. (Mass.) *McCafferty v. Lewando's etc. Cleaning Co.*, 562.

ARBITRATION.

See Insurance, 3-8.

ARREST.

See Homicide, 5, 6.

ASSAULT TO KILL.

See Homicide, 1.

ASSUMPSIT.

ASSUMPSIT—Payment in Articles of Personality.—Where there is an agreement to pay a certain sum in specified articles of personal

property, at agreed prices, on a particular day, a failure to deliver the articles on the day fixed converts the transaction into a money obligation, and a recovery on the common counts may be had. (Ill.) *McKinne v. Lane*, 338.

ATTACHMENT.

In General.

1. **ATTACHMENT—Nature of Proceeding—Lien.**—A proceeding by attachment is in the nature of a proceeding in rem. The attaching creditor acquires a specific lien upon the attached property, which ripens into a judgment against the res when the order of sale is made. Such a proceeding is in effect a finding that the property attached is an indebted thing, and a virtual condemnation of it to pay the owner's debt. (Or.) *Katz v. Obenchain*, 821.

2. **ATTACHMENT LIEN—Necessity of Entry of Judgment.**—The validity or continuation of an attachment lien is not dependent upon the entry of the judgment in the judgment lien docket. (Or.) *Katz v. Obenchain*, 821.

3. **ATTACHMENT—Caption to Certificate.**—It is not necessary that a certificate of attachment should have a caption stating the title of the cause and the names of the parties, if such matters are stated in the body of the certificate. (Or.) *Haines v. Connell*, 835.

Priority Over Unrecorded Deed.

4. **ATTACHMENT—Priority Over Unrecorded Deed.**—An attachment levied in good faith upon land previously conveyed by an unrecorded deed takes precedence, under the Oregon statutes, over the conveyance. (Or.) *Haines v. Connell*, 835.

5. **ATTACHMENT—Unrecorded Deed—Burden to Show Good Faith.**—When, in a suit involving the priority of an attachment over a prior unrecorded deed, the attaching creditors, by the allegations of their answer, assume the burden which the law casts on them of showing their good faith and want of notice in levying the attachment, a failure to deny such allegations in the reply is an admission of their truth. (Or.) *Haines v. Connell*, 835.

Levy of Writ—Trespass.

6. **ATTACHMENT, Officer Acting Under Writ of, What may not do.**—If an officer having a writ of attachment against a woman who owns a lunchroom managed by her husband goes to such room, and, in addition to attaching the chattels therein, orders the husband and the employes out of the room in the evening, it being run night and day, puts a lock and staple on the door, and leaves a keeper therein during the night, and by thus closing prevents the customers from coming in until 10 or 11 o'clock of the next forenoon, these acts of expulsion and of locking up are beyond his authority under his writ. (Mass.) *Walsh v. Brown*, 556.

7. **A PUBLIC OFFICER Exceeding His Authority becomes a trespasser ab initio.** (Mass.) *Walsh v. Brown*, 556.

8. **TRESPASS, When not Waived.**—The giving of a bond to dissolve an attachment does not estop the person giving it from maintaining an action against the attaching officer for acts done by him, and not justified by his writ, and on account of which he became a trespasser ab initio. (Mass.) *Walsh v. Brown*, 556.

ATTORNEY AND CLIENT.

Disbarment of Attorney.

1. **ATTORNEYS—Grounds for Disbarment.**—Where an attorney, upon discovering a defect in the charter of a corporation, conspires to

harass the company and to embarrass its business by organizing a corporation of the same name ostensibly for the purpose of conducting a similar business, but really for the sole purpose of injuring its business and extorting money from it, his conduct warrants disbarment proceedings, although he acts openly and under a claim of right. (Ill.) *People v. MacCauley*, 287.

2. **ATTORNEYS.**—The Standard of Personal and Professional Integrity which should be applied to persons admitted to practice law is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law. (Ill.) *People v. Macauley*, 287.

3. **ATTORNEYS.**—Youth or Inexperience does not extenuate the offense of fraudulent conspiracy to extort money that is inconsistent with the common honesty which should be an attribute of every attorney having the license of this court. (Ill.) *People v. Macauley*, 287.

Contracts of Attorneys.

4. **CONTRACTS OF ATTORNEYS, Rescinding Because of Unconscientious Advantage Taken.**—If a man who has killed another and is charged with murder in the first degree and threatened with mob violence, and is under great excitement, enters into a contract with a firm of attorneys, whereby they agree to defend him, receiving of him property in excess of seven thousand dollars in value, leaving him an estate of a little more than one thousand dollars, and a few days thereafter he commits suicide, such contract may, in a suit brought by his administrator, be adjudged to be unlawful and oppressive, and relief granted therefrom. (Ark.) *Pindall v. Waterman*, 87.

AUTOMOBILES.

See Highways, 8-12.

BANKRUPTCY.

1. **BANKRUPTCY—Discharge—Res Judicata.**—A debt due to a creditor of a bankrupt, provable in bankruptcy proceedings, is barred by a discharge in bankruptcy granted upon notice to such creditor and without objection, although the bankrupt has been refused a discharge in bankruptcy in a former proceeding, on objection of the same creditor, and in respect to the same indebtedness, if the ground for such refusal does not appear, and the debt is one not excepted from the operation of the discharge by the terms of the bankruptcy statutes. (Fla.) *Bluthenthal v. Jones*, 181.

2. **BANKRUPTCY—Judgment for Breach of Promise.**—A judgment recovered in an action for breach of contract to marry, wherein there is no allegation of seduction, is for a breach of contract, not for a willful and malicious injury, and hence does not survive the discharge of the defendant in bankruptcy. (Iowa) *Bond v. Milliken*, 440.

3. **BANKRUPTCY—Appeal.**—The Question cannot be Raised for the first time on appeal that a discharge in bankruptcy is not effectual as against a judgment because the latter was not scheduled. (Iowa) *Bond v. Milliken*, 440.

BANKS AND BANKING.

1. **BANKS—Checks, Improper Delay in Presenting for Indorsement, What is.**—If the drawer, drawee, and payee of a check all

reside in the same city, or town, the check is not presented in reasonable time unless presented before closing of business hours on the day after its issuing. If not presented within the time thus fixed, and there is a loss due to delay, such loss falls on the holder of the check. (Mass.) *Gordon v. Levine*, 565.

2. **BANKING.**—Check, Time for Presenting, When It Passes from One Owner to Another.—The fact that after a check issues it passes from hand to hand, and several persons thereby become owners of it at different times, does not extend the time for its presentment for payment, when the drawer, drawee, and holder all reside in the same city or town. The doctrine of *Taylor v. Wilson*, 11 Met. 44, 45 Am. Dec. 180, disapproved. (Mass.) *Gordon v. Levine*, 565.

BASTARDY.

1. **BASTARDY** Proceedings are of a Civil, and not of a criminal, nature. (Ark.) *Land v. State*, 25.

2. **CONSTITUTIONAL LAW**—Bastardy Proceedings, Power of the Court to Commit Father to Jail—Imprisonment for Debt.—Though a proceeding in bastardy is not criminal, but civil in its nature, yet the court may be authorized to enter judgment against the father for the lying-in expenses of the mother and for the maintenance of the child, and to enforce such judgment by his commitment to jail. This is a proper exercise of the police power of the state. (Ark.) *Land v. State*, 25.

3. **EVIDENCE**—Exhibition of a Child to the Jury.—In bastardy proceedings, the court may allow the child to be exhibited to the jury. The weight to be given such evidence is for the jury. (Ark.) *Land v. State*, 25.

BENEFICIAL ASSOCIATIONS.

1. **BENEFIT ASSOCIATION**, When not Bound by the Act or Neglect of a Clerk.—The promise of the clerk of a local lodge of the Modern Woodmen of America that he will notify a beneficiary of any assessment that may be levied is not binding, and does not prevent a forfeiture from occurring by his failure to keep such promise and the consequent default in the payment of assessments, which would have been paid had notice thereof been given as promised. (Wash.) *Sheridan v. Modern Woodmen*, 987.

2. **MUTUAL BENEFIT ASSOCIATIONS**.—Insanity of the person insured does not excuse the nonpayment of assessments nor prevent a forfeiture resulting therefrom. (Wash.) *Sheridan v. Modern Woodmen*, 987.

3. **MUTUAL BENEFIT ASSOCIATIONS**—Laches of Beneficiary. Where the beneficiary of mutual benefit insurance knows that the insured is insane, and that the dues and assessments on his policy are payable every three months, and, having made a tender of payment, which is refused, fails to take any further steps during the remaining two years of the life of the insured for his reinstatement, such beneficiary is estopped from maintaining an action on the policy, on the ground that the original cause of forfeiture occurred through the insanity of the insured and the failure of the clerk of a local lodge to keep his promise to give notice of the assessments becoming due. (Wash.) *Sheridan v. Modern Woodmen*, 987.

BIGAMY.

1. **BIGAMY**—Burden of Proof as to Matters of Confession and Avoidance.—In a prosecution for bigamy, if it is proved that the

accused and his first wife were married according to the laws of the state wherein the marriage took place, it is not necessary for the prosecution to show that she was competent to enter into the marriage relation, nor that there were no impediments to the marriage. (Wash.) *State v. Kniffen*, 1009.

BILL OF EXCEPTIONS.

See Appeal and Error, 3, 4.

BILL OF PARTICULARS.

See Pleading, 2-4.

BILLS AND NOTES.

1. **PROMISSORY NOTE** Given to Compound Felony.—To defeat an action on a note given to compound a felony, it is not necessary to prove that the alleged crime was in fact committed. (Iowa) *W. T. Joyce Co. v. Bohan*, 410.

2. **BILLS AND NOTES—Indorsement and Reindorsement—Liability—Estoppel.**—If a bank, after indorsing a note to its president for collection, and receiving from him a reindorsement to its own order, transfers the note for value to a third person without striking out its indorsement, and the failure to strike out the indorsement is not caused by mistake, accident, or oversight, the bank is estopped to deny its liability to such third person as an indorser in blank, regardless as to whether the reissue was before or after maturity. (Colo.) *Moore v. First National Bank*, 120.

3. **BILLS AND NOTES—Contract to Pay Debts.**—If a person, in consideration of an assignment to him of all of a bank's assets agrees to pay all of its liabilities, he is liable for the payment of a note on which the bank is liable as an indorser. (Colo.) *Moore v. First National Bank*, 120.

4. **BILLS AND NOTES.**—Forged paper without negligence imputed to the party affected by the forgery is not a binding contract, whether the forgery was committed by alterations or a substitution of the forged contract for the supposed or genuine one. (Me.) *Biddeford Nat. Bank v. Hill*, 499.

BREACH OF MARRIAGE CONTRACT.

1. **MARRIAGE, Promise of, What Implied Therefrom.**—Unconditional promises of marriage exchanged between a man and a woman imply that each is physically, morally and legally competent to enter the status of matrimony and capable, in so far as he or she knows or has reason to believe, of effectuating the principal purposes of the marriage relation. (Wash.) *Grover v. Zook*, 1012.

2. **MARRIAGE Between Consumptives, Right to Refuse to Keep Promise of.**—If a man having the hereditary taint of consumption enters into an engagement of marriage with a woman already afflicted with that disease, their contract of marriage is against public policy, and he should withdraw from it, and if he does so, he is not liable to an action for damages. (Wash.) *Grover v. Zook*, 1012.

See Bankruptcy, 2.

BROKERS.

1. **BROKER to Sell Real Property, When Entitled to Commissions.** If, after real property has been placed in a broker's hands for sale, such sale is brought about by his advertisements and exertions, he is entitled to commissions, though the sale is made by the owner. (Ark.) Branch v. Moore, 78.

2. **BROKER to Sell Real Property, Attempt to Revoke the Agency.** If, after a broker is employed to sell real property and introduces a purchaser to the owner, the latter then or subsequently revokes the agency and soon afterward makes the sale to a person introduced by the broker, the latter is entitled to his commissions. (Ark.) Branch v. Moore, 78.

3. **IF A BROKER to Sell Real Property is induced by the owner, after introducing an intending purchaser, to discontinue negotiations on the ground that the wife of the owner will not consent to the conveyance, and the owner subsequently effects a sale to the person thus introduced, the broker is entitled to his commissions.** (Ark.) Branch v. Moore, 78.

4. **AGENCY to Sell Real Property, Right to Revoke.**—An owner employing a person to sell real property may revoke the agency at any time before the sale is made, but he cannot do so merely for the purpose of depriving the broker of his commissions. (Ark.) Branch v. Moore, 78.

5. **A BROKER to Sell Real Estate cannot be Deprived of His Right to Commissions** on the ground that the property was a homestead, and the authorization to sell was not binding on the wife if in fact the sale is made and she joins in a conveyance to the purchaser. (Ark.) Branch v. Moore, 78.

CARRIERS.

1. **COMMON CARRIERS are not Insurers of the Safety of Their Passengers.**—They are held to reasonable care only, and that care means the highest care consistent with the proper transaction of their business. (Mass.) Millmore v. Boston El. Ry. Co., 558.

2. **STREET RAILWAYS, Duty of, to Alighting Passengers.**—A conductor does not perform his duty by simply waiting a reasonable time for a passenger to alight. He must exercise reasonable care to see that the passenger is off the car. He is not, however, absolutely bound to see that the passenger is off. The care resting on him is the highest care consistent with the proper transaction of the business, and if he has exercised that degree of care, he has not been negligent. (Mass.) Millmore v. Boston El. Ry. Co., 558.

3. **STREET RAILWAYS, Duty of, to See Alighting Passenger.**—A conductor of a street railway is not bound absolutely to see that an alighting passenger has safely alighted before starting the car, but such conductor is required to know, if in the exercise of due care, caution and diligence he could know, that any person is attempting to alight before permitting the car to start in such a manner as might be liable to injure him. (Mass.) Millmore v. Boston El. Ry. Co., 558.

Note.

Cemeteries, constitutionality of statutes prohibiting use of property as, 473.

CERTIORARI.

1. **CERTIORARI**—Judgments of the Criminal Courts, When will be Set Aside upon.—A judgment of the juvenile court will be vacated on certiorari when it does not appear from the record that facts existed or were found authorizing the court to deprive the father of the custody of the child and commit it as a ward of the state. (Utah) *Mill v. Brown*, 935.

2. **CERTIORARI**, Inquiry into the Constitutionality of a Statute Under.—In a proceeding by certiorari the constitutionality of a statute may be inquired into and determined, if, on finding that the statute is invalid, the acts of the court or judge must be held to have no support, and to be hence of no force or effect. (Utah) *Mill v. Brown*, 935.

3. **CERTIORARI**—Inquiry into the Regularity of the Manner of the Appointment of a Judge.—In certiorari the court cannot inquire into the regularity of the manner of the appointment or the qualification of the judge whose judgment is assailed. (Utah) *Mill v. Brown*, 935.

Note.

Chancery. See Infants.

COLLATERAL SECURITY.

See Pledges.

COMMERCE.

See Intoxicating Liquors.

COMMON LAW.

1. **COMMON LAW**.—The Spirit of the Common Law is the instinct of common sense. (Minn.) *Bader v. New Amsterdam Cas. Co.*, 613.

2. **COMMON LAW**—Nature and Origin.—The common law is not a codification of exact or inflexible rules for human conduct, for the redress of injuries, or protection against wrongs, nor yet a mere figment of judicial genius; but, on the contrary, is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of them. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

Note.

Connivance. See Divorce.

CONSPIRACY.

1. **CORPORATIONS**, Liability of, for Conspiracy.—A corporate body is liable for conspiracy under the same circumstances as a natural person. (Mass.) *Aberthaw Const. Co. v. Cameron*, 542.

2. **CONSPIRACY**.—To a conspiracy it is necessary that there be a mutual intent whereby all the conspirators work together for a common end. (Mass.) *Aberthaw Const. Co. v. Cameron*, 542.

3. **CONSPIRATORS**, Who are not.—The fact that a corporation, being informed that a person working upon a building being con-

structed for it is obnoxious to certain trades unions, and that, if not discharged by his employer, there will be a general strike, attempts to persuade such employer to avoid further difficulty by discharging such employe, does not make the corporation a co-conspirator with the trades unions in seeking the discharge of such employe. (Mass.) *Aberthaw Const. Co. v. Cameron*, 542.

4. **CONSPIRACY to Obtain the Discharge of Workman—Finding of, When Sustained.**—A finding that the defendants conspired together to compel the plaintiff to employ only union carpenters, and that, in pursuance of such conspiracy, they caused a breach of an existing contract of employment between the plaintiff and one of the defendants without any just cause or legal provocation, is warranted by evidence tending to show that the plaintiff was in the employ of a person who had a contract with one of the defendants to do certain concrete work in a building under process of erection for it, and that defendants, for the purpose of compelling the employment only of persons belonging to such trades unions, united in securing the abandonment of such defendant. (Mass.) *Aberthaw Const. Co. v. Cameron*, 542.

5. **INJUNCTION Extending Beyond the Case Made by the Complaint.**—In a Suit to Restrain Defendants from Carrying Out a Conspiracy to Compel the Discharge of nonunion workmen through the violation of a contract, the court cannot grant an injunction to prevent interference in the future, if the plaintiff, in the performance of other contracts, chooses to employ nonunion workmen. There is no presumption that the defendants will engage in similar wrongful acts in the future, and if they do so, this must be pleaded and proved before it can be the ground for relief. (Mass.) *Aberthaw Const. Co. v. Cameron*, 542.

CONSTITUTIONAL LAW.

Extra Session of Legislature.

1. **CONSTITUTIONAL LAW—Extra Session of Legislature—Proclamation.**—If, after the governor has issued a proclamation convening the General Assembly in extra session to meet on a day specified to consider legislation upon certain designated subjects, it occurs to him that other subjects than those specified should be passed upon by the legislature, he may lawfully issue another proclamation fixing the same time for the meeting of the General Assembly as was fixed in the first, and designate other subjects for its consideration. (Pa.) *Pittsburg's Petition*, 845.

2. **CONSTITUTIONAL LAW—Extra Session of Legislature—Subject Within Proclamation.**—A statute enabling cities in close proximity to be united, providing for the consequences of the consolidation, the temporary government of the consolidated city, and the payment of the debts of such united cities is within the scope of the proclamation of the governor calling an extra session of the legislature for the purpose of considering legislation to enable cities in close proximity to be united in one municipality. (Pa.) *Pittsburg's Petition*, 845.

Construction of Statutes.

3. **CONSTITUTIONAL LAW—Construction of Statutes.**—It is the duty of courts to construe statutes with reference to the constitution, and if that is clearly violated by a provision of a statute, such provision must be declared inoperative; but if the provision is not clearly in conflict with the constitution, or if there is a well-

founded or reasonable doubt as to the constitutionality of the provision, the legislative will as expressed therein will be sustained. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

Class Legislation.

4. **CONSTITUTIONAL LAW—Class Legislation.**—If conditions reasonably justify the distinguishing of a class, and the law affects equally all who come within that class, such law is not unconstitutional as class legislation. (Mo.) State v. Swagerty, 671.

5. **STATUTE, Effect of Unconstitutional.**—An unconstitutional law by which it is sought to affect the rights of a citizen is of no force or effect, and does not bind anyone. (Utah) Mill v. Brown, 935.

6. **STATUTES, Classification, Constitutionality of.**—The legislature may make a classification so affecting cities of the first and second classes and other parts of the state that juvenile courts may be created for such cities, and the powers of such courts left elsewhere to the district courts. (Utah) Mill v. Brown, 935.

Regulation of Right to Labor.

7. **CONSTITUTIONAL LAW.—The Right to Labor or Employ Labor,** guaranteed by the fourteenth amendment, is subject to the power of the states to reasonably regulate callings affecting the public health and welfare. (Or.) State v. Muller, 805.

8. **CONSTITUTIONAL LAW—Hours of Labor by Females.**—A statute is constitutional which forbids the employment of females more than ten hours a day in any factory, laundry or mechanical establishment. (Or.) State v. Muller, 805.

9. **CONSTITUTIONAL LAW—Employment of Minors.**—The legislature, under its police power, can fix an age limit below which boys should not be employed, and when the age limit is so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and if such boy is injured while engaged in the performance of the prohibited duties for which he is employed, his employer is liable in damages for the injuries thus sustained. (Pa.) Lenahan v. Pittston Coal Min. Co., 885.

Judicial Officers and Acts.

10. **JUDICIAL OFFICERS — Interest — Disqualification.**—The maxim, that "A person ought not to be judge in his own cause, because he cannot act both as judge and party," applies in all cases where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort. (Me.) Conant's Appeal, 512.

11. **JUDICIAL OFFICERS—Interest—Disqualification.**—If one of a board of town selectmen signs the report of the location of a town way, and also a petition for the way, and assists in laying it out, he is disqualified from participating in the judgment of the board, and his participation therein renders such judgment void, even if a sufficient number without him concur in the result. (Me.) Conant's Appeal, 512.

12. **JUDICIAL ACTS, What are—Sheep Inspectors.**—The acts of a sheep inspector in quarantining sheep and in defining the place and limits of the quarantine are not ministerial, but quasi judicial. (Utah) Garff v. Smith, 924.

13. **JUDICIAL ACTS AND OFFICERS—Sheep Inspectors.**—If sheep inspectors and their deputies are required by law to inspect

and quarantine sheep and make regulations for such quarantining, without prescribing at what character of place nor within what limits the sheep must be quarantined, the determining of such place and limits involves matters of judgment and discretion, not from fixed and designated, but from varied and multifarious, facts, and the acts of such officers are quasi judicial in their character, for which they cannot be held liable in a civil action in the absence of malice, fraud or corruption. (Utah) *Garff v. Smith*, 924.

See Bastardy, 2; Counties, 12-14; Drainage; Executors and Administrators, 3; Statutes.

Note.

Constitutional Law, contracts, laws in force at execution of, constitute parts of, 476.

contracts, impairment of obligation of, when forbidden, 470, 471.

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See Juvenile Courts; Laws; Reform Schools and Reformatories.

CONTRACTS.

1. **CONTRACTS Against Public Policy.**—A contract to transfer county orders and take chances on the result of an action expected or threatened to be brought to have them declared void and their payment enjoined, made on behalf of a corporation through its general manager, who is also chairman of the county board of supervisors, is opposed to public policy and void. (Wis.) *Giblin v. North Wisconsin L. Co.*, 1040.

2. **CONTRACTS—Privilege of Naming Child.**—The privilege of naming a child may be waived by its parents and bestowed upon another, and when so bestowed in a contract with a third person, it rests on such privity between the parent and child as to enable the child to ratify the transaction and enforce the contract. (Wis.) *Freeman v. Morris*, 1038.

3. **CONTRACT TO PAY DEBTS—Extent of Liability.**—If one assumes the debts of a bank in consideration of a transfer to him of its assets, his obligation is not limited to the amount of its estimated liabilities. (Colo.) *Moore v. First National Bank*, 120.

4. **CONTRACTS Partly in Writing and Partly in Parol.**—Under a written contract for the collection of claims according to a "system" of the collector, such system as explained by the agent securing the

contract becomes part thereof, although not in writing, and the written and oral parts of the contract are to be construed together in determining what the whole contract expresses. (Me.) *American Mercantile Exchange v. Blunt*, 463.

5. **CONTRACTS—Abrogation by Statute.**—If an entire contract is lawful when made and a statute afterward renders performance of it unlawful, neither party is prejudiced, but the contract is to be considered at an end; and although a party is thus released from liability for damages for nonperformance, he has no right to maintain an action for recovery on the contract, the performance of any part of which is prohibited, even though it has been partly performed. (Me.) *American Mercantile Exchange v. Blunt*, 463.

6. **CONTRACTS—Abrogation by Statute—Part Performance.**—If any material stipulation in an entire contract is rendered illegal by the enactment of a statute before performance, the contract cannot be enforced. The contract fails and no recovery can be had even for the part performed. (Me.) *American Mercantile Exchange v. Blunt*, 463.

7. **CONTRACTS—Meaning of—What Enforceable.**—The term "contract" implies mutual obligations, and, in general, contracts, other than options or unilateral obligations, are not enforceable unless both parties are bound, so that an action could be maintained by each against the other for a breach. (Ind.) *Fowler Utilities Co. v. Gray*, 344.

CONVERSION.

Trover and Conversion.

CORPORATIONS.

In General.

1. **CORPORATIONS—Estoppel.**—One Who Purchases All the Stock in a corporation does not acquire the ownership of the corporate property so that representations made to him at the time of the purchase in regard to the right of the corporation to draw its water supply from a pond can create an estoppel in favor of the corporation itself. (Ill.) *Coal Belt etc. Ry. Co. v. Peabody Coal Co.*, 282.

Married Woman as Incorporator.

2. **CORPORATIONS—Married Woman as Incorporator.**—Under a statute providing that "three or more adult persons, residents of this state, may form a corporation," a married woman may be an incorporator, although two of the three incorporators of the corporation are husband and wife. (Wis.) *Good Land Co. v. Cole*, 1056.

3. **CORPORATIONS—Married Woman Incorporator—Effect on Separate Property.**—The investment by a wife of her separate property in a corporation in which she and her husband are incorporators gives the husband no control over it by reason of their relation to the corporation. (Wis.) *Good Land Co. v. Cole*, 1056.

Acts and Liabilities of Stockholders.

4. **CORPORATIONS—Acts of Stockholders—Liability.**—Corporations are not responsible for the acts of their stockholders not acting in a representative capacity. (Colo.) *Liebhardt v. Wilson*, 97.

5. **CORPORATIONS—Debts of Adjunct Corporation.**—Whether a corporation was formed by another corporation to be used as an adjunct of the first is immaterial, so far as the liability of the original corporation for the debts of the other is involved, if such debts were

incurred after the adjunct corporation had gone out of business and had been revived and operated by third persons. (Colo.) *Liebhardt v. Wilson*, 97.

6. **CORPORATIONS—Liability of Majority Stockholder.**—A stockholder in a corporation is not liable for its acts beyond his statutory liability, from the mere fact of his being the majority stockholder. (Colo.) *Liebhardt v. Wilson*, 97.

7. **CORPORATIONS—Liability of Majority Stockholder.**—If a majority stockholder in a corporation is not in charge of its business nor consulted as to its transactions, he is not personally liable for a purchase made by it from a third person, although he afterward bought the same property for another corporation in which he is a stockholder. (Colo.) *Liebhardt v. Wilson*, 97.

8. **CORPORATIONS—Liability of Stockholders—Extent of Interest.**—The liability of a stockholder in a corporation does not depend upon the amount of stock which may be held by him therein, unless he has used an influence possessed by reason of his interest for fraudulent purposes. (Colo.) *Liebhardt v. Wilson*, 97.

Dividends and Profits.

9. **CORPORATIONS—Suit for Profits.**—A shareholder cannot ordinarily sue the corporation for his share of accumulated profits until a dividend has been declared. (Pa.) *Corgan v. George F. Lee Coal Co.*, 891.

10. **CORPORATIONS—Sale of Stock—Right to Dividends.**—As between the vendor and vendee of shares of corporate stock, the vendee is entitled to all dividends declared thereon after the sale of the stock, and, although the transfer has not been recorded, the transferee has a right to the dividends as against the transferor. (Pa.) *Corgan v. George F. Lee Coal Co.*, 891.

Suit against Directors.

11. **CORPORATIONS—Directors—Remedy Against, When must be in Equity, and not in Law.**—To enforce a liability arising from a statute providing that the directors of a street railway company shall be jointly and severally liable to the extent of its capital stock for all its debts and contracts until the whole amount of its capital stock shall be paid in, and a certificate stating the amount so fixed and paid in shall have been signed and sworn to by its president, treasurer, clerk, and a majority of its directors, and filed in the office of the secretary of the commonwealth, the remedy is in equity and not at law, because the liability is not to be enforced solely for the benefit of the creditor who may first seek to avail himself of it, but must be made available for the benefit of all creditors. (Mass.) *Westinghouse Electric etc. Co. v. Reed*, 576.

12. **CORPORATIONS—Suit Against Directors, Corporation, When not a Necessary Party to.**—Under a statute making the directors of a corporation liable for its debts until the whole amount of its capital stock has been paid in, the corporation is not a necessary party to a suit against the directors. (Mass.) *Westinghouse Electric etc. Co. v. Reed*, 576.

13. **CORPORATION, Directors, Liability of, is not Terminated by Their False Certificate.**—Under a statute making directors of a corporation liable for its debts until its capital stock has been paid in, and a certificate stating the amount is signed and sworn to by the president, treasurer, clerk, and a majority of the board of directors, the liability of the directors does not terminate on their filing a false

certificate of the required facts, though such certificate was made in good faith. (Mass.) *Westinghouse Electric etc. Co. v. Reed*, 576.

Service of Process by Publication.

14. **CONSTITUTIONAL LAW—Due Process of Law.—Service by Publication** upon a domestic corporation which has failed to put forth officers or agents upon whom service may be had constitutes due process of law. (Fla.) *Clear Water etc. Co. v. Roberts*, 153.

15. **JUDGMENTS Against Corporations—Service by Publication.** A personal judgment against a domestic corporation based upon service of process by publication as provided by statute is not void. (Fla.) *Clear Water etc. Co. v. Roberts*, 153.

See Conspiracy, 1-4.

COSTS.

COSTS.—A Judgment for Costs is not a Debt created by contract, express or implied, but is a liability created by statute. (Ark.) *Buckley v. Williams*, 24.

COTENANCY.

See Tenancy in Common.

COUNTIES.

County Commissioners.

1. **JURISDICTION of County Commissioners—Determination of an Appeal.**—The question of the jurisdiction of county commissioners to affirm the location of a town way, made by its selectmen, and any other questions affecting the legality of their proceedings therein, may be raised and determined on appeal. (Me.) *Conant's Appeal*, 512.

County Orders.

2. **JUDGMENTS—County Orders—Failure of Consideration.**—If county orders are adjudged void, there is a total failure of consideration for a prior sale of them. (Wis.) *Giblin v. North Wisconsin L. Co.*, 1040.

3. **COUNTY ORDERS—Sale of—Implied Warranty.**—In a sale of county orders there is an implied warranty that the seller has title and that such orders are not spurious, false or counterfeit. (Wis.) *Giblin v. North Wisconsin L. Co.*, 1040.

4. **JUDGMENTS—Tender of Defense.**—If a suit is brought to declare certain county orders void and to enjoin their payment, the fact that the assignee of such orders did not notify and tender the opportunity to the assignor, as indorser of the orders, to defend the action does not prevent the judgment in that action from being conclusive, if the assignor actually defended such suit. (Wis.) *Giblin v. North Wisconsin L. Co.*, 1040.

Taxation and Expenditures—Protection of Harbors.

5. **CONSTITUTIONAL LAW—Taxation for County Purposes.**—Legislative authority to a county to pay out for other than county purposes money derived from taxes assessed and imposed by a county is in conflict with a constitutional provision that "the legislature shall authorize the several counties in the state to assess and impose taxes for county purposes, and for no other purposes." (Fla.) *Board of County Commrs. v. Board of Pilot Commrs.*, 196.

6. CONSTITUTIONAL LAW—Expenditures for County Purposes.—Whether an expenditure to be made from the funds derived by a county from taxes assessed and imposed by it by virtue of legislation under the constitution is or is not for a county purpose, is to be determined by the courts from the facts of the case, but when an expenditure is authorized by the legislature as being a county purpose, the courts will not interfere except in cases free from all reasonable doubt. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

7. CONSTITUTIONAL LAW—Expenditures for County Purposes.—If a county purpose has been designated by a statute which directs that the expenses incurred by certain officers for the protection of ports, harbors, bays, and rivers within the county, shall be audited and paid, this designation of a county purpose will, in deference to the legislative department, be recognized and enforced by the courts unless it clearly appears that it is not a county purpose within the meaning of the constitution. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

8. COUNTIES—Expenditures by.—If the payment demanded of a county is for a county purpose, the particular officers engaged and methods used under a statute in incurring the expenditure do not affect its character. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

9. COUNTIES—Protection of Harbors.—It is competent for the state, acting through the counties, to protect the ports, harbors, bays and rivers therein, if the control of the general government within its sphere is not thereby interfered with. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

10. COUNTIES—Burden of Protecting Harbors.—When a port or harbor is within a county, it is competent for the legislature to impose upon the county the burden of protecting it. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

11. COUNTIES—Supervision Over Harbors.—If, under a constitution, the powers and duties of county commissioners are prescribed by statute, and the statute does not give them exclusive police or other supervision over the ports or harbors of the state, the legislature may provide for the exercise of such powers within a county by officials other than the county commissioners. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

12. CONSTITUTIONAL LAW—County Expenditures.—The constitution does not require that the legislature shall impose a limitation upon expenditures incurred for county purposes, and in the absence of such a limitation the legislature has plenary power within proper county purposes. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

13. COUNTIES—Protection of Harbors.—The fact that the greater part of a harbor is within the corporate limits of a city, and under the protection of the police department thereof, does not relieve the county of its powers and duties with reference to the protection of such harbor within its territory. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

14. COUNTIES—Protection of Harbors.—Even if a harbor lies within the corporate limits of more than one county, and is under the police protection of both counties, the state is not thereby precluded from providing for the protection of the portion of the harbor within one of such counties at the expense thereof. (Fla.) Board of County Commrs. v. Board of Pilot Commrs., 196.

COURTS.

In General.

1. **COURTS.**—A Court Consists of Persons Officially Assembled - under authority of law at the appropriate time and place for the administration of justice. (Or.) Marsden v. Harlocker, 786.

2. **COURTS.**—The Law Makes a Distinction Between a Judge and a judicial tribunal. (Or.) Marsden v. Harlocker, 786.

3. **CONSTITUTIONAL LAW**—Creation of New Courts.—The facts that certain powers and duties may be exercised by certain courts does not prohibit the legislature from creating new courts, conferring upon them like powers and duties under a constitution declaring that the constitutional power shall be vested in the supreme court, in district courts, in justices of the peace, and in such other courts inferior to the supreme court as may be established by law. (Utah) Mill v. Brown, 935.

Probate Courts.

4. **JURISDICTION.**—The Probate Courts of Arkansas are superior courts with limited jurisdiction, and judgments rendered in the exercise of such jurisdiction cannot be called into question collaterally. (Ark.) Hare v. Shaw, 17.

Juvenile Courts.

5. **CONSTITUTIONAL LAW**—Creating Juvenile Courts.—The legislature may create a court or courts wherein juvenile offenders may be dealt with, although they were formerly dealt with in other courts. (Utah) Mill v. Brown, 935.

6. **CONSTITUTIONAL LAW**—Juvenile Courts, Vesting Exclusive Jurisdiction.—The legislature may vest in juvenile courts in cities of the first and second class exclusive jurisdiction of juvenile offenders, where the object is to relieve the overcrowded courts in those cities of this burden. (Utah) Mill v. Brown, 935.

7. **STATUTES**, Implied or Indirect Amendment of—Constitutional Law.—A statute creating juvenile courts and prescribing their functions is not unconstitutional under a constitution providing against amending any law without setting forth the new section as amended. This statute is not intended as an amendment of any other law, and if it has such effect, it is incidental and by implication merely. This prohibition was not intended to prevent new legislation that may incidentally affect earlier laws. (Utah) Mill v. Brown, 935.

8. **CONSTITUTIONAL LAW**—Juvenile Courts.—The statutes creating courts having jurisdiction of juvenile offenders are in no sense criminal, and are not intended to provide punishment, but to save the child from becoming a criminal, and are hence not unconstitutional, though they do not provide for trial by jury, or arraignment, or plea, nor notice to the person or a warrant of arrest, and requiring the child to be a witness against himself. (Utah) Mill v. Brown, 935.

9. **CONSTITUTIONAL LAW**—Juvenile Courts—Attempting to Give Jurisdiction Over Adults.—Section 7 of the statutes of Utah providing for criminal courts, and declaring, where a child is delinquent as defined by the act, his parent responsible for or aiding, encouraging, causing, or contributing to the delinquency, shall be guilty of a misdemeanor, and may be brought before the court and examined, and if found guilty, the court may impose conditions on him, and as long as he complies therewith, may suspend the sentence, is unconstitutional, because it denies to him the right of trial by jury. (Utah) Mill v. Brown, 935.

10. **CONSTITUTIONAL LAW—Juvenile Courts, Statute not Void as a Whole.**—Though the statute creating juvenile courts is invalid in so far as it undertakes to pronounce the parent of the delinquent child guilty of misdemeanor in certain cases and punishable therefor, but does not provide for a trial by jury, this does not render the balance of the statute unconstitutional or void. (Utah) *Mill v. Brown*, 935.

11. **CONSTITUTIONAL LAW—Juvenile Courts—Rights of Parents.**—Before a child can be made a ward of the state by proceedings in the juvenile courts, it must appear that the child is delinquent within the meaning of the statute, and that the parent or legal guardian is incompetent or has neglected and failed to care and provide for the child the training and education contemplated and required by both law and morals, and a court committing a child without first finding the existence of these conditions exceeds its power. (Utah) *Mill v. Brown*, 935.

12. **JUVENILE COURTS—Notice to Parents.**—Though a parent or guardian is not a necessary party to the proceedings in juvenile courts, and cannot be bound by a judgment respecting his rights to the custody and control of the child, yet it is proper to give such formal notice to such parent or guardian to the end that all the facts may be elicited by the investigation. (Utah) *Mill v. Brown*, 935.

13. **JUVENILE COURTS, Practice in.—Findings Should be made in each case in conformity with the facts, and judgment rendered in accordance therewith.** (Utah) *Mill v. Brown*, 935.

CRIMINAL LAW.

Former Jeopardy.

1. **CRIMINAL LAW—Former Jeopardy—Improper Discharge of Jury.**—The silence of a person on trial, accused of crime, or his failure to object or protest against an unlawful discharge of the jury before verdict, does not constitute a consent or waiver of such discharge, or of his constitutional right not to be put twice in jeopardy for the same offense. (Fla.) *Allen v. State*, 188.

2. **CRIMINAL LAW—Former Jeopardy—Wrongful Discharge of Jury.**—The power of the court to discharge a jury after it has been sworn in chief, before verdict, should be exercised only in case of a manifest, urgent, or absolute necessity, and if the jury is discharged for a reason illegally insufficient and without an absolute necessity for it, and without the defendant's consent, the discharge is equivalent to an acquittal, and may be pleaded in bar to any further trial, or to any subsequent indictment. (Fla.) *Allen v. State*, 188.

3. **CRIMINAL LAW—Former Jeopardy.**—A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is thus charged when it has been impeached and sworn. (Fla.) *Allen v. State*, 188.

Trial.

4. **CRIMINAL LAW—Affirmative Defense—Amount of Proof.**—In criminal cases in which the burden of proof is on the defendant to sustain an affirmative defense set up, it is only necessary to establish it by a preponderance of the evidence, and it is not required that it should be proven beyond a reasonable doubt. (Pa.) *Commonwealth v. Deitrick*, 861.

5. **CRIMINAL LAW—Erroneous Instructions.**—If clear error appears in the instructions to the jury upon the vital and controlling defense set up in a criminal case the appellate court cannot say that no harm was done the defendant, and therefore no reversible error was committed. (Pa.) *Commonwealth v. Deitrick*, 861.

6. **CRIMINAL TRIALS—Jury, Failure to Instruct Where There is No Request.**—If a request is made in a criminal trial for an instruction respecting the lesser offense involved in the offense charged and no exception taken because an instruction thereon is not given, and the defendant is convicted, he is not entitled to a reversal or new trial because of not giving the instruction. (Wash.) *State v. Parsons*, 1003.

DAMAGES.

DAMAGES cannot be Recovered for that which might have been avoided by reasonable diligence. (Me.) *Davis v. Poland*, 480.

DEATH.

1. **DEATH—Right of Action for Causing.**—At the common law the death of a human being gave rise to no civil action in behalf of any person under any circumstances. (Mo.) *Bates v. Sylvester*, 761.

2. **DEATH—Survivorship of Action for Causing.**—A cause of action for wrongful death does not survive the death of the wrongdoer. (Mo.) *Bates v. Sylvester*, 761.

3. **SURVIVAL OF HUSBAND'S ACTION for Killing of His Wife.** A cause of action existing in favor of a husband for the killing of his wife through carelessness and negligence does not survive to his executor, where the statute purports to authorize the executors or administrators to prosecute actions arising from wrongs done to the property or person of another. The death of the wife is not an injury to the person or property of the husband. (Ark.) *Billingsley v. St. Louis etc. Ry Co.*, 95.

DEEDS.

Warranties.

1. **DEEDS.—A Minor is not Bound by the Warranties in a deed** executed by his mother, who had purchased the land at an administrator's sale, of her husband's estate, if the minor does not claim as her heir, but as heir of his father. (Ill.) *Manternach v. Studdt*, 310.

Consideration.

2. **DEEDS—Consideration.**—It is not necessary that the consideration for a deed be adequate in value. Although such consideration is small or even nominal, in the absence of fraud, it is enough to support the deed against a prior unrecorded conveyance. (Mo.) *Strong v. Whybark*, 710.

3. **DEEDS—Want of Consideration—Evidence of.**—In the absence of fraud, want of consideration cannot be shown against a recital of consideration for the purpose of defeating the operative words of a deed. (Mo.) *Strong v. Whybark*, 710.

4. **DEEDS—Record—Consideration.**—If the controversy is between the vendee in a duly recorded deed and the vendee in a prior unrecorded deed from the same grantor, the consideration in the former to make it superior must be a valuable, as distinguished from a good,

consideration, but such consideration need not be full and adequate. (Mo.) *Strong v. Whybark*, 710.

Avoidance by Wife.

5. **CONVEYANCE—Avoidance of, for Threats, or Undue Influence.**—A wife may avoid a deed of her separate property induced and obtained from her by threats of the imprisonment of her husband, no matter whether the threat is of lawful or unlawful imprisonment. (Fla.) *Burton v. McMillan*, 220.

6. **MAXIM "IN PARI DELICTO"** does not Apply to a case where a married woman sues to set aside a deed of her separate property made by her under express or implied threats of the prosecution of her husband for crime, and to save him from prosecution, whether the threatened prosecution is lawful or unlawful, when she was sick at the time of the execution of the deed, and does not appear to have had abundant opportunity for consideration and consultation with disinterested advisers. (Fla.) *Burton v. McMillan*, 220.

Quitclaim Deed.

7. **DEEDS—Quitclaim—Record—Consideration—Priority Over Unrecorded Deed.**—A grantee in a recorded quitclaim deed for a recited consideration of "natural love and affection and five dollars," without any notice or actual knowledge of a prior unrecorded warranty deed of the same land, from the same grantor, and without any fraud or collusion between such grantee and his grantor, takes title in against the grantee in such warranty deed. (Mo.) *Strong v. Whybark*, 710.

8. **DEEDS—Quitclaim—Notice.**—The rule that a quitclaim deed is notice of pre-existing equities, and that the grantee therein and those who claim under him take with notice that his title is questionable, has no application where the grantee under a subsequent quitclaim deed from the same grantor acquires title for value and without notice of a former unrecorded deed. (Mo.) *Strong v. Whybark*, 710.

9. **DEEDS—Quitclaim—Record—Notice.**—A purchaser for value by quitclaim deed is as much within the protection of the registry act as one who becomes a purchaser by warranty deed. (Mo.) *Strong v. Whybark*, 710.

10. **DEEDS—Quitclaim—Fraud.**—If fraud in its execution is relied upon as a defense to a quitclaim deed, the defendant must allege and prove it. (Mo.) *Strong v. Whybark*, 710.

See *Homesteads*.

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of tenant at sufferance, 42.

of unlawful detainer, 34.

DIVORCE.

1. **DIVORCE—Connivance in Adultery, What Amounts to.**—If a husband arranges that his wife and another man may be permitted to occupy the house of a third person for an evening, without interference or interruption, and that they shall be secretly watched, his object being to afford her an opportunity to commit adultery and obtain divorce from her if she does, and she, knowing nothing of the arrangement, goes to such house and commits the act intended, the

husband is guilty of connivance, and cannot obtain a divorce on account thereof. (Mass.) *Noyes v. Noyes*, 517.

2. **DIVORCE—Void Judgment in—Affidavit.**—Under a statute requiring a petition in divorce to be supported by the affidavit of plaintiff, such affidavit cannot be made by a next friend, and if thus made, the decree of divorce is void. (Mo.) *Hinkle v. Lovelace*, 698.

3. **DIVORCE—Affidavit, When Jurisdictional.**—If a statute requires that a petition in divorce be supported by an affidavit of plaintiff as to the absence of collusion, fear or restraint, and good faith, such affidavit is jurisdictional, and the absence thereof to that effect made by plaintiff personally, is fatal to the decree of divorce and renders it void. (Mo.) *Hinkle v. Lovelace*, 698.

4. **DIVORCE—Verification of Petition, Delay of.**—A verification by a plaintiff of her petition in divorce on the day of the final decree, by her making the required statutory affidavit, does not cure a prior fatal defect to the petition, consisting of an affidavit made by a next friend. (Mo.) *Hinkle v. Lovelace*, 698.

5. **DIVORCE—Collateral Attack.**—A petition in divorce cannot be amended in a matter of substance, after publication of notice, so as to make a valid judgment thereon against a defendant who does not appear, and a judgment rendered under such circumstances is subject to collateral attack. (Mo.) *Hinkle v. Lovelace*, 698.

6. **DIVORCE—Verification of Petition, Absence of.**—The verification required by statute to be made and annexed to a petition in divorce proceedings is a matter of substance, and the court acquires no jurisdiction of the cause without it. (Mo.) *Hinkle v. Lovelace*, 698.

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DOWER.

1. **DOWER—Release Without Joining With Husband.**—It is not necessary for a husband and wife to unite in the same deed to effect a release of her dower. She may relinquish her dower to his grantee by a quitclaim deed in which he does not join. (Iowa) *Fowler v. Chadima*, 433.

2. **DOWER, Assignment of Right to.**—A widow's right of dower in property of her deceased husband cannot, before its assignment in the manner prescribed by law, be conveyed by her to a stranger, so as to confer on him rights enforceable in an action at law, but such

a conveyance is valid and enforceable in equity. (Ark.) *Flowers v. Flowers*, 84.

3. **DOWER, Conveyance of does not Include Right to Rents and Profits Prior to the Assignment of.**—The quarantine rights of the widow until dower shall be assigned cannot be transferred to another. Hence, one to whom she assigns her rights is not entitled to an accounting of the rents and profits of the dwelling-house and the lands thereto attached prior to the assignment of dower. (Ark.) *Flowers v. Flowers*, 84.

See Husband and Wife, 1-9.

DRAINAGE.

DRAINAGE STATUTE—When Unconstitutional.—A statute providing that when any swamp land may endanger the public health, when its drainage will result in the reclamation of other waste lands, or where the construction of a ditch will benefit lands of adjoining owners, the owner of such land may petition the board of supervisors for the construction of a ditch as they may deem proper, the proceedings in respect to assessments to be analogous to those for local improvements, is unconstitutional because in effect authorizing the taking of property for private purposes and without due process of law. (Minn.) *State v. Board of Supervisors*, 640.

DURESS.

See Deeds, 5.

EASEMENTS.

EASEMENTS—Oral Agreement—Statute of Frauds.—An oral agreement for a perpetual right of way over the lands of another creates an easement or interest in land which is within the statute of frauds, and to be taken therefrom must be supported by clear, definite, and conclusive evidence. (Colo.) *Laesch v. Morton*, 108.

EJECTMENT.

1. **EJECTMENT—Evidence—Harmless Error.**—If both parties in ejectment claim the land through a common source of title, errors committed in allowing the introduction of improper evidence of such title are harmless. (Fla.) *Mansfield v. Johnson*, 159.

2. **JURISDICTION—Suits Involving Title to Land.**—A statute which requires suits for the possession of real estate or whereby the title thereto may be affected, to be brought in the county wherein such real estate lies, does not apply to actions in which the question of title is merely incidental to the main controversy. (Mo.) *Hewitt v. Price*, 681.

ELECTIONS.

Notice on Proclamation.

1. **ELECTIONS—Necessity of Notice.**—In the case of general elections the statutory requirements for issuing proclamations or giving notice are treated as directory only, but in the case of special elections such requirements are considered mandatory. (Or.) *Marsden v. Harlocker*, 786.

2. **ELECTIONS—Order or Notice of Local Option Election.**—As the right to vote under the Oregon statutes upon the question of prohibiting the sale of intoxicating liquors in any particular district is

inaugurated by filing a petition the election held in pursuance thereof is special, and hence the making of an order therefor by the county court is mandatory and a condition precedent to a valid election. (Or.) *Marsden v. Harlocker*, 786.

3. **ELECTIONS—Irregularity of Court in Ordering Local Option Election.**—Where the statutes confer on the county authority to order an election on the question of selling intoxicating liquors in a particular district, a memorandum signed by members of the court separately and at various times and places in the county is not an order signed by the court. (Or.) *Marsden v. Harlocker*, 786.

Injunction against Canvass.

4. **ELECTIONS.—A Court of Equity will Enjoin the Canvass of a vote at a local option election, which election is invalid because not ordered as prescribed by law, if no provision for a contest is made by statute.** (Or.) *Marsden v. Harlocker*, 786.

Ballots.

5. **ELECTIONS.—Tampering with Ballots, When not Presumed.**—Although it appears that a number of tickets were counted as straight for a particular party by the officers of an election, and no one noticed a cross on any of them indicating a vote for a candidate of another party, yet if it appears, on a recount, that such ballots did not have a cross on them indicating a vote for such candidate, it will not be presumed that they have been tampered with in the meantime, and he should be given the benefit of them. (Ill.) *Winn v. Blackman*, 237.

6. **ELECTIONS.—Distinguishing Marks on Ballots, What are not.**—The fact that a cross is so marked that, upon examination of the back of a ballot, the marking can be traced does not establish the existence of a distinguishing mark on account of which the ballot can be rejected, there being no evidence tending to show how or for what purpose the marking was made. (Ill.) *Winn v. Blackman*, 237.

7. **ELECTIONS.—Indorsing Initials of a Judge upon the Ballots.**—The provision of statute requiring the indorsement of the initials of one of the judges on ballots is mandatory, and without it the ballot cannot be counted. (Ill.) *Winn v. Blackman*, 237.

8. **ELECTIONS.—Ballots, Indorsing of, must be in the Judge's Own Handwriting, and One Judge cannot Indorse for Another.**—Under a statute providing that the judge of election who hands a ballot to a voter shall indorse his initials thereon, and that no ballot without such indorsement shall be allowed to be deposited in the ballot-box, one judge cannot authorize another to indorse his initials, and if such indorsement, though so authorized, is made on a ballot, it cannot be counted. (Ill.) *Winn v. Blackman*, 237.

9. **ELECTIONS.—Ballot, When not so Marked that It cannot be Counted.**—If there is nothing on the face of a ballot to show that it has ever been counted, except that there is a slight roughing of the surface inside the party circle, indicating that something has been erased by a rubber, the ballot should be rejected. (Ill.) *Winn v. Blackman*, 237.

10. **ELECTIONS.—Ballots having a V-Shaped Mark Instead of a Cross.**—If in the square of a ballot opposite the name of a candidate there is no cross, but instead a marking resembling a V appears, the ballot should be rejected. (Ill.) *Winn v. Blackman*, 237.

11. **ELECTIONS.—Defective Marking in the Party Circle.**—Where the marking in a party circle, though not a cross, may be designated as two crosses, yet if it appears to have been properly made by one

who is very nervous, the ballot should be counted for the candidate of the party in whose circle the marking appears. (Ill.) Winn v. Blackman, 237.

12. **ELECTIONS—Marks Which will not be Held to be Distinguishing.**—If a ballot is properly marked in the party circle and has also upon it other marks made by a pencil, forming a figure not resembling any known object and very difficult to be described, it will not be treated as a distinguishing mark, requiring the rejection of the ballot. (Ill.) Winn v. Blackman, 237.

13. **ELECTIONS—A Distinguishing Mark Prohibited by the Law** is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of mark put upon a ballot to indicate who cast it, and to furnish means of evading the law as to secrecy. (Ill.) Winn v. Blackman, 237.

14. **ELECTIONS—Distinguishing Marks.—Whether a Given Mark upon a Ballot is or is not a Distinguishing Mark** is largely, if not wholly, a question of fact to be determined from the original ballot itself, and where that ballot is certified to an appellate court, it has as good an opportunity to determine this question as had the trial court. (Ill.) Winn v. Blackman, 237.

15. **ELECTIONS—To Warrant the Rejection of a Ballot Because of a Distinguishing Mark**, the court should be able to say that such mark was placed on the ballot by the voter for the purpose of distinguishing it from the others. (Ill.) Winn v. Blackman, 237.

16. **ELECTIONS—Distinguishing Marks, Marks Made by a Voter, When are not.**—It is not every mark or blot placed upon a ballot by a voter that is a distinguishing mark, nor should the ballot be rejected because there is upon it some mark which the court believes would enable the voter who cast the ballot to identify it as the one made by him. (Ill.) Winn v. Blackman, 237.

17. **ELECTIONS—Distinguishing Mark.—A Small "t" near the bottom of a ballot made near an ink blot warrants the court in rejecting the ballot on the ground that such letter may have been intended as a distinguishing mark.** (Ill.) Winn v. Blackman, 237.

18. **ELECTION—Distinguishing Mark.—Writing the Name of a Candidate Already Printed on a Ballot.**—Where a ballot having the candidates of three parties appears with a cross in a party circle and a cross in the squares opposite the name of each of the candidates of that party, and with the name of one of such candidates erased by drawing several lines through it, and in its place the name is written of a candidate whose name appears among the candidates of another party, there is nothing amounting to a distinguishing mark or otherwise unlawful on this ballot, and it should be counted for the person whose name appears to be so written. (Ill.) Winn v. Blackman, 237.

19. **BALLOTS—Distinguishing Marks—Writing of Names on a Ballot.**—The writing of a name on a ballot, not directly in connection with any office, does not constitute a distinguishing mark, when, from attending circumstances, it is probable that the object of the voter was to vote for the person named for an office respecting which one of the parties had no name printed on the ballot. (Ill.) Winn v. Blackman, 237.

20. **ELECTION—Distinguishing Marks.**—The fact that three small strokes of a pencil appear near the margin of a ballot does not require that it be excluded as containing a distinguishing mark. (Ill.) Winn v. Blackman, 237.

21. ELECTIONS.—The Marking of Two or More Party Tickets in the Circle nullifies the ballot only so far as both tickets bear names of candidates for the same office. (Ill.) Winn v. Blackman, 237.

22. ELECTIONS—Mutilated Ballots, When Properly Rejected.—A ballot mutilated by being cut across one end, taking off a part of the names of all the candidates for that office of one party with a single exception, and also the circle opposite the name of that party and all squares opposite to names of its candidates, and having a cross in the circle of the other party, and a cross near the name of certain candidates, neither cross appearing within the square, is properly rejected. (Ill.) Winn v. Blackman, 237.

23. ELECTIONS—Index Hand Pointing to a Name.—If a ballot is marked in a party square, but has also a cross in the square opposite the name of a candidate of the other party, and below an index hand pointing to such name, the object of the voter is apparently to call the attention of the election officers to his vote for such candidate, and not to use a distinguishing mark, and the ballot should be counted. (Ill.) Winn v. Blackman, 237.

24. ELECTIONS—Distinguishing Marks.—The fact that a marking in a party circle is by three straight lines crossing in the middle and forming a six-pointed star does not require the ballot to be rejected as bearing a distinguished mark. (Ill.) Winn v. Blackman, 237.

25. ELECTIONS—Ballots Picked Up Off a Floor after the voting was over and marked "void" are properly excluded. (Ill.) Winn v. Blackman, 237.

26. ELECTIONS.—A Ballot Which does not Bear the Initials of Any of the Judges on its back is properly rejected. (Ill.) Winn v. Blackman, 237.

27. ELECTIONS.—A Ballot on Which the Whole Face of Several Squares is blackened by a lead pencil, but which has no cross in any of its circle or squares, is properly rejected. (Ill.) Winn v. Blackman, 237.

Note.

Elections, bonds, notice of elections to authorize issuing of, necessity for, 795, 796.

general, imperfect notice of, 794.

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special, effect of defects in notices of, 794.

special, notice of, what must contain, 795.

special, notice of, when must be given, 794.

EMINENT DOMAIN.

1. EMINENT DOMAIN.—The Payment into Court in condemnation proceedings, of the amount of the commissioners' award as a condition precedent to the right of the condemning corporation to take possession of the land, and the receipt thereof by the owner of the land, do not preclude either of them from further litigating the amount of compensation. (Mo.) St. Louis etc. R. R. Co. v. Drummond Realty etc. Co, 724.

2. **EMINENT DOMAIN—Jury Trial.**—While condemnation proceedings may be commenced by the appointment of commissioners, either party may thereafter demand a jury to reassess the damages. (Mo.) *St. Louis etc. R. R. Co. v. Drummond Realty etc. Co.*, 724.

3. **EMINENT DOMAIN—Entirety of Tract.**—The fact that public roads pass through a tract of land is not alone sufficient to destroy its continuity so that it cannot be considered as an entirety in assessing damages. (Mo.) *St. Louis etc. R. R. Co. v. Drummond Realty etc. Co.*, 724.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

Jurisdiction over Minors.

1. **EQUITY JURISDICTION to Decree Sale of Minor's Land.**—Courts of equity have no inherent jurisdiction to decree a sale of a minor's land for the mere purpose of reinvesting the proceeds. (Mo.) *Headly v. Crouse*, 648.

Chancery Practice.

2. **EQUITY PRACTICE—Exhibits, Effect of.**—Written exhibits attached to a bill in equity are presumed to have been introduced in evidence. (Ark.) *Neff v. Elder*, 67.

3. **CHANCERY PRACTICE—Right to Dispense with the Assessment of Damages.**—If the trial judge finds that the plaintiff has not sustained enough damages from the defendant's misconduct to warrant a reference to the master, such reference may be refused. The smallness of the claim is a sufficient ground for refusing to exercise jurisdiction in equity. (Mass.) *Giragosian v. Chritjian*, 570.

4. **EQUITY PLEADING—Relief Under General Prayer.**—A complaint that sets up the facts out of which equities in favor of the plaintiff arise, and a general prayer for relief, is sufficient to enable the court to award such a decree as the law and facts afford. (Or.) *Katz v. Obenchain*, 821.

Laches and Limitations.

5. **EQUITY—Laches—Stale Demands.**—A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands when the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. (Ill.) *Deadman v. Yantis*, 291.

6. **EQUITY—Laches—Statute of Limitations.**—In administering their remedies, courts of equity, while sometimes adopting the statutory period of limitation, by analogy, have never regarded themselves bound down by any hard-and-fast rule, but, looking at the parties, their relation to each other, and the surrounding circumstances, have determined the question of diligence, in each case, according to equity, having due regard for those elementary principles upon which their jurisdiction rests. (Ill.) *Deadman v. Yantis*, 291.

Note.

Equity, infants, jurisdiction to authorize the sale of real property of, 655-659.

ESTATES.

1. **MERGER OF ESTATES—When does not Take Place.**—When a lesser and higher estate meet and coincide in the same person, they

will be kept separate when equity and justice require it, unless there is an expressed intention to the contrary. (Or.) *Katz v. Obenchain*, 821.

2. **MERGER OF ESTATES.**—A Mortgage is not Extinguished as against a subsequent attachment lien, by a conveyance of the legal title to the mortgagee, when there is no express intention therefor. (Or.) *Katz v. Oberchain*, 821.

3. **MERGER.**—The Doctrine of the Merger of the Mortgage Lien with the Legal Title, when they are united in the same person, does not apply where the principles of equity require that the lien and title be treated as separate. (Ark.) *Neff v. Elder*, 67.

ESTOPPEL.

1. **ESTOPPEL.**—Clear, Precise, and Unequivocal Evidence is requisite to establish an estoppel. (Ill.) *Coal Belt etc. Ry. Co. v. Peabody Coal Co.*, 282.

2. **ESTOPPEL.**—There can be no Estoppel by Silence unless there is a duty to speak. (Iowa) *Beechley v. Beechley*, 412.

3. **AN ESTOPPEL in Pais is Based on Fraud**, actual or constructive. There must be deception, and change of conduct in consequence thereof. (Iowa) *Beechley v. Beechley*, 412.

EVIDENCE.

Copy of Records.

1. **EVIDENCE**—Public Records, What are and How must be Certified as.—A license and marriage certificate, being a public record of a county of a sister state, do not appertain to the court, and must, to be admissible as evidence, be certified as required by section 906 of the Revised Statutes of the United States. Nor is a copy of the record of such license and certificate admissible because it is made by a clerk of the circuit court, if he does not certify in that capacity nor annex the seal of the court, but, on the contrary, certifies as a deputy clerk of the county and attaches its seal. (Wash.) *State v. Kniffen*, 1009.

2. **EVIDENCE**—Record of Judgment.—A certified record of a judgment, although it does not contain a copy of the original judgment, but merely a copy of a certified copy of such original, taken from the minutes and judgment docket, is nevertheless admissible in evidence to show the existence of such judgment. (Fla.) *Mansfield v. Johnson*, 159.

3. **EVIDENCE**—Copy of Record.—A certified copy of the record of a judgment in a judgment-book taken therefrom is competent evidence of the record of the judgment in such book, and is unnecessary to produce the document which has been recorded upon such book to prove that fact. (Fla.) *Mansfield v. Johnson*, 159.

4. **EVIDENCE**—Transcript of Record.—The custodian of a record having authority to certify a transcript thereof has authority to specify in his certificate the particular record from which the transcript is taken, and such certificate is at least prima facie evidence of the fact recited. (Fla.) *Mansfield v. Johnson*, 159.

5. **EVIDENCE**—Copy of Records.—It is the duty of clerks of the circuit court who have authority to record instruments, or to make entries in the records of which they have custody, in the course of their official duty, to note on such records the date upon which they record such instrument or make such entries, and such notes become parts of such record, and the dates specified in such

notes are to be taken as *prima facie* correct. In certifying such entries the clerk also has authority to certify such notes, and such certified copies are admissible in evidence. (Fla.) *Mansfield v. Johnson*, 159.

6. **EVIDENCE—Copy of Execution.**—If an original execution has been returned to the court issuing it, and the copy thereof offered in evidence is certified by the clerk of that court, who has the custody of the original, to be a true copy thereof, such certified copy is admissible without the production of the original. (Fla.) *Mansfield v. Johnson*, 159.

Parol to Vary Writing.

7. **EVIDENCE—Explanation of Receipt in Full.**—A person suing for an alleged balance owing for the purchase of goods may explain why he gave the defendant a receipt in full. (Ill.) *McKinnie v. Lane*, 338.

8. **CONTRACTS IN WRITING—Presumption.**—Unless fraud or mistake is shown, a contract in writing is conclusively presumed to contain the entire agreement in which all previous negotiations respecting the subject matter have been merged. (Mass.) *Smith v. Vose & Sons Piano Co.*, 539.

9. **CONTRACTS, Written, Oral Evidence to Ascertain the Meaning of.**—If any special term of a written contract when applied to the transaction concerning which the parties dealt is ambiguous, oral evidence is relevant and admissible, not to construe a new agreement, but to ascertain what the parties understood by the one they have made. (Mass.) *Smith v. Vose & Sons Piano Co.*, 539.

10. **CONTRACT to Procure Water—Extrinsic Evidence to Show that Fresh Water was Meant.**—Under a contract to procure water by the drilling of a well, extrinsic evidence of all prior negotiations of the parties is admissible to show that a supply for drinking water and other uses in a manufactory was what was desired, and that salt water was not within the contemplation of the parties to the contract, and that is not complied with by procuring such water. (Mass.) *Smith v. Vose & Sons Piano Co.*, 539.

EXECUTIONS.

1. **EXECUTION.**—A Vested Remainder is Subject to levy and sale on execution against the remainderman. (Ill.) *Deadman v. Yantis*, 291.

2. **EXECUTION SALE—Absence of Bona Fide Debt.**—The Purchaser at the execution sale is not required to look beyond what is disclosed upon the face of the record to ascertain whether the judgment was founded upon a bona fide debt. (Ill.) *Deadman v. Yantis*, 291.

3. **EXECUTION SALES—Rights of Purchaser.**—If a judgment upon which an execution has issued has become a lien upon land before a deed thereof is recorded, it is immaterial whether the execution was actually levied before or after the record of the deed, as in either case the title of the purchaser at the execution sale would be superior to the title acquired by the grantees by virtue of such deed. (Fla.) *Mansfield v. Johnson*, 159.

4. **EXECUTION SALES—Right of Purchaser at execution sale,** whether such purchaser be the execution creditor or a third person, are fixed by the status existing at the time the lien is acquired, and not by the status existing at the time of the sale. (Fla.) *Mansfield v. Johnson*, 159.

5. EXECUTION SALES—Notice of Equities—Bona Fide Purchaser.—If, at the time his lien is acquired, an execution creditor has no notice, actual or constructive, of the equities of third persons in real estate, the title to which stands in the name of the judgment debtor as the apparent absolute owner, the execution creditor as purchaser at the execution sale of such land takes a good title, and is protected as a bona fide purchaser even though he had notice of the equities of others at the time of the sale. (Fla.) *Mansfield v. Johnson*, 159.

6. EXECUTION SALES—Rights of Purchaser—Estoppel.—If execution has been levied upon all the right, title, and interest of a judgment debtor in land, and sale has been made and a conveyance executed in pursuance of such levy purporting to convey such entire interest, the execution purchaser is not estopped from claiming the entire property by the fact that he remained silent at the time of the sale when a third person protested against the sale on the ground that the judgment debtor owned only an undivided one-fifth interest in the property sold. (Fla.) *Mansfield v. Johnson*, 159.

7. JUDGMENTS—Enforcement of Inequitable Decree.—Upon an original or cross bill to carry a former decree into execution, the court will look into the original case and see whether the decree is equitable and just. If it is not, its enforcement will be denied. (Ill.) *Teel v. Dunnihoo*, 319.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATOR, Trust Relation of.—An administrator of an estate stands in a trust relation toward those interested in the estate, including the widow and heirs. (Ark.) *Flowers v. Flowers*, 84.

2. TRUSTEE, Purchase of Trust Estate by.—The administrator of a decedent may purchase and take a conveyance of the dower interest of his wife, when there was no threat, fraudulent misrepresentation, or concealment of facts, and the price paid was fairly adequate at the time, though the interest subsequently became worth much more. (Ark.) *Flowers v. Flowers*, 84.

3. ADMINISTRATION on Estate of Absentee—Validity.—A statute authorizing administration on the estate of a person who has absented himself and concealed his whereabouts for seven years is constitutional, and an administration thereunder is valid although he is in fact not dead. (Iowa) *New York Life Ins. Co. v. Chittenden*, 444.

4. ADMINISTRATION on Estate of Absentee—Life Insurance.—Where the estate of an absentee has been administered, and the insurer of his life, rather than stand suit on the policy, and litigate the question of death, has paid the loss to the administrator, the money thus paid cannot be recovered back when it thereafter appears that the absentee is alive. (Iowa) *New York Life Ins. Co. v. Chittenden*, 444.

See Garnishment.

EXEMPTIONS.

EXEMPTION Against Judgment for Costs.—Under a statute exempting specified classes of personal property from seizure on attachment, or sale on execution, or other process from any court issued for the collection of any debt by contract, no exemption exists against a judgment for costs. (Ark.) *Buckley v. Williams*, 24.

Note.

Exemptions from execution, constitutionality of statutes granting, 478, 479.

EXTRA SESSIONS OF LEGISLATURE.

See Constitutional Law, 1-2.

FACTORS.

1. **PRINCIPAL AND AGENT**—Factors—Sales—Purchaser's Liability to Principal.—A purchaser of property from a commission merchant who credits him with the amount of the purchase and sells other goods to him, and in settlement of their accounts pays to such merchant the balance, is liable to the principal in case such merchant fails to pay him. (Colo.) *Liebhardt v. Wilson*, 97.

2. **CUSTOMS**—Factors.—A local custom among factors to credit the buyer with the amount of a sale and charge him with goods received from him is not binding on the principal of a factor. (Colo.) *Liebhardt v. Wilson*, 97.

FELLOW-SERVANTS.

See Master and Servant, 18-24.

FENCES.

See Railroads.

FIDELITY BONDS.

See Insurance, 14.

FIRES.

See Waters and Watercourses, 6.

Note.

Forcible Detainer, definitions of, 34.

statutes omitting element of force, 34, 35.

FORGERY.

1. **FORGERY**—Note—Genuine Signature.—If a person, without negligence, and by fraud and deceit, is induced to sign a note, not intending to sign it as such, the instrument is a forgery. (Me.) *Biddeford National Bank v. Hill*, 499.

2. **FORGERY**—Note—Genuine Signature—Bona Fide Purchaser.—If a person, without negligence, and by fraud and deceit, is induced to sign a note, not intending to sign it as such, the note is not valid in the hands of a bona fide purchaser for value. (Me.) *Biddeford Nat. Bank v. Hill*, 499.

FORMER JEOPARDY.

See Criminal Law, 1-3.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS**—Oral Contract for Work or Labor.—An oral contract for the performance of work or labor, not specify-

ing the time within which it is to be performed, must be interpreted in the light of its subject matter and the circumstances surrounding it, and if the manifest intent and understanding of the parties were that it was not to be performed within the year, it falls within the statute of frauds. (Me.) *White v. Fitts*, 483.

2. STATUTE OF FRAUDS—Oral Contract for Work.—If, considering the terms and subject matter of an oral contract, the nature and extent of the work to be done under it, and the knowledge of the parties of all the circumstances governing the progress of the work, the conclusion is irresistible that it was not contemplated or understood by the parties that the contract was to be performed within one year from the making of it, it is within the statute of frauds. (Me.) *White v. Fitts*, 483.

3. STATUTE OF FRAUDS—Oral Contract for Labor—Death of Party.—If an oral contract for the performance of labor cannot by its terms be performed within one year from its execution, it is not taken out of the operation of the statute of frauds by the death of one of the parties within the year. (Me.) *White v. Fitts*, 483.

4. STATUTE OF FRAUDS—Right to Invoke.—If one performs services for another in consideration of an oral contract under which he is to be paid in land, he cannot, by invoking the statute of frauds, rescind such contract and recover in money for such services, unless the other party also insists upon the statute and refuses to perform the contract on his part. (Colo.) *Colorado Lumber etc. Co. v. Dustin*, 126.

See Easements.

GAME LAWS.

1. GAME LAW.—No Owner of Deer Raised in Capacity has a better right thereto than has the hunter at common law to the deer captured or killed by him. (Mo.) *State v. Weber*, 715.

2. GAME LAW—Domesticated Animals.—A statute making it unlawful to have in possession the carcass of any deer not having thereon the evidence of its sex applies to all deer, wild or domesticated. (Mo.) *State v. Weber*, 715.

3. GAME LAW—Domesticated Animals.—A statute making it unlawful to have in possession the carcass of any deer not having thereon the evidence of its sex is not unconstitutional as applied to a dealer in meats who has purchased the carcasses of deer from one who raised them in captivity. (Mo.) *State v. Weber*, 715.

GARNISHMENT.

1. GARNISHMENT.—A Guardian cannot be Garnished after the death of his ward by creditors of her heirs. (Iowa) *Pugh v. Jones*, 451.

2. THE GARNISHMENT of an Administrator by creditors of the heirs after the heirs have assigned their interest in the estate is ineffectual. (Iowa) *Pugh v. Jones*, 451.

GIFTS.

1. GIFT, When not Perfected by Placing Account in Savings Bank in the Name of the Depositor for Another as Trustee.—If a person having deposits in several savings banks causes each of his accounts to be transferred to himself as trustee of a person designated, and makes an assignment to himself as such trustee, keeping such books

in his possession during his lifetime, and drawing out the dividends for his own use, and making statements of the persons to whom such books were to go, they being the persons named as beneficiaries, this does not constitute a perfected gift in favor of any of them, and on his death the accounts represented by the books constitute part of his estate. (Mass.) *Coolidge v. Knight*, 573.

2. **GIFTS INTER VIVOS.**—To constitute a gift inter vivos two essential elements must combine: An intention to make the gift then and there, and such an actual or constructive delivery at the same time to the donee as divests the donor of all dominion over the subject and invests the donee therewith. (Pa.) *Reese v. Philadelphia etc. Ins. Co.*, 880.

3. **GIFTS INTER VIVOS—Delivery—Intention.**—If a woman takes her safe deposit box containing her securities from the vault of a trust company, and calling in one of its officers, declares to him her intent to give such securities to her nephew who is present, and then executes blank transfers and hands the securities to her nephew, who places them in his safe deposit box, while hers is surrendered, and the nephew, who is about to go on a long journey, appoints his aunt his deputy, to have access to his box, there is a valid gift of the securities, although the aunt thereafter sells some of them, collects interest and dividends from others, and deposits the sums collected to her own account. (Pa.) *Reese v. Philadelphia etc. Ins. Co.*, 880.

4. **GIFTS INTER VIVOS—Impeachment.**—A donor is not permitted to impeach his own gift. What is said or done by him, unassociated with and unassented to by, his donee is wholly irrelevant to the issue as to the validity of the gift, and cannot be considered. (Pa.) *Reese v. Philadelphia etc. Ins. Co.*, 880.

GOODWILL.

1. **BUSINESS, Effect of the Sale of the Goodwill of.**—When a man voluntarily sells the goodwill of a business, he thereby precludes himself from setting up a competing business which will derogate from the goodwill so sold. (Mass.) *Old Corner Book Store v. Upham*, 532.

2. **BUSINESS, Goodwill of, Effect of Competing Business upon—Question of Fact.**—In each case where the goodwill of a business is sold and the vendor sets up a competing business, it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does not derogate from the grant made by the sale. (Mass.) *Old Corner Book Store v. Upham*, 532.

3. **BUSINESS, Goodwill of, When Derogated from by a New Business Established by the Vendor.**—If one connected with a business for many years, first as clerk and then as partner, has special charge of a department connected with the sale of books of a particular religious denomination, sells his interest in the business and in the goodwill thereof, and subsequently starts a new business primarily to sell the books of the same denomination, and solicits aid and patronage of persons prominent in that denomination, there can be no doubt that the effect of the new business will be to derogate from the goodwill so sold. (Mass.) *Old Corner Book Store v. Upham*, 532.

4. **BUSINESS, Goodwill of, Persons Selling will not be Permitted to Derogate from, Through a Corporation.**—If a person selling his interest in the goodwill of a business forms a corporation for the purpose of setting up and conducting a rival business in derogation of such goodwill, he will be enjoined from working for or holding stock

in such corporation or in otherwise being connected with it, and it will be enjoined from employing him directly or indirectly in its business, or in recognizing him as a stockholder or otherwise connected therewith, except to let him sell his share of the stock or receive what is due him in respect thereof when the corporate business wound up. (Mass.) *Old Corner Book Store v. Upham*, 532.

GUARDIAN AND WARD.

In General.

1. **GUARDIAN AND WARD—Collateral Attack upon Guardianship.**—In an action by the guardian of a person of unsound mind in the name and for the benefit of his ward, such ward cannot by next friend appear and challenge the appointment of the guardian, when such appointment and the letters of guardianship are *prima facie* regular. (Ark.) *Hare v. Shaw*, 17.

2. **JURISDICTION, Presumed in the Appointment of a Guardian.** Where the record of the court is silent upon the subject, it must be presumed, in support of the appointment of the guardian of a person of unsound mind, that the court inquired into the condition of the alleged imbecile and found him to be of unsound mind, and took all necessary steps to acquire jurisdiction of his person. (Ark.) *Hare v. Shaw*, 17.

3. **GUARDIAN AND WARD, Liability of the Latter for the Acts and Agreements of the Former.**—His guardian cannot bind an insane person by agreement. Hence, a person accepting the lease of the property of an insane ward with an agreement by the guardian that certain repairs shall be made to remove known dangerous defects cannot recover of the ward if injured by such defects. (Utah) *Reams v. Taylor*, 930.

Sales of Real Estate.

4. **GUARDIAN AND WARD—Sales—Publication of Notice—Sufficiency.**—If the statute provides that notice of a guardian's application to sell his ward's real estate shall be published for three successive weeks, such requirement is satisfied by the publication in three consecutive weekly issues of a newspaper before the date noticed for the filing of the petition, or making the application for the order of sale. (Colo.) *Mortgage Trust Co. v. Redd*, 132.

5. **GUARDIAN AND WARD—Sales of Real Estate.**—If a guardian, under order of court, sells real estate belonging to his wards, and one of them, after becoming of age, transfers her interest therein to a subsequent purchaser, a nonsuit cannot be granted in an action to foreclose a trust deed thereon, on the ground of invalidity of the guardian's sale. (Colo.) *Mortgage Trust Co. v. Redd*, 132.

6. **JUDGMENTS—Collateral Attack—Guardian's Sales—Failure to Give Notice.**—The giving by a guardian of the required statutory notice by publication of his petition to sell his ward's estate is not essential to the jurisdiction of the court, and its omission is not fatal to the judgment, nor does it render it open to collateral attack. (Colo.) *Mortgage Trust Co. v. Redd*, 132.

7. **JUDGMENTS—Collateral Attack—Guardian's Sales.**—In a proceeding by a guardian to obtain permission to sell his ward's real estate, the constitution and statute expressly gives the district court jurisdiction of the subject matter, and by filing the petition for leave to sell, the court acquires jurisdiction of the person of the ward, and is then called upon to determine whether the facts entitle the petitioner to the relief asked, and also whether the petitioner has given the notice required by statute, and, if error is committed in passing upon either of these questions, it is not in acquiring, but in

the exercise of, jurisdiction, and the judgment rendered therein is not subject to collateral attack. (Colo.) Mortgage Trust Co. v. Bedd, 132.

See Garnishment.

Note.

Guardian and Ward, proceedings by the former for the sale of property of the latter are in rem, 148.

sales, collateral attack upon, 149.

sales, jurisdiction to order, when attaches, 149.

sales, notice of application for, cases holding to be jurisdictional, 151, 152.

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sales, notice of application for, whether jurisdictional, 149.

sales, notice to ward of the application for is not essential unless made so by statute, 148.

sales of property of ward, proceedings for are not adverse, 148.

HABEAS CORPUS.

1. **HABEAS CORPUS to Test Validity of Statute.**—The writ of habeas corpus cannot be used to review a judgment of conviction under which a prisoner is held if the judgment is merely erroneous, but if the judgment is assailed on the ground that it is void because it is based on a charge made under an invalid provision of a statute, and the charge constitutes no offense under the law of the state, the validity of the provision of the statute defining the offense may be determined on habeas corpus. (Fla.) Ex parte Knight, 191.

2. **HABEAS CORPUS—Void Statute.**—If a statute on which a charge of crime is made is inoperative and void, a judgment of conviction thereon is void, and persons held in custody under such judgment are entitled to be discharged on habeas corpus. (Fla.) Ex parte Knight, 191.

HARBORS.

See Counties, 9-14.

HIGHWAYS.

Leaving Team Unfastened.

1. **MUNICIPAL CORPORATIONS—Use of Horses in Streets—Duty to Fasten.**—A person has no right to leave his horse in a public street unless it is securely fastened or in charge of some one competent to take care of it, and he is bound to take care that the horse does no injury in consequence of being frightened by anything that may occur. (Colo.) City of Denver v. Utzler, 108.

Reckless Riding.

2. **NEGLIGENCE—Parent and Child—Reckless Riding of Child.**—If a father sends his young son, known to be a reckless rider, upon the highway to deliver a message upon a horse known to be unruly, and which the son is unable to control, such father is guilty of negligence. (Ind.) Broadstreet v. Hall, 356.

3. **NEGLIGENCE—Proximate Cause—Parent and Child—Reckless Riding of Child.**—If a father sends his young son, known to be a reckless rider, upon the highway to deliver a message upon a horse known to be unruly, and which the son is unable to control, and which, in consequence, he runs into a carriage causing a personal injury, the

father is guilty of negligence, and such negligence is the proximate cause of the injury. (Ind.) *Broadstreet v. Hall*, 356.

4. **NEGLIGENCE—Anticipation of Injury.**—To constitute actionable negligence it is not essential that the complaining party should make it appear that the precise injury or accident which did occur could have been anticipated or foreseen by him. (Ind.) *Broadstreet v. Hall*, 356.

5. **MASTER AND SERVANT—Parent and Child—Negligence of Child.**—If a father sends his young son, known to be a reckless rider, upon the highway, to deliver a message, upon a horse known to be unruly, he thereby creates the relation of master and servant between himself and his son, and is liable on account of the son's negligence in riding the horse along the highway while engaged in the performance of the business of his father. (Ind.) *Broadstreet v. Hall*, 356.

6. **NEGLIGENCE—Use of Highways.**—Whoever travels over and along a public highway must do so in such a manner and with such care as is consistent with the rights and safety of others traveling thereon. A violation of this duty is negligence. (Ind.) *Broadstreet v. Hall*, 356.

7. **EVIDENCE—Negligence—Master and Servant.**—In an action against a father to recover for a personal injury inflicted by the reckless riding of his son on an unruly horse while upon an errand for his father, evidence of prior specific acts of careless and reckless riding by such son and of his reputation in that regard is admissible to charge his father with notice or knowledge thereof, and of his incompetency, for that reason, to be intrusted with the control and management of the horse at the time he was sent on the errand in question. (Ind.) *Broadstreet v. Hall*, 356.

Use of Automobiles.

8. **AUTOMOBILES, Operated and Propelled** in a manner not incompatible with the safety of the traveling public, have equal rights with other vehicles upon the public highway, subject to such rules and regulations as are prescribed by law. (Mo.) *State v. Swagerty*, 671.

9. **AUTOMOBILES—Constitutional Law—Special Legislation.**—A statute regulating the operation and speed of automobiles on the public streets, roads, and highways is not unconstitutional as special legislation on the ground that it does not apply to all vehicles using the public highways. (Mo.) *State v. Swagerty*, 671.

10. **AUTOMOBILES—Police Regulations.**—A statute regulating the operation and speed of automobiles on streets, roads and highways, if otherwise valid, is a police regulation, and clearly within the power of the legislature to enact. (Mo.) *State v. Swagerty*, 671.

11. **AUTOMOBILES—Regulation of Speed.**—The validity of a section of a statute fixing the rate of speed at which automobiles may be operated upon the public highway does not depend upon the validity of another section of such statute requiring the obtaining of a license to operate an automobile. (Mo.) *State v. Swagerty*, 671.

12. **AUTOMOBILES—Regulation of Speed.**—A statute limiting the rate of speed at which automobiles may be run on the public highways to nine miles per hour is within the power of the legislature to enact, and cannot be declared void on the ground that it is unreasonable. (Mo.) *State v. Swagerty*, 671.

HOGS.

See *Municipal Corporations*, 39-41.

HOMESTEADS.

1. **HOMESTEAD, Exemption of Proceeds of Voluntary Sale of from Garnishment.**—If the statutes of the state provide that, in case of the sale of a homestead, any subsequent homestead acquired by the proceeds shall be exempt from attachment or execution, the proceeds of a voluntary sale of a homestead which its vendors intend to invest in another homestead are exempt from garnishment. (Wash.) *Becher v. Shaw*, 982.

2. **A HOMESTEAD may Exist in Lands Held by a Husband and Wife as Joint Tenants.** (Ill.) *Lininger v. Helpenstell*, 264.

3. **HOMESTEAD—Joint Tenancy.**—If lands held as a homestead belong to a husband and wife as joint tenants, either may, as against the other, insist that such property is a homestead, and not subject to transfer except in the manner provided for the conveyance of homesteads. (Ill.) *Lininger v. Helpenstell*, 264.

4. **HOMESTEAD.—A Conveyance by a Husband to His Wife of a Homestead, not joined in by her, is inoperative.** (Ill.) *Lininger v. Helpenstell*, 264.

5. **HOMESTEAD.—A Conveyance by a Wife of Homestead Property, not joined in by her husband, though he has previously executed a deed purporting to convey the property to her, is void.** (Ill.) *Lininger v. Helpenstell*, 264.

6. **HOMESTEAD.—Upon the Decease of a Wife, a homestead owned by her and her husband as joint tenants vests in him exclusively.** (Ill.) *Lininger v. Helpenstell*, 264.

7. **HOMESTEADS—Lease.**—The Value of a Homestead, so far as concerns an alleged release thereof by leasing the premises for the purpose of prospecting for oil and gas, is determinable as of the date of the lease, and not as of the time when gas or oil is discovered by the lessees. (Ill.) *Bruner v. Hicks*, 332.

8. **HOMESTEAD.—A lease of a Homestead, valued at less than one thousand dollars, for the purpose of prospecting the premises for oil and gas, for an indefinite term in case these substances are discovered, is void and will sustain no rights in favor of the lessee, if the lessors have not released their homestead right in the manner provided by statute, or voluntarily abandoned possession and accepted rent with knowledge of the facts.** (Ill.) *Bruner v. Hicks*, 332.

HOMICIDE.*Assault to Kill.*

1. **ASSAULT with Intent to Kill.**—The gravamen of the offense of assault with intent to kill is the intent with which the act is done. (Mo.) *State v. Williamson*, 678.

2. **ASSAULT with Intent to Kill—Shooting at One, Hitting Another.**—If a person shoots at one person with intent to kill him, but accidentally shoots another, he cannot be convicted of an assault with intent to kill the latter. (Mo.) *State v. Williamson*, 678.

Accidental Killing.

3. **HOMICIDE—Accidental Killing.**—Under the plea of not guilty a person accused of murder may show that the killing was accidental, and if the testimony satisfies the jury that the killing was the result of an accident, it should return a verdict of not guilty. (Pa.) *Commonwealth v. Deitrick*, 861.

4. **HOMICIDE—Accidental Killing.—Burden of Proof in homicide cases where the defense of accidental killing is set up does not shift,**

but rests on the prosecution to show that the killing was willful or intentional. (Pa.) Commonwealth v. Deitrick, 861.

Killing Misdemeanor.

5. **HOMICIDE—Killing to Prevent Escape.**—If a misdemeanor has been committed, and is charged in the warrant, flight of the accused from an officer even after actual capture and custody, there having been no conviction, will not justify the use of a deadly weapon, and a killing in such a case is manslaughter at least. (Pa.) Commonwealth v. Loughhead, 896.

6. **HOMICIDE—Killing to Prevent Escape.**—In a case of arrest for misdemeanor, an officer is never required to retreat, and may meet force with force, but he cannot justifiably take the life of a person who is fleeing from arrest, or of one who has been arrested and has escaped from custody and is fleeing from him, when the charge is simply a misdemeanor. (Pa.) Commonwealth v. Loughhead, 896.

HUSBAND AND WIFE.

Antenuptial Conveyance.

1. **ANTENUPTIAL DEED in Fraud of Wife not yet Selected.**—A voluntary conveyance, made to defeat the marital rights of the future wife of the grantor, is not relieved of invalidity by the fact that she has not yet been selected. (Iowa) Beechley v. Beechley, 412.

2. **ANTENUPTIAL DEED.**—Misrepresentation of the Value of his property by the grantor in an antenuptial deed is incompetent to prove fraud in its execution. (Iowa) Beechley v. Beechley, 412.

3. **ANTENUPTIAL DEED—When not Fraudulent.**—An antenuptial deed, if not voluntary, will be set aside as in fraud of the woman whom the grantor thereafter marries, only on proof that the grantee was a party to the fraudulent intent. (Iowa) Beechley v. Beechley, 412.

4. **ANTENUPTIAL DEED to Children by Former Marriage.**—A voluntary conveyance to the children of the grantor by a former marriage is not fraudulent as to his prospective wife, when only a reasonable provision is made for them, and no misrepresentation is made to her. (Iowa) Beechley v. Beechley, 412.

Interest of Wife in Husband's Land.

5. **STATUTES—Construction—Husband and Wife—Inchoate Interest of Wife.**—A statute providing that a wife's inchoate interest in her husband's land shall become vested where his land is sold at judicial sale must be liberally construed in her favor. (Ind.) Green v. Estabrook, 349.

6. **HUSBAND AND WIFE.**—Wife's Inchoate Right under statute to a one-third interest in her husband's lands is a substitute for dower. (Ind.) Green v. Estabrook, 349.

7. **MARRIED WOMEN are Regarded as Purchasers** for a valuable consideration of all property which accrues to them by virtue of the marriage. (Ind.) Green v. Estabrook, 349.

8. **HUSBAND AND WIFE.**—Wife's vested interest which she takes in her husband's land sold at judicial sale is not cut down by reason of the fact that the demands of creditors have been satisfied. (Ind.) Green v. Estabrook, 349.

9. **CONSTITUTIONAL LAW—Husband and Wife—Wife's Inchoate Rights.**—A statute providing that a wife's inchoate interest in

her husband's lands shall become vested when such land is sold at judicial sale does not deprive him of his property without due process of law. (Ind.) *Green v. Estabrook*, 349.

Effect of Mortgage Joined in by Wife.

10. **MORTGAGES—Effect of Joinder of Wife in.**—If a wife joins her husband in a mortgage of his real estate, she is thereby barred of her inchoate interest therein as against the mortgagee and his privies. (Ind.) *Green v. Estabrook*, 349.

11. **MORTGAGES—Joinder of Wife in Rights of wife.**—If a wife joins her husband in the execution of a mortgage on his hands, she is entitled to a decree on foreclosure that her husband's interest shall first be exposed for sale. (Ind.) *Green v. Estabrook*, 349.

12. **MORTGAGES—Joinder of Wife in—Rights as Against Creditors.**—If a wife joins her husband in the execution of a mortgage on his lands, she is entitled to her marital interest, as against creditors in the surplus arising from the sale of the land on mortgage foreclosure. (Ind.) *Green v. Estabrook*, 349.

13. **MORTGAGES—Joinder of Wife in Rights upon Redemption.**—A wife upon redeeming from a mortgage in which she has joined with her husband may enforce the whole claim against his two-thirds interest in the land. (Ind.) *Green v. Estabrook*, 349.

14. **MORTGAGES—Joinder of Wife in—Foreclosure Rights of Wife.**—If a wife joins her husband in the execution of a mortgage on his land, and upon foreclosure the court orders that his two-thirds interest shall first be exposed for sale, and it sells for a sum sufficient to satisfy the mortgage debt, the unsold interest of the wife vests in her when the year for redemption expires. (Ind.) *Green v. Estabrook*, 349.

15. **HUSBAND AND WIFE—Mortgages—Redemption.**—If a husband redeems his land sold at judicial sale, the inchoate interest of his wife therein does not become choate. (Ind.) *Green v. Estabrook*, 349.

See Deeds, 5-6, Homesteads.

Note.

Industrial Schools. See Reform Schools and Reformatories.

INFANTS.

INFANTS—Ratification of Invalid Sale of Land.—If a decree of court rendered without jurisdiction attempts to create a lien on certain land of a father in favor of his minor children whose land he is authorized to sell for reinvestment, to secure them in the purchase money, and afterward divides all of his land among them by deeds of gift, the acceptance of such deeds does not amount to a ratification of such invalid sale of the land of the children, nor preclude them from attacking it. (Mo.) *Heady v. Crouse*, 643.

See Equity, 1; Judgments, 12; Process; Reformation of Deeds.

Note.

Infants, jurisdiction of equity, inherent power of, to direct sale of property of, decisions affirming, 656-659.

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See Juvenile Courts; Reform Schools and Reformatories.

INJUNCTION.

1. **INJUNCTION—Breach of Contract.**—Generally, an injunction will not be granted to restrain a breach of contract when the complainant's promises are of such a nature that they could not be specifically enforced, unless they have already been performed. (Ind.) *Fowler Utilities Co. v. Gray*, 344.

2. **INJUNCTION—Breach of Contract—Specific Performance.**—General rules of law governing suits for specific performance of contracts govern suits for injunction to prevent the breach of a contract. (Ind.) *Fowler Utilities Co. v. Gray*, 344.

3. **INJUNCTION—Breach of Contract.**—An injunction will not lie to restrain an apprehended injury resulting from a breach of contract, unless the petitioner is without adequate remedy at law, and the contract itself is free from doubt and not uncertain or vague in its terms or provisions. (Ind.) *Fowler Utilities Co. v. Gray*, 344.

See Elections, 4; Nuisances.

INSANE PERSONS.

PRINCIPAL AND AGENT—Insane Persons.—An insane person cannot have an agent, because he cannot delegate powers either directly or by implication of law. (Utah) *Reams v. Taylor*, 930.

INSTRUCTIONS.

See Trial.

INSURANCE.

Authority of Agents and Waivers by Them.

1. **INSURANCE AGENT—Scope of Authority.**—When an insurance agent has been authorized to deliver drafts in settlement of a claim, his acts and declarations in effecting a settlement bind his principal, regardless of restrictions on his authority contained in the policy. (Iowa) *New York Life Ins. Co. v. Chittenden*, 444.

2. **INSURANCE, FIRE—Waiver of Conditions.**—An insurance company may waive conditions inserted in the policy for its benefit, and such waiver may be inferred from the conduct of its agents and representatives. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

Arbitration of Loss.

3. **INSURANCE, FIRE—Waiver of Arbitration.**—The insured is released from complying with a contract to submit the loss under a

fire policy to arbitration, as a condition precedent to bringing suit, by any conduct on the part of the insurer's representatives which has the effect of unreasonably delaying or preventing an appraisal from being had or an award being made. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

4. **INSURANCE, FIRE—Waiver of Arbitration—Question for Jury.**—Whether arbitration of a fire insurance loss failed on account of the fraud of either party, and whether delay and failure to demand an appraisal or to proceed therewith in a reasonable time, if agreed upon, constitute a waiver, are questions for the jury to determine. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

5. **INSURANCE, FIRE—Arbitration—Appraisement.**—A provision in a fire insurance policy that the loss is to be paid sixty days after due notice and satisfactory proof of loss has been received does not give the insurer, after he has agreed to an appraisal and named an appraiser, an absolute right to sixty days within which to commence the appraisal. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

6. **INSURANCE, FIRE—Appraisement—Time for.**—The right of the insured to have an appraisal of his loss under an agreement therefor is not indefinite as to time, but such appraisal must be completed by the insurer within a reasonable time, and what is such reasonable time upon the facts of the case is a question for the jury to determine. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

7. **INSURANCE, FIRE—Appraisement—Waiver.**—In an action on a fire insurance policy where the defense is set up that a required appraisement has not been made, an instruction that such requirement might be waived and that the insurer's conduct should be considered on the question of waiver by unreasonable delay is proper, and not open to the objection that it permits the jury to put a too liberal construction upon the contract of insurance. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

8. **PLEADING—Plea in Abatement—Plea in Bar—Estoppel.**—An insurer, by pleading a provision of his policy for the arbitration of the amount of the loss, and that he has not waived such provision, in abatement of the action, and procuring an unsuccessful trial on such plea, cannot thereafter change his position and claim that the matter so pleaded in abatement is a matter in bar of the action to recover on the policy. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

Proof of Loss.

9. **INSURANCE, FIRE—Waiver of Proof of Loss by the insurer** within a specified time may be inferred from such acts and conduct as are inconsistent with an intention to insist upon a strict performance. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

10. **INSURANCE, FIRE—Waiver of Proof of Loss.**—A distinct recognition of liability by the insurer, as by an offer to pay all or a part of the loss, amounts to a waiver of formal notice and proof of loss or of defects therein. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

Accident Insurance.

11. **ACCIDENT INSURANCE—Construction Favorable to Insured.**—A construction as favorable to the insured as reasonably may be must be given to a policy of insurance, but only a natural and logical construction, not a strained or sophistical one. (Minn.) *Bader v. New Amsterdam Cas. Co.*, 613.

12. **ACCIDENT INSURANCE—Ordinary Sense of Words.**—The language of the parties to a policy of insurance must be given its

natural and ordinary meaning; the words are to be taken in their popular sense, in the absence of anything showing a contrary intention. (Minn.) *Bader v. New Amsterdam Cas. Co.*, 613.

13. ACCIDENT INSURANCE—Shooting by Burglar.—Where a man is shot by a burglar and dies a few hours afterward from the wound, his beneficiary is entitled to one-half, but not the whole amount, of ordinary accident indemnity, under a provision in the policy on his life which does not exclude indemnity for loss by accident caused by sunstroke, freezing, poison, somnambulism, racing, shooting, wrestling, etc., but which in such cases limits the liability of the insurer to one-half the amount of ordinary indemnity specified for such loss. (Minn.) *Bader v. New Amsterdam Cas. Co.*, 613.

Fidelity Bonds.

14. INSURANCE—Fidelity Bond—Breach of Warranty to Examine Account.—If an application for an officer's fidelity bond contains a statement that his accounts shall be examined and verified by his employer quarterly, and that such statement shall be considered as a warranty, and the bond provides that the guarantor shall be notified immediately upon discovering any fraud or dishonesty on the part of such officer, the verification of such officer's accounts as required by his bond is not satisfied by accepting as true, the amount which he has in bank, as shown by his deposit book, without any investigation to ascertain from the bank whether such book represents the true state of his account, and in case of the officer's defalcation the guarantor is not liable on the bond. (Colo.) *United States Fidelity etc. Co. v. Downey*, 128.

See Beneficial Association; Executors and Administrators, 4.

INTERSTATE COMMERCE.

See Intoxicating Liquors.

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS—Power of Municipalities to Control Traffic in.—The business of handling and selling intoxicating liquor may be licensed, regulated, restrained, or prohibited by the legislature, without limit, in the exercise of the police power, and this power may be expressly delegated to municipalities. (Ind.) *Schmidt v. City of Indianapolis*, 385.

2. INTOXICATING LIQUORS—Interstate Commerce.—Intoxicating liquors when transported as articles of interstate commerce and delivered to the consignee are subject to the police regulations of the several states, and of the cities therein under power delegated by the state. (Ind.) *Schmidt v. City of Indianapolis*, 385.

3. INTOXICATING LIQUOR—Power to License Traffic.—The police power may be rightfully exercised in the levy of such a license tax as will limit and discourage the business of handling and selling intoxicating liquors, and this power necessarily implies the right to fix the amount of the license fee. (Ind.) *Schmidt v. City of Indianapolis*, 385.

4. INTOXICATING LIQUORS—Amount of License Fee.—The power to license and to fix the fee to be charged for carrying on the business of dealing in intoxicating liquors being lodged in a municipality, the amount to be exacted will be disturbed only in case of a manifest abuse of power. (Ind.) *Schmidt v. City of Indianapolis*, 385.

5. INTOXICATING LIQUORS—Ordinances—Discrimination.

A municipal ordinance imposing a license fee upon all breweries, distilleries, and depots thereof, established within the city, is not unjustly discriminating, though it defines the places which shall be considered as depots, so as to include a brewery outside the city shipping beer to be a resident agent to be sold in such city. (Ind.) *Schmidt v. City of Indianapolis*, 385.

6. INTOXICATING LIQUORS—Interstate Commerce.—Intoxicating liquors are articles of commerce, and as such, while being transported from state to state, are within the protection of that clause of the constitution of the United States which gives to Congress the power to regulate commerce with foreign nations and among the several states, and thus are subject to the exclusive jurisdiction of Congress. (Me.) *State v. Intoxicating Liquors*, 504.

7. INTOXICATING LIQUORS—Interstate Commerce—Delivery. Under the act of Congress known as the "Wilson Act," a state statute must permit the delivery of an interstate shipment of intoxicating liquors to the consignee within the state, but, after such delivery, the state has power to prevent the sale of the liquor, even in the original package. (Me.) *State v. Intoxicating Liquors*, 504.

8. INTOXICATING LIQUORS—Interstate Commerce—Arrival in State.—Placing of an interstate shipment of intoxicating liquor in the carrier's warehouse to be delivered to the consignee does not constitute their arrival in the state, within the meaning of the act of Congress known as the "Wilson Act," so as to subject them to state laws or seizure thereunder. (Me.) *State v. Intoxicating Liquors*, 504.

9. INTOXICATING LIQUORS—Interstate Commerce—Binding Effect of Decisions.—The decisions of the United States supreme court upon the question of the interpretation and application of the interstate commerce clause of the United States constitution, and the act of Congress, known as the "Wilson Act," relating to interstate shipments of intoxicating liquors, are conclusive and binding upon the state courts. (Me.) *State v. Intoxicating Liquors*, 504.

10. INTOXICATING LIQUORS—Interstate Commerce—Delivery. Though interstate transportation of intoxicating liquors may end before delivery, interstate commerce therein does not end before delivery to the consignee, either actual or constructive, so as to subject the shipment to the police powers of the state. (Me.) *State v. Intoxicating Liquors*, 504.

11. INTOXICATING LIQUORS—Interstate Commerce—Delivery. An interstate shipment of intoxicating liquor into the state is not subject to state police regulation until there has been a delivery to the consignee, and it makes no difference whether the consignee is known to the carrier or not, nor whether the name of the consignee is fictitious. (Me.) *State v. Intoxicating Liquors*, 504.

See *Municipal Corporations*, 47, 48.

IRRIGATION COMPANY.

See *Waters and Watercourses*, 3.

JUDGMENTS.**Validity.**

1. JUDGMENTS—Collateral Attack.—A judgment may be collaterally attacked for error in assuming jurisdiction, but it cannot be thus attacked for an error committed in the exercise of jurisdiction legally obtained. (Colo.) *Mortgage Trust Co. v. Redd*, 132.

2. JUDGMENTS—Presumption as to Jurisdiction.—If a judgment of a court of general jurisdiction is rendered in a special statutory proceeding, the same presumptions of jurisdiction attach thereto as to a judgment of the same court when proceeding according to the course of the common law. (Colo.) *Mortgage Trust Co. v. Redd*, 132.

3. JUDGMENT—Absence of Bona Fide Debt.—A judgment fraudulently obtained because no bona fide debt existed is not void, but merely voidable, at the instance of the party aggrieved when he promptly seeks relief. (Ill.) *Deadman v. Yantis*, 291.

4. JUDGMENTS—Wrong Reason Therefor.—If a judgment is right, even though the reasons given therefor wholly fail to sustain it, or would logically lead to a different one, it must stand. (Pa.) *Corgan v. George F. Lee Coal Co.*, 891.

Conclusiveness and Res Judicata.

5. JUDGMENTS—Privity Between Defendants.—The assignee of county orders who with the assignor thereof is a defendant to an action, in which such orders are declared void, is in privity with such assignor, and the judgment in such suit is binding as between them. (Wis.) *Giblin v. North Wisconsin L. Co.*, 1040.

6. JUDGMENTS—Res Judicata.—If plaintiff makes a claim hostile to each and every defendant in a suit asserting that an instrument for the payment of money in which each of the defendants claims an interest, either as present holder or as privy to the present holder, by reason of being a transferrer of the present holder, is fraudulent and void, and obtains a decree affirming his claim against such instrument, it must be held fraudulent and void in any subsequent litigation between the same parties however they are arrayed against each other in such subsequent litigation. (Wis.) *Giblin v. North Wisconsin L. Co.*, 1040.

7. JUDGMENTS—Cancellation of Void County Orders.—A judgment in an action canceling and declaring void certain county orders is a decree quasi in rem, and establishes prima facie as against all persons the status of such orders. (Wis.) *Giblin v. North Wisconsin L. Co.*, 1040.

8. RES JUDICATA.—A judgment in a suit to quiet title to one part of a tract of land is conclusive in a subsequent suit involving the balance of the tract depending on the same title and between the same parties or their privies. (Wash.). *Bird v. Winyer*, 995.

9. JUDGMENTS—Res Judicata.—Where one who has constructed a railroad under a contract to receive money, also stock and bonds placed with a trust company, sues the railroad company, joining the trust company as defendant, but dismissing it at the trial, and is adjudged entitled to a lien, the money, and a certain amount of stock, no money judgment being rendered for the stock, because having no pecuniary value, the judgment does not bar him from suing in equity to compel the trust company to deliver the certificates of stock and the railroad company to make a transfer of the shares on its books. (Mo.) *Baumhoff v. St. Louis etc. R. R. Co.*, 745.

10. JUDGMENTS—Who Bound by.—If a testator, dying childless, devises his land to his widow, with remainder to the heirs of her body, and after she marries again and has children, she and her husband obtain a decree against them authorizing a sale of the land for reinvestment, the children of a daughter of such widow, born after the entry of the decree, such daughter having died before the widow, are not bound by it, as they derive title, not by inheritance from their

mother, but directly from the will as being heirs of the body of their grandmother. (Mo.) *Heady v. Crouse*, 643.

11. **JUDGMENTS—Res Judicata—Questions not Identical.**—A decision that a certain decree and a deed in pursuance thereof did not divest the fee, and that they should be disregarded in determining where the fee rested, is not conclusive of whether the deed can be reformed by striking out the words "bodily heirs." (Ill.) *Teel v. Dunnihoo*, 319.

12. **JUDGMENTS—Conclusiveness Against Minors.**—Where the court acquired jurisdiction of the parties and the subject matter, then, although errors subsequently intervened, the title of a bona fide purchaser under the decree cannot be impeached by minor parties to the suit. (Ill.) *Teel v. Dunnihoo*, 319.

13. **JUDGMENTS—Res Judicata.**—Where Some Controlling Fact or question material to the determination of both causes of action has been determined in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether or not the cause of action is the same in both suits. (Ill.) *Teel v. Dunnihoo*, 319.

14. **JUDGMENTS—Conclusiveness Against Parties.**—Where a court having jurisdiction of the parties and subject matter makes findings of fact in its decree upon which innocent parties rely, such facts, when again called in question in a subsequent suit by a party or privy to the first suit, are regarded as established by the findings in the first decree. (Ill.) *Teel v. Dunnihoo*, 319.

Limitation of Actions.

15. **LIMITATIONS OF ACTIONS upon Judgments.**—There is no statute of limitations in Massachusetts fixing the time after which an action cannot be sustained upon a judgment. The statute providing that a judgment or decree shall be presumed to be satisfied and paid twenty years after its rendition creates a presumption, and not a limitation, and a judgment may, therefore, be recovered on a judgment rendered more than twenty years prior to the commencement of the action upon it, if the evidence rebuts the presumption of its payment. (Mass.) *Haynes v. Blanchard*, 551.

16. **LIMITATION OF ACTIONS upon Judgments.**—A statute imposing a limitation of twenty years upon actions upon contracts does not apply to an action on a judgment. (Mass.) *Haynes v. Blanchard*, 551.

See Executions.

JUDICIAL OFFICERS.

See Constitutional Law, 10-13.

JUDICIAL SALE.

JUDICIAL SALE, Mistake in Notice of.—The naming of the date of sale in the notice thereof as June 1, 1093, instead of 1893, is a trivial irregularity which could mislead no one, and is cured by the confirmation of the sale. (Ark.) *Neff v. Elder*, 67.

JURISDICTION.

See Courts; Ejectment; Judgments.

JURY.

JURY—Right to, in Equity.—The right of trial by jury, considered as an absolute right, does not extend to cases of equitable jurisdiction. (Ill.) *Shedd v. Seefeld*, 269.

Note.

Jury Trial. See Reform Schools and Reformatories.

JUVENILE COURTS.

See Courts, 5-13.

LABOR UNIONS.

See Conspiracy.

LACHES.

See Equity, 5-6.

LANDLORD AND TENANT.*In General.*

1. **LEASES**—Provision for Renewal Invalid for Indefiniteness.—A provision in a lease that the lessee may have the "privilege of five years longer, he paying additional rent on revaluation now fixed at five hundred dollars," no provision being made as to how or when the revaluation should be determined, is too vague and indefinite to constitute a valid covenant for renewal. (Ill.) *Streit v. Fay*, 304.

2. **LEASES**—Holding Over—Tenancy from Year to Year.—Where a lessee is suffered to remain in the possession of the premises for more than a year after the expiration of the term, during which period the rent was collected from him, he becomes a tenant from year to year. (Ill.) *Streit v. Fay*, 304.

3. **LEASES**—Refusal to Pay Rent.—Where the ownership of leased premises is in doubt, a statement by the lessee, when asked for the rent, that he will pay it when he knows the right party to pay to, is not a refusal of payment nor a denial of the demandant's right as landlord. (Ill.) *Streit v. Fay*, 304.

4. **LEASE**.—A Tenancy from Year to Year cannot be Terminated by a demand for immediate possession, but the tenant must be notified to quit in accordance with the statute. (Ill.) *Streit v. Fay*, 304.

Dangerous Premises.

5. **LANDLORD AND TENANT**—Risk Assumed by the Latter.—A tenant accepting a lease of premises known to be in a dangerous condition must be deemed guilty of contributory negligence or to have assumed the risk, and hence cannot recover for personal injuries subsequently suffered through such condition. (Utah) *Reams v. Taylor*, 930.

6. **LANDLORD AND TENANT**.—A tenant accepting a lease and taking possession of premises on which are dangerous defects should either repair the defects and deduct the cost from the rent, or surrender the premises, and failing to do either, if he is injured by such defects cannot recover therefor. (Utah) *Reams v. Taylor*, 930.

Unlawful Detainer.

7. **LANDLORD AND TENANT**—Unlawful Detainer.—An action of unlawful detainer does not lie to determine the rights of the parties in the property sued for. (Ark.) *Washington v. Moore*, 29.

8. LANDLORD AND TENANT—Unlawful Detainer—Disputed Title.—A tenant cannot dispute the title of his landlord so long as he remains in possession under him. He cannot acquire possession under the lease and then dispute the title. (Ark.) *Washington v. Moore*, 29.

9. LANDLORD AND TENANT—Unlawful Detainer—Purchase of the Property by the Tenant.—In an action of unlawful detainer, the plea by the tenant that he has purchased the property of the plaintiff and received a bond for the title, and has paid of the purchase price all except a sum designated, which sum the tenant pleads that he is willing to pay if the plaintiff will accept it, may be struck out on motion of the plaintiff. (Ark.) *Washington v. Moore*, 29.

See Homesteads, 7, 8.

Note.

Laws, retrospective, attempting to change uses to which property may be applied, 473.

retrospective, cemetery, prohibiting use of property as, 473.

retrospective, to correct mistakes or carry out the intention of the parties, 469.

retrospective, validating marriages, 469.

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retrospective, what forbidden as, 468.

LEGISLATURE.

See Constitutional Law.

LICENSE TAX.

See Taxation, 8, 4.

LIMITATION OF ACTIONS.

1. LIMITATIONS—Suit to Quiet Title.—Where a mortgagee obtains a conveyance of the legal title and takes possession of the premises, a suit by him to enjoin a sale under an attachment levied prior to the conveyance is in the nature of a suit to quiet title, rather than to foreclose a mortgage, within the meaning of the statute of limitations. (Or.) *Katz v. Obenchain*, 821.

2. LIMITATION OF ACTIONS—Minority—Marriage.—If a wife, during her minority, executes a conveyance of her land, and afterward obtains a void decree of divorce and contracts a second marriage, and on attaining her majority executes a second conveyance to the same grantee, after which her first husband dies, and both her conveyances are void, the statute of limitations against any action by her to recover the land commences to run on the death of her first husband. (Mo.) *Hinkle v. Lovelace*, 698.

See Adverse Possession; Equity, 5, 6; Judgments, 15, 16.

Note.

Limitation of Actions, constitutionality of laws prescribing, 479, 480.

LIS PENDENS.

1. LIS PENDENS.—Parties Who, After the Commencement of the Suit, acquire title to real property, are charged with notice of such commencement. (Ark.) *Neff v. Elder*, 67.

2. LIS PENDENS—Prior Purchasers and Assignees.—A mortgagee and his assignees are not affected by a suit brought after the execution of the mortgage to which they are not parties. (Ark.) *Neff v. Elder*, 67.

LIVESTOCK.

See Animals; Railroads.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION—Probable Cause When Question of Law.—In an action for malicious prosecution the question as to whether there was probable cause is one solely of law, if the facts are undisputed. (Wis.) *King v. Apple River Power Co.*, 1063.

2. MALICIOUS PROSECUTION—Probable Cause—Advice of Counsel—Statement of Facts.—If a person takes the advice of reputable counsel based upon a full, fair and honest statement of all the facts and information within such person's knowledge before making a criminal complaint, honestly believing the one charged to be guilty, he has probable cause as matter of law for his action, and is not subject to an action for malicious prosecution. The term "full, fair and honest statement of all the facts," as here used, does not mean all the facts discoverable, but all the facts within the knowledge of the person making the statement. (Wis.) *King v. Apple River Power Co.*, 1063.

MANDAMUS.

COUNTIES—Expenditures by—Mandamus to Enforce.—If an expenditure by a county is authorized by a valid law, and the correctness of the amount due by the county is ascertained and approved as the law directs, there being no question as to bona fides, it is the duty of the county commissioners to audit, approve, and pay the same, and such payment may be enforced by mandamus. (Fla.) *Board of County Commrs. v. Board of Pilot Commrs.*, 196.

MARRIAGE.

See Breach of Marriage Contract.

Note.

Marriages, constitutionality of statutes validating, 469.

MASTER AND SERVANT.

Discharge of Employé.

1. MASTER AND SERVANT—Employment for Definite Term—Right to Discharge.—Under a contract of employment for a definite term, provided the duties of the employment are satisfactorily performed, the employer has the absolute right, whenever he becomes in good faith dissatisfied with the services of the employé, to discharge him, and it is immaterial in such case that in fact no valid grounds for the discharge exist. (Pa.) *Corgan v. George F. Lee Coal Co.*, 891.

2. MASTER AND SERVANT—Employment for Definite Term—Right to Discharge.—Under a contract of employment for a definite term, provided the duties of the employment are satisfactorily performed, the employer has the right, whenever he becomes in good faith dissatisfied with the services of the employé, to discharge him,

and is not bound to give any reason for the dismissal at the time, and if he gives a wrong reason therefor, he is not thereby estopped from setting up any other or different cause really existing when the servant is discharged. (Pa.) *Corgan v. George F. Lee Coal Co.*, 891.

Mining Employés.

3. **MINING EMPLOYE**, When does not Assume the Risk.—If two experienced miners examine the ribs and face of an entry where one of them is to work, and such ribs and face present an appearance of safety, the jury is justified in finding that he did not assume the risk, and that he exercised due care and caution for his own safety, and had the right to assume that the mine owners had discharged any duty which they owed him in reference to any dangers that might arise from the proximity of a cross-cut to his entry. (Ill.) *Superior Coal etc. Co. v. Kaiser*, 233.

4. **MINE OWNER**, When Guilty of Want of Due Care for His Employés.—If a mine owner, by making a thorough examination, would have discovered and might have averted a danger from which an employé was subsequently injured, there is a failure to discharge a duty which rests on the owner of a mine to use reasonable care and diligence to ascertain that the employé is provided with a safe place in which to work. (Ill.) *Superior Coal etc. Co. v. Kaiser*, 233.

5. **MINING EMPLOYE**, Duty of, for His Own Safety.—While a miner is bound to take notice of defects which are patent, he is not required to make an examination for hidden defects, and may act on the presumption that the mine owners have used reasonable care. (Ill.) *Superior Coal etc. Co. v. Kaiser*, 233.

6. **MINE OWNERS**, Duty of, to Provide Safe Place for Work Notwithstanding Changing Conditions.—The rule which requires the master to furnish a safe place to work applies, although the servant is employed in constantly producing changes and temporary conditions, as in mining, for the time being more or less dangerous, if the servant has no part in producing the condition which leads to his injury. (Ill.) *Superior Coal etc. Co. v. Kaiser*, 233.

Rules Promulgated by Employer.

7. **MASTER AND SERVANT**—Negligence in Violating a Rule.—If the master promulgates a rule for the safety of his servants, and one of them is injured while violating that rule and on account of its violation, he is guilty of contributory negligence as a matter of law. (Ark.) *St. Louis etc. Ry. Co. v. Dupree*, 74.

8. **MASTER AND SERVANT**—Rules, Habit of Violating.—If a rule promulgated by a master for the safety of his servants is habitually violated, and this violation is known to and acquiesced in by him, evidence of such violation is admissible to repel the inference which would otherwise be drawn that the violation amounted to contributory negligence by the person injured thereby. (Ark.) *St. Louis etc. Ry. Co. v. Dupree*, 74.

Safe Place and Appliances.

9. **MASTER AND SERVANT**—Safe Place and Appliances.—It is the duty of the master to furnish his employé with a reasonably safe place to work in, and a reasonably safe appliance to work with. This duty is absolute and cannot be delegated. (Wis.) *Yazdewski v. Barker*, 1059.

10. **MASTER AND SERVANT**—Place and Appliances in General Use.—If a master furnishes his servant such a place to work in or

appliance to work with as is in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances, he has discharged his duty to furnish a reasonably safe place or appliance. (Wis.) *Yazdewski v. Barker*, 1059.

11. MASTER AND SERVANT—Place and Appliances—"Obviously" Dangerous.—The master does not discharge his duty to his servant by furnishing him the ordinary place to work in, or appliances in general use to work with, if such ordinary place or generally used appliance is "obviously" dangerous. The word "obviously," as here used, does not mean that the danger should be obvious to any person, however unskilled or ignorant, but that it should be obvious to the ordinarily careful employer, or to a person having equal skill and judgment and opportunity for examination. (Wis.) *Yazdewski v. Barker*, 1059.

12. APPEAL AND ERROR—Laches.—So far as defects in ways, works, and machines are concerned, there is no difference between the liability at the common law and the liability under the employers' liability act, except in the amount recoverable. Hence, the exclusion from evidence of the notice given by the plaintiff to comply with such act is harmless. (Mass.) *McCafferty v. Lewando's etc. Cleaning Co.*, 562.

13. MASTER AND SERVANT—Liability to Person Injured When not Known to be in Place of Danger.—A master is not answerable to a servant injured because he placed himself in a position of danger, when such injury is due to the act of another servant, who, on his part, did not know that the one injured was in such place of danger, or that it was a part of his duty to be there. (Ark.) *St. Louis etc. Ry. Co. v. Dupree*, 74.

Assumption of Risks and Contributory Negligence.

14. MASTER AND SERVANT—Assumption of Risks.—A workman employed in a factory assumes all the obvious risks, whether as a matter of fact he knows of them or not, and it is for him to determine whether he will make an examination before going to work, or will work without such examination and take his chances. (Mass.) *McCafferty v. Lewando's etc. Cleaning Co.*, 562.

15. MASTER AND SERVANT.—A workman falling into a hole in a floor, which is clearly visible and must be seen by anyone looking on the floor, cannot recover of his master. (Mass.) *McCafferty v. Lewando's etc. Cleaning Co.*, 562.

16. STATUTES Fixing Age Limit for Employment—Violation—Contributory Negligence—Assumption of Risks.—A boy, employed in violation of a statute fixing the age limit under which boys shall not be employed in a certain business, is not chargeable with contributory negligence, or with having assumed the risks of employment in such business. (Pa.) *Lenahan v. Pittston Coal Min. Co.*, 885.

17. MASTER AND SERVANT—Change in the Condition of the Place of Employment, When Immaterial.—If the plaintiff is suing for injuries suffered from falling into a hole in the floor of the factory where she works, evidence tending to prove that such hole had been kept covered at a prior date is immaterial and inadmissible, if it was not covered at the time plaintiff was injured and its condition was obvious. (Mass.) *McCafferty v. Lewando's etc. Cleaning Co.*, 562.

Fellow-servants.

18. MASTER AND SERVANT—Fellow-Servants, Who are not.—An inspector of railway cars and an engine foreman, in charge of an engine, switching, making up, and breaking up trains, are not fellow-servants, where they are working in different departments of the

service and not together for a common purpose. (Ark.) *St. Louis etc. Ry. Co. v. Dupree*, 74.

19. STREET RAILWAYS—Fellow-servants, Conductor and Motorman of, When are.—The motorman and conductor of one car of a street railway are fellow-servants of the conductor and motorman of another car, when they are engaged in the same common employment, meeting and passing each other frequently, and associating together every day, and there is such coassociation and co-operation in the same line of employment that each necessarily knows the habits and capacity of the other, and has an opportunity to exercise a mutual influence upon the other. (Wash.) *Berg v. Seattle etc. Ry. Co.*, 968.

20. MASTER AND SERVANT—Fellow-servant, Question of, When for the Jury.—Whether a miner working in an entry and the machine runners and shooters working in a cross-cut were fellow-servants is a question for the jury, where the miner did not work in the cross-cut at any time. (Ill.) *Superior Coal etc. Co. v. Kaiser*, 233.

21. MASTER AND SERVANT—Fellow-Servant's Negligence—Assumption of Risks.—An employé is relieved from his ordinary assumption of the risks of his fellow-servant's negligence upon the promise of the master to remove that danger only for a time reasonably required to perform that promise, and when such reasonable time has expired, the master's promise is broken to the knowledge of the employé, and he can no longer be considered as relying thereon. What is such reasonable time depends upon the circumstances of each particular case. (Wis.) *Williams v. Kimberly etc. Co.*, 1049.

22. MASTER AND SERVANT—Fellow-servant's Negligence—Assumption of Risks.—The fact that one suing to recover for injuries caused by the negligence of a fellow-servant shows by his complaint that such servant was retained in the service for ten days after the promise of the master to remove him, without any allegation of an excuse for such delay, does not necessarily negative its existence nor show that the ten days' period in question was unreasonable, so as to deprive the plaintiff of the right to rely on the promise of the master. (Wis.) *Williams v. Kimberly etc. Co.*, 1049.

23. MASTER AND SERVANT—Negligence of Master—Removal of Incompetent Servant.—The master owes the duty of immediate removal of an incompetent employé whenever he acquires knowledge of such incompetence. Hence, he is guilty of negligence in failing so to remove in the sense, at least, of conduct subjecting him to liability to other employés. (Wis.) *Williams v. Kimberly etc. Co.*, 1049.

24. MASTER AND SERVANT—Incompetent Fellow-servants—Promise to Remove—Assumption of Risks.—The rule justifying an employé in temporary exposure to known risks upon the employer's promise to remove the danger applies to risks arising from the incompetence of fellow-employés as well as those arising from dangerous machinery, and there is no distinction because the danger results from the incompetence of a fellow-servant using complicated machinery, instead of simple tools and implements, or none at all. (Wis.) *Williams v. Kimberly etc. Co.*, 1049.

Liability for Employés Tort.

25. MASTER AND SERVANT, Act of the Latter, When Imputed to the Former.—If the driver of a team, while engaged in the business of the master, leaves the team unhitched and unattended in a public street, to go into a poolroom on an errand of his own, to obtain some tobacco for himself, and the team runs away and injures a person in the exercise of due care, the negligence of the driver in leaving the team is the omission to continue in its proper custody when

he had such custody for the master, and the latter is liable. (Mass.) *Hayes v. Wilkins*, 549.

See Conspiracy; Constitutional Law, 7-9.

MAXIM IN PARI DELICTO.

See Deeds, 6.

MERGER.

See Estates.

MINES AND MINING.

MINES AND MINING—Rights of Cotenant.—An owner of an undivided interest in a mine has no right to use the tunnel therein to convey ore from an outside mining claim. (Colo.) *Laesch v. Morton*, 106.

MORTGAGES.

Proof of Mortgage.

1. **EVIDENCE—Admission of Without Objection.**—Though the method employed of proving the existence of a mortgage is not proper, yet if no objection is made to it, the competency of the evidence cannot be questioned on appeal. (Ark.) *Neff v. Elder*, 67.

Deed Absolute.

2. **MORTGAGE—Deed Absolute.**—The Burden of Proof is upon the party alleging that a deed absolute on its face was intended as a mortgage, to establish such fact by clear and convincing evidence. (Ill.) *Deadman v. Yantis*, 291.

3. **MORTGAGE—Deed Absolute—Right to Redeem.**—When the legal title is, by deed absolute in form, conveyed to secure a loan, no action is necessary to divest the right to redeem. Such right may be lost by laches. (Ill.) *Deadman v. Yantis*, 291.

4. **MORTGAGE—Deed Absolute—Subsequent Grantee.**—Where one having the right to redeem under a deed absolute, intended as a mortgage, makes a sale and directs the holder of the legal title to convey the premises to the purchaser, the latter takes the title divested of the condition of defeasance. (Ill.) *Deadman v. Yantis*, 291.

Payment and Assignment.

5. **MORTGAGE, Rights of Assignee.**—If a mortgage is enforceable by the original mortgagee, his assignees are protected, though, before the assignment to them, suit was pending involving the right to enforce the mortgage. (Ark.) *Neff v. Elder*, 67.

6. **MORTGAGE, Discharge of by a Mortgagee Who has Ceased to be the Owner of the Indebtedness.**—Though the indebtedness to secure which a mortgage was given has been transferred, the release of the mortgage of record by the original mortgagee protects a bona fide purchaser or encumbrancer having no notice of the assignment, it not having been filed for record. (Wis.) *Bautz v. Adams*, 1030.

7. **MORTGAGE—Payment to the Original Mortgagee Who has Ceased to be the Owner of the Mortgage Indebtedness.**—The maker of a negotiable note secured by mortgage is not protected by the recording act in paying the mortgage indebtedness to the original mortgagee and taking a release from him, where he has not possession of the note secured nor authority from the real owner thereof to receive payment. (Wis.) *Bautz v. Adams*, 1030.

8. PAYMENT OF A NOTE SECURED BY A MORTGAGE Made to the Agent of the Original Mortgage after he had assigned the indebtedness is nevertheless good, if the assignee permitted such agent to represent himself as having authority to do what he did, and he had for many years acted as the agent of such assignee in receiving payment of principal and interest on loans made by him. (Wis.) *Bautz v. Adams*, 1030.

9. PRINCIPAL AND AGENT—Authority to Receive Payment of Mortgage Note.—If a person is not the owner or possessor of a note and mortgage, authority to him to receive payment of the indebtedness is essential to extinguishing the security. This authority may be established by circumstances showing its existence with reasonable certainty, and need not be expressed in writing or otherwise directly established. (Wis.) *Bautz v. Williams*, 1030.

See Husband and Wife, 10-15; Subrogation.

MUNICIPAL CORPORATIONS.

In General.

1. MUNICIPAL CORPORATIONS—Ordinances—Town Vote in Contravention of.—A vote at a special town meeting authorizing a property owner in such town to repair and put in habitable condition a certain wooden building situated within a certain district cannot contravene or modify the application of a duly adopted and valid town ordinance which expressly prohibits such work within such district, unless a license is granted therefor by the town authorities. (Me.) *Inhabitants of Houlton v. Titcomb*, 492.

2. MUNICIPAL CORPORATIONS—Liability for Consequential Damages to Private Property.—A municipal corporation, if it confines itself within the limits of its power and jurisdiction, is not liable to an action for consequential damages to private property or persons, unless expressly made so, when the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable. (Fla.) *Anderson v. Fuller*, 170.

3. MUNICIPAL CORPORATIONS—Grants of Franchise Rights—Rights of Public.—While municipalities may, by ordinance, grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable ordinances that are reasonable may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding they may interfere with legal franchise rights. (Fla.) *Anderson v. Fuller*, 170.

4. MUNICIPAL CORPORATIONS—Franchise Rights.—A water company placing its pipes in the streets under a franchise contract with the city does so in subordination to the superior rights of the public, through its duly constituted authorities, to construct sewers in the same streets, whenever the public interest demands; and if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursements on account thereof. (Fla.) *Anderson v. Fuller*, 170.

5. MUNICIPAL CORPORATIONS—Water-pipes in Streets—Cost of Removing.—A city is not authorized, directly or indirectly,

to burden itself or its citizens, by contract, with the cost of removing and replacing the water-pipes of a corporation that necessarily have been interfered with in the laying of sewers in the streets. (Fla.) *Anderson v. Fuller*, 170.

6. MUNICIPAL CORPORATIONS—Void Contracts—Suit by Taxpayer.—A taxpayer in a city may properly maintain a suit to restrain the paying out of public moneys upon its void and unauthorized contracts. (Fla.) *Anderson v. Fuller*, 170.

Consolidation of Cities.

7. CONSTITUTIONAL LAW—Consolidation of Cities—Special Legislation.—It is purely a legislative matter to determine what cities may be consolidated, and a statute making contiguity or close proximity a condition of the right to consolidate does not attempt to regulate the affairs of any special city and is not unconstitutional as special legislation. (Pa.) *Pittsburg's Petition*, 845.

8. CONSTITUTIONAL LAW—Consolidation of Cities—Special Legislation.—A statute enabling cities that are contiguous or in close proximity to consolidate, if general in form and substance, is not unconstitutional as special legislation or arbitrary classification, although at the time of its passage there are only two cities in the state to which it can apply. (Pa.) *Pittsburg's Petition*, 845.

9. CONSTITUTIONAL LAW—Consolidation of Cities—Due Process of Law.—A statute enabling contiguous cities to consolidate is not contrary to the national constitution guaranteeing due process of law, in that it permits the qualified electors of the larger city to overpower or outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of its qualified voters or electors. (Pa.) *Pittsburg's Petition*, 845.

10. CONSTITUTIONAL LAW—Consolidation of Cities—Extending Term of Office.—A statute enabling cities to consolidate, and which will have the effect of extending the term of councilmen in one of them, is not invalid as violating a constitutional provision that "no law shall extend the term of any public officer." (Pa.) *Pittsburg's Petition*, 845.

Laying out Ways.

11. MUNICIPAL CORPORATIONS.—The Laying Out Ways in a town involves the taking of private property for a public use, under statute authority, and all statute requirements must be fully and strictly complied with. (Me.) *Conant's Appeal*, 512.

12. MUNICIPAL OFFICERS—Judicial Duties—Laying Out Ways.—Duties of municipal officers in laying out town ways are not ministerial merely, but judicial, as they exercise their judgment as to the propriety of the way, and as to its location between termini, and especially in determining whether the prerequisite conditions exist which warrant the taking of private property for public use and awarding damages to the owners of land so taken. (Me.) *Conant's Appeal*, 512.

Loss of Title to Streets by Estoppel or Prescription.

13. MUNICIPAL CORPORATIONS—Public Streets, Loss of Title by Prescription.—Where land dedicated as a public street is in possession of, and subject to acts of ownership by, a stranger to the dedication, such possession is presumed to be adverse, and may ripen into title by prescription as against the municipality in which the street is situated. (Ark.) *El Dorado v. Ritchie Grocery Co.*, 22.

14. MUNICIPAL CORPORATIONS, Estoppel of, to Insist upon the Existence and Opening of Public Streets.—Although property has by

its owners been designated upon recorded plats as constituting part of public streets, and they have by such plats dedicated it as such streets, yet if a municipal corporation of which they are parts stands by, and by its silent acquiescence in the occupation of the land including such streets, knowing that large sums of money are being invested on the faith and in the belief that no streets existed, or, if any existed, that they have been abandoned, the municipality becomes estopped from insisting that the buildings and other structures on such streets obstruct a highway. (Ill.) *City of Chicago v. Illinois Steel Co.*, 258.

15. **MUNICIPAL CORPORATIONS** are not Within the Statute of Limitations except as to private rights, but courts of equity will prevent the operation of this rule by enforcing an equitable estoppel, where to permit the assertion of a right in the street after long acquiescence in the expenditure of money in the erection of buildings would work a gross injustice to private persons. (Ill.) *City of Chicago v. Illinois Steel Co.*, 258.

Change in Grade of Street.

16. **PUBLIC STREETS—Change of Grade—Damage to Abutting Owner.**—A city may, in bringing a street of which it owns the fee to the re-established grade, excavate therein so that the soil of an abutting lot will slide into the street, without incurring liability for taking property without compensation or for removing the lateral support. (Iowa) *Talcott Brothers v. City of Des Moines*, 419.

17. **PUBLIC STREET—Damages for Change of Grade.**—Under a constitutional provision that private property shall not be taken or damaged for public use without just compensation, a city is liable to the owner of property for damages thereto resulting from the first grading of the adjacent street. (Minn.) *Sallden v. City of Little Falls*, 635.

18. **PUBLIC STREET—Change in Grade.—The Measure of Damages** to abutting property from the first grading of a street is the difference in the value of the property before and after the acts complained of, unless the cost of restoring the premises to their natural condition is less than the difference in value, in which case such cost is the measure of relief. (Minn.) *Sallden v. City of Little Falls*, 635.

Defects and Obstructions in Streets.

19. **MUNICIPAL CORPORATIONS—Defects in Streets—Liability for.**—If two causes combine to produce an injury both in their nature proximate, the one being a defect in a city street and the other some accident for which neither party is responsible, such as the accident of a horse running away beyond control, the city is liable, provided the owner of the horse was not at fault, and the injury would not have been sustained but for the defect in the street. But there can be no recovery if the accident be caused by the unskillfulness or want of care of the owner or driver of the horse, or if it can be shown that either of them by any want of care directly caused the accident. (Fla.) *Janes v. City of Tampa*, 203.

20. **MUNICIPAL CORPORATIONS—Obstruction in Street—Liability for.**—If an injury to a horse would not have been sustained but for an obstruction in a street caused by the negligence of the city, and there was no negligence or fault on the part of the owner of the horse or his servant, the city is liable. (Fla.) *Janes v. City of Tampa*, 203.

21. MUNICIPAL CORPORATIONS—Obstructions in Streets—Liability.—It is the duty of a city to maintain its streets in a reasonably good condition for ordinary travel by persons using due care and prudence, and the city has no right to allow its citizens owning property bordering upon the street to place obstructions upon such portions thereof as are intended to be used as a travelway, and when such obstruction is the proximate cause of an injury, and the person injured could not have avoided it by the exercise of reasonable and ordinary care and prudence, the city is liable. (Colo.) *City of Denver v. Utzler*, 108.

22. MUNICIPAL CORPORATIONS—Excavations in Streets—Liability for Injury to Horses.—If a horse takes fright and runs away and is injured because of the negligence of a municipal corporation in leaving a dangerous excavation in the street unprotected, an action may be maintained against the city; provided, that the driver of the horse exercised due care and skill in driving or managing it. (Colo.) *City of Denver v. Utzler*, 108.

23. MUNICIPAL CORPORATIONS—Defects in Streets—Liability for Injury to Horses.—A defect in a public street within a city does not render the corporation liable for an injury to a team of horses coming in contact with it unless the defect is the proximate cause of the injury, and this cannot be said to be true where the carelessness or negligence of the driver permits those causes to be set in motion which produce the damage. (Colo.) *City of Denver v. Utzler*, 108.

Contracts for Public Work.

24. MUNICIPAL CORPORATIONS—Contracts for Public Work.—If its charter requires the officers of a city to award contracts for public work to the lowest bidder, a contract made in violation of its requirements is illegal and void, and neither the municipality nor its officers can make a binding contract for such work except in compliance with the requirements of the law. (Fla.) *Anderson v. Fuller*, 170.

25. MUNICIPAL CORPORATIONS—Contracts for Public Work.—Under a city charter requiring its officers to award contracts for public work to the lowest bidder, the incorporation into the advertisement for bids, or in the specifications for the work upon which bids are predicated, of illegal or unauthorized conditions or obligations upon the contractor, compliance with which upon his part will necessarily and illegally increase the cost of the work, is not a letting of such contract to the lowest bidder, and will render the contract illegal and void. (Fla.) *Anderson v. Fuller*, 170.

Municipal Contracts—Ultra Vires—Contractor's Bond.

26. MUNICIPAL CONTRACT—Bond to Secure Payment.—The order in which a contract for the construction of a sewer and the bond to secure payment to materialmen and laborers are executed is not material. After the bid has been accepted and approved, the bond may be executed before the contract, or the contract before the bond. (Minn.) *Red Wing Sewer Pipe Co. v. Donnelly*, 619.

27. MUNICIPAL CONTRACT—Recitals in Bond.—Where a bond, given to secure payments to materialmen and laborers under a contract to construct a sewer, recites that the contract was executed as of one date, the sureties are estopped to assert that it was in fact signed by the president of the board of public works at another and subsequent date. (Minn.) *Red Wing Sewer Pipe Co. v. Donnelly*, 619.

28. MUNICIPAL CONTRACT—Action by Materialmen.—One who sells materials for the construction of a sewer is not required, in an action for their value on the bond of the contractor, to show that they actually entered into the construction of the sewer. (Minn.) *Red Wing Sewer Pipe Co. v. Donnelly*, 619.

29. MUNICIPAL CONTRACT—Doctrine of Ultra Vires.—The tendency of courts to refuse recognition to the doctrine of ultra vires is less pronounced in the case of municipal than in the case of private corporations; but in both cases, when the doctrine is invoked, it should not be allowed to prevail where it will defeat the ends of justice or work a legal wrong. (Minn.) *Bell v. Kirkland*, 621.

30. MUNICIPAL CONTRACT.—The Term "Ultra Vires" is used in two senses. The first describes a contract wholly outside the power of the corporation to make under any circumstances; the second, a contract within the power of the corporation to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power in some particular or through some undisclosed circumstance. Contracts in the first class are ultra vires in the primary and proper sense of the term, and ordinarily are void in toto; but contracts in the second class are ultra vires in a secondary sense merely, and the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. (Minn.) *Bell v. Kirkland*, 621.

31. MUNICIPAL CONTRACT—Doctrine of Ultra Vires.—The fact that a city has not procured a right of way for a portion of a contemplated sewer line does not render invalid its entire contract for the construction of the sewer. (Minn.) *Bell v. Kirkland*, 621.

32. MUNICIPAL CONTRACT—Doctrine of Ultra Vires.—The facts that only a small proportion of a contract is ultra vires in any sense, and that it has been substantially performed by the parties, are strong, if not conclusive, considerations for refusing to hold it void. (Minn.) *Bell v. Kirkland*, 621.

33. MUNICIPAL CONTRACT—Ultra Vires.—A Recital in a Bond given by one contracting to construct a sewer that the contract is valid and subsisting precludes the sureties from asserting it to be ultra vires. (Minn.) *Bell v. Kirkland*, 621.

Municipal Ordinances in General.

34. MUNICIPAL CORPORATIONS—Ordinances—Reasonableness. If the adoption of a municipal ordinance is expressly authorized by the legislature and the power so granted is not in conflict with constitutional prohibitions, or fundamental principles, it cannot be successfully assailed as unreasonable in a judicial tribunal. (Ind.) *Miller v. Town of Syracuse*, 367.

35. CONSTITUTIONAL LAW.—Municipal Legislation is to be construed and interpreted by the same rules as statutes, and its constitutionality and validity upheld whenever possible. (Ind.) *Schmidt v. City of Indianapolis*, 385.

36. MUNICIPAL ORDINANCES in derogation of the common law must be construed strictly and not enlarged by implication. (Me.) *Inhabitants of Houlton v. Titcomb*, 492.

37. MUNICIPAL CORPORATIONS—Ordinance's Validity—Presumption.—If a municipal ordinance is adopted which would be lawful if intended for one purpose, and unlawful if for another, the presumption is that the purpose was lawful. (Ind.) *Schmidt v. City of Indianapolis*, 385.

38. MUNICIPAL CORPORATIONS—Penal Ordinances—Unfair Enforcement—Pleading.—Unless facts are pleaded showing a fixed and continuous policy of unjust discrimination on the part of a municipality in the enforcement of a penal ordinance, its validity cannot be inquired into. (Ind.) *Schmidt v. City of Indianapolis*, 385.

Police Regulations—Keeping Hogs.

39. MUNICIPAL CORPORATIONS—Ordinances—Police Power—Keeping Hogs.—An ordinance prohibiting the keeping of hogs in a pen within certain prescribed limits of a city is clearly within the scope of the exercise of the police power which may be delegated to the city. (Ind.) *Miller v. Town of Syracuse*, 367.

40. MUNICIPAL CORPORATIONS—Ordinances—Exercise of Police Power.—Under a general grant to a city of authority to exercise the police power, ordinances exercising such power should not be declared invalid as unreasonable unless plainly in violation of constitutional guaranties. (Ind.) *Miller v. Town of Syracuse*, 367.

41. MUNICIPAL CORPORATIONS—Ordinances—Keeping of Hogs.—An ordinance prohibiting the keeping of hogs in a pen within certain prescribed limits in a city is valid as a legitimate exercise of the police power for the promotion of the public health and comfort. (Ind.) *Miller v. Town of Syracuse*, 367.

Declaring Certain Things Nuisances.

42. MUNICIPAL CORPORATIONS—Power to Declare a Nuisance. A thing is not a nuisance merely because a municipal ordinance declares it to be such. (Me.) *Inhabitants of Houlton v. Titcomb*, 492.

43. NUISANCES—Power of Municipal Corporation to Declare.—Under a general grant of power to a municipal corporation to declare what shall constitute a nuisance, it cannot declare that to be a nuisance which from its evident nature, situation and surroundings is not, and cannot in fact become a nuisance. (Ind.) *Miller v. Town of Syracuse*, 366.

44. NUISANCES—Power of Municipal Corporations to Declare.—Under a general grant of power to a municipal corporation to declare what shall constitute a nuisance, it may include nuisances per se, and those things which in their nature may become nuisances, and as to which there may be honest differences of opinion in impartial minds. (Ind.) *Miller v. Town of Syracuse*, 367.

45. MUNICIPAL CORPORATIONS—Ordinances—Nuisance.—A municipal ordinance which treats a thing as a nuisance is sufficient, without a formal declaration, that it is such. (Ind.) *Miller v. Town of Syracuse*, 367.

46. MUNICIPAL CORPORATIONS—Exercise of Police Power—Nuisances.—The legislature may properly delegate to incorporated towns the exercise of police power within fixed constitutional limits, to declare, prevent and abate nuisances and preserve the public health. (Ind.) *Miller v. Town of Syracuse*, 367.

Regulating Liquor Traffic.

47. MUNICIPAL CORPORATIONS—Ordinances—Motives in Enacting.—If a city is empowered to enact an ordinance "to tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries," the motives and purposes inducing the passage of a penal ordinance licensing and regulating such breweries, distilleries and depots are irrelevant, and courts will not inquire into them. (Ind.) *Schmidt v. City of Indianapolis*, 385.

48. MUNICIPAL CORPORATIONS—Ordinances—License Tax or Tax for Revenue.—An ordinance relating to health, welfare, morality and security, and imposing the payment of a fee for the purpose of carrying out such regulation, imposes a license proper by virtue of the police power, but when the fee is imposed solely for revenue purposes, it is a tax. (Ind.) *Schmidt v. City of Indianapolis*, 385.

49. MUNICIPAL CORPORATIONS—Ordinances—License on Liquor Traffic.—Generally, license fees imposed upon useful occupations are in fact taxes exacted under the revenue power, while licenses imposed upon the liquor traffic and such other occupations as call for regulation by the state are none the less licenses proper because they yield a revenue in excess of that required for the purpose of regulation. (Ind.) *Schmidt v. City of Indianapolis*, 385.

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MURDER.

See Homicide.

NAVIGABLE WATERS.

See Nuisance, 1, 2.

NEGLIGENCE.

1. NEGLIGENCE—How Determined.—If a statute fails to define what shall constitute negligence, it must be determined by the rules of the common law. (Ind.) *Chicago etc. Ry. Co. v. Ramsey*, 379.

2. INFANTS—Trespassers—Use of Land by Owner.—The owner of land who makes changes on it, in the course of its beneficial use, which tend to attract children and to expose them to danger, is under no obligation to take special precautions for their safety when they enter without permission. (Pa.) *Thompson v. Baltimore etc. R. R. Co.*, 897.

See Highways.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. NEW TRIAL.—A Motion for Judgment Notwithstanding the Verdict, which the court denies, does not bar a subsequent motion for a new trial upon a settled case. (Minn.) *Sallden v. City of Little Falls*, 635.

2. NEW TRIAL—Instructions—Exceptions.—Assigning the giving of an instruction to the jury, or other ruling of the trial court, as a cause for a new trial, presents no question to such court as to the correctness of such ruling, unless an exception has been properly taken thereto. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

3. APPEAL AND ERROR—New Trial, Motion for, When not Necessary.—A motion for a new trial is not necessary in a case where

an action is commenced by a guardian and dismissed because of his want of authority to bring it, if the evidence upon which the dismissal rested was brought up by a bill of exceptions. (Ark.) *Hare v. Shaw*, 17.

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NUISANCE.

1. **NUISANCES at Common Law**.—Anything offensive to the sight, smell, or hearing, erected or carried on in or near a public place where the people dwell or pass, or have the right to pass, to their annoyance, is a nuisance at common law. (Ind.) *Miller v. Town of Syracuse*, 266.

2. **NUISANCE—Power to Declare by Statute**.—The state may declare what may, at law, be deemed a nuisance. (Me.) *Inhabitants of Houlton v. Titcomb*, 492.

3. **INJUNCTION Against Nuisance—Municipal Ordinance**.—A bill in equity cannot ordinarily be maintained for the mere violation of a municipal ordinance, and, to authorize an injunction against a threatened act of violation, it must amount to a nuisance if done. (Me.) *Inhabitants of Houlton v. Titcomb*, 492.

4. **NUISANCE—Injunction Against**.—Equity will restrain by injunction the threatened violation of a municipal ordinance when such violation contemplates an act which amounts to a nuisance at law, not because the act is a violation of the ordinance, but because it is a nuisance. (Me.) *Inhabitants of Houlton v. Titcomb*, 492.

5. **NUISANCE—Injunction Against**.—A municipal corporation may enjoin nuisances or threatened nuisances affecting matters with reference to which a portion of the power of the state has been conferred to it. But the right is limited to such matters, and with respect to other matters the right depends upon the same conditions as the right of individuals, namely, special damages. (Me.) *Inhabitants of Houlton v. Titcomb*, 492.

6. **NUISANCE, Removal of**.—A court of equity will not, except in extreme cases, exercise its power to compel the removal of existing structures upon land, though they may constitute a nuisance, but will leave the plaintiff to his remedy at law. (Me.) *Whitmore v. Brown*, 454.

7. **NUISANCE, Acquiescence in, Removal of**.—A court of equity will not intervene to remove an alleged nuisance when the plaintiff

has long tolerated it, but will leave him to establish his claim at law. (Me.) *Whitmore v. Brown*, 454.

8. **NUISANCE—Structures on Another's Land.**—The mere fact that structures are or will be erected on the land of another without the required statutory license, does not make them nuisances or outlaws to be lawfully assailed and destroyed by anyone, or abated at the private suit of any person. (Me.) *Whitmore v. Brown*, 454.

9. **NUISANCE—Erection of Building—Injunction Against.**—A court of equity will not, at the suit of a private person, restrain the erection of a building on the land of another, not in fact a nuisance, merely because its erection is forbidden by statute or ordinance. (Me.) *Whitmore v. Brown*, 454.

10. **NUISANCE.**—Structures on Land of another lessening plaintiff's enjoyment thereof for residence purposes, and also lessening its commercial value, do not give a right to an abatement of them as a nuisance, or even to damages. (Me.) *Whitmore v. Brown*, 454.

11. **NUISANCE—Structures on Land.**—A land owner, to enable him to have structures upon the land of another declared a nuisance, must show that they infringe some individual right recognized by the law as a legal private right of his. That they infringe the legal rights of others gives him no cause of action. (Me.) *Whitmore v. Brown*, 454.

12. **NUISANCE.**—Structures Infringing Public Rights only, such as navigation and boating, can be dealt with only by the public, by a proceeding in the name of the state, or by some authorized person in behalf of the public. An individual affected has no separate right of action in his own name. (Me.) *Whitmore v. Brown*, 454.

13. **NUISANCE.**—Proximity or Ugliness of Otherwise Harmless Structures upon the land of another, although they obstruct the view of the adjoining owner, do not constitute them a nuisance. The hurt to plaintiff must come from the structure, qua nuisance, to give him a cause of action. (Me.) *Whitmore v. Brown*, 454.

14. **NUISANCE—Injunction Against Erection of Structure.**—To enable a plaintiff to have a wharf on the land of another declared a nuisance and the extension thereof enjoined, on the ground that it materially impedes the passage by water to and from his land, the proof of that fact must be clear and convincing. (Me.) *Whitmore v. Brown*, 454.

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OFFICERS.

De Facto Officers—Salaries.

1. **PUBLIC OFFICER.**—The Acts of a *De Facto Officer* are Valid Only so far as concerns the public. If he performs services or duties, no matter how faithfully, he cannot maintain any action to recover the emoluments. (Utah) *Tanner v. Edwards*, 919.

2. **PUBLIC OFFICERS**—Right of *De Jure Officer* not Impaired by the Payment of His Salary to Another.—The wrongful payment of the emoluments or salary to a *de facto* officer does not impair the *de jure* officer's right to it, nor his right to recover from the state or municipality which made the wrongful payment. (Utah) *Tanner v. Edwards*, 919.

3. **PUBLIC OFFICER**, Right of to Salary Whether He Performs the Duties or not.—The right of an officer who has been appointed, commissioned and qualified, and is an officer *de jure*, to his salary cannot be successfully denied on the ground that, during the time for which the salary was sought, he was not discharging the duties of the office, and its duties were being discharged by the officer *de facto* to whom the salary has been paid. (Utah) *Tanner v. Edwards*, 919.

Liability of Judicial Officers.

See Constitutional Law.

4. **JUDICIAL OFFICERS**, Liability of.—A public officer acting judicially or in a quasi judicial capacity cannot be made personally liable in a civil action unless the act complained of is willful, corrupt or malicious, or without his jurisdiction. (Utah) *Garff v. Smith*, 924.

Liability of Sureties.

5. **OFFICIAL BONDS**—Liabilities of Sureties.—The liability of the sureties on an official bond is to be determined by the terms of

the bond itself, and such terms cannot be extended beyond the reasonable meaning thereof construed with reference to the purposes contemplated by the law requiring the bond. (Fla.) *Jennings v. Bobe*, 156.

6. OFFICIAL BONDS—Breach of.—Making an application for fees earned and unlawfully collecting from the county money as fees in excess of those allowed by law do not constitute a breach of a constable's bond conditioned that he "shall diligently and faithfully perform all the duties of his said office as prescribed by law." (Fla.) *Jennings v. Bobe*, 156.

Removal of Officers.

7. MUNICIPAL CORPORATIONS, Authority of, to Remove Officers.—In the cities and towns of Massachusetts there is no power to remove public officers, such, for instance, as members of the board of health, except what is given by statute. Therefore, the power to remove is not vested in the voters in a town meeting assembled. (Mass.) *Attorney General v. Stratton*, 527.

See Attachment, 6-8; Constitutional Law, 10-13.

ORDINANCES.

See Municipal Corporations, 34-38.

PARENT AND CHILD.

PARENT AND CHILD—Master and Servant—Principal and Agent—Torts of Child.—A parent, merely as such, is not liable for the torts of his child; but he may be liable upon the relation of principal and agent, or master and servant. (Ind.) *Broadstreet v. Hall*, 356.

PAROL TO VARY WRITING.

See Evidence, 7-10.

PARTITION.

1. PARTITION.—Reversioners and Remaindermen owning interests in fee in land subject to an unexpired life estate are entitled to partition. (Ill.) *Deadman v. Yantis*, 291.

2. PARTITION.—Sale Should not be Made for the purposes of partition unless necessary in order to protect the parties from serious loss. (Wis.) *Idema v. Comstock*, 1027.

3. PARTITION OR SALE—Test.—The established test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole. (Wis.) *Idema v. Comstock*, 1027.

4. PARTITION OR SALE.—Burden of Proof to establish the necessary requisites to a sale of land rather than a partition in kind is on the party alleging the necessity and advisability of such sale. (Wis.) *Idema v. Comstock*, 1027.

5. APPEAL.—A Defendant in Partition whose answer merely asserts that she is the owner of the undivided one-fourth of the land sought to be partitioned and denies the allegations of the bill that she is not entitled to any interest therein, has no right of appeal, in

the absence of a cross-bill, from a decree dismissing the bill. (Ill.) *Manternach v. Studd*, 310.

PASTURING LIVESTOCK.

See *Animals*.

PAYMENT.

PAYMENT BY MISTAKE—Recovery of Money.—The rule that money paid under a mutual mistake of fact can be recovered back is not applicable where, under an assumption of fact known to both parties to be doubtful, a voluntary payment has been made in extinguishment of a claim. (Iowa) *New York Life Ins. Co. v. Chittenden*, 444.

PHYSICIANS AND SURGEONS.

1. **PHYSICIANS—Implied Contract to Pay for Services.**—A promise to pay a physician for his services is not implied from the mere fact that a father calls him to attend his sick son, who is a man of mature age; but if the circumstances or conditions are such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered, the father is liable under an implied contract. (Mo.) *Morrell v. Lawrence*, 660.

2. **PHYSICIANS—Compensation—Wealth of Patient.**—If a physician is entitled to recover for services rendered his patient, he is entitled to recover only the reasonable value thereof, whether the patient is a poor man or a man of great wealth. (Mo.) *Morrell v. Lawrence*, 660.

3. **PHYSICIANS—Compensation—Wealth of Patient.**—The jury in estimating the reasonable value of the services rendered by a physician to his patient, have no concern with the question of the patient's ability to satisfy the judgment. (Mo.) *Morrell v. Lawrence*, 660.

4. **PHYSICIANS—Compensation—Wealth of Patient.**—If, in an action by a physician to recover for his services, the defendant introduces evidence to show that the physician was accustomed to charge smaller fees for similar services than those sued for, the latter has the right to show in rebuttal, if such is the fact, that the smaller fees were charged to poor men because of their poverty, and that the defendant's financial condition justified a charge for fair and reasonable compensation, and this is as far as the wealth of the defendant can be shown. (Mo.) *Morrell v. Lawrence*, 660.

5. **PHYSICIANS—Compensation—Evidence.**—A physician in an action to recover for services rendered his patient is entitled to show that he is a physician of learning and skill, and that fact should be taken as an element in estimating the reasonable value of the services rendered, but he has no right, in such case, to show what his general professional reputation as a physician is. (Mo.) *Morrell v. Lawrence*, 660.

6. **PHYSICIANS—Compensation—Wealth of Patient—Evidence.**—If a physician sues a father on an implied promise to pay for professional services rendered his son, and such physician knew in a general way the financial standing of both father and son, it is error to exclude evidence offered to show that such son was a man of considerable fortune and amply able to pay for the services rendered. (Mo.) *Morrell v. Lawrence*, 660.

PLEADING.

1. **PLEADING.**—A Demurrer Admits an Agreement as Alleged, together with all other facts properly pleaded. (Utah) *Reams v. Taylor*, 930.

2. **BILL OF PARTICULARS.**—The Object of a Bill of particulars is to inform the defendant of the claim he is called upon to defend against. (Ill.) *McKinnie v. Lane*, 338.

3. **BILL OF PARTICULARS.**—The Effect of a Bill of particulars is to limit and restrain the plaintiff, on the trial, to the proof of the particular causes of action therein mentioned. (Ill.) *McKinnie v. Lane*, 338.

4. **BILL OF PARTICULARS.**—The Amendment of a Bill of Particulars in assumpsit should be permitted where the bill states that the balance of the amount was to be given in goods at agreed prices, while the evidence shows that payment was to be in goods or in cash. (Ill.) *McKinnie v. Lane*, 338.

See Actions.

PLEDGES.

1. **PLEDGE**—Collateral Security—Duty to Make Available.—If a bond, note, bank stock, or accepted order on a third person is transferred and delivered to a creditor as collateral security, it is the duty of the pledgee to use reasonable care and diligence to make such collateral available and effectual for the purpose for which it was pledged, and if through his negligence or wrongful act or omission, the collateral is lost, he is accountable and liable to the pledgor for its value. (Mo.) *National Exch. Bank v. Kilpatrick*, 689.

2. **PLEDGE**—Collateral Security—Loss of Through Negligence.—If the payment of a note given to a bank is secured by the pledge of bank stock as collateral security, and when such bank stock is worth par value, the pledgor directs the bank holding the note to sell such stock and apply the proceeds on the note, and the bank fails and neglects to do so, it must, in the event that the bank stock subsequently becomes worthless, bear the loss, the amount of which must be credited on the note. (Mo.) *National Exch. Bank v. Kilpatrick*, 689.

PRINCIPAL AND AGENT.

1. **PRINCIPAL AND AGENT**—Inquiry as to the Extent of the Latter's Authority.—One seeking to acquire title to checks by the indorsement of an agent of the payee is bound to inquire and ascertain the extent of his authority. (Mass.) *A. Blum Jr.'s Sons v. Whipple*, 553.

2. **PRINCIPAL AND AGENT**—Laches—Delay in Giving Notice of an Unauthorized Indorsement of Checks.—Where an agent having checks of his principal in his possession, without authority to indorse, transfer or collect them, proceeds to negotiate and indorse them, and to collect the proceeds, which he embezzles, there is no duty on the part of the principal to give prompt notice of the want of the agent's authority, nor does the failure to do so for two years constitute a ratification of the agent's acts, or prevent the recovery by the principal of a person to whom the checks were indorsed and who has received the proceeds thereof. (Mass.) *Blum Jr.'s Sons v. Whipple*, 553.

3. **AGENCY.**—Whatever Evidence has a Tendency to prove an agency is admissible, even though it be not full and satisfactory, and

it is the province of the jury to pass upon it. (Iowa) *Joyce Co. v. Rohan*, 410.

4. **AGENCY**.—When One Knowingly and Without Dissent permits another to act as his agent, the capacity will be conclusively presumed. (Iowa) *Joyce Co. v. Rohan*, 410.

See Brokers; Insane Persons; Factors; Mortgages, 8-9.

PROBATE COURTS.

See Courts, 4.

PROBATE PROCEEDINGS.

See Executors and Administrators; Wills.

PROCESS.

1. **PROCESS**.—Service on Minors.—Jurisdiction of minor defendants in a proceeding by an administrator to sell land to pay debts of the estate is not acquired by leaving a copy of the summons with their mother and informing her of its contents, when she is a creditor of the estate, and the real party in interest, having resigned her office as administratrix in order to purchase at the sale. (Ill.) *Manternach v. Studd*, 310.

2. **PROCESS**.—Presumption in Support of Jurisdiction.—Where a decree in chancery is entered at a term subsequent to the return term and recites due service of process, but the return on the summons is insufficient, the finding in the decree will be supported by the presumption that a second summons was issued and served for the term at which the decree was entered; but no such presumption can be indulged where the decree was entered at the return term of the summons, in which case the recitals in the decree cannot prevail if the summons and return show the court was without jurisdiction. (Ill.) *Manternach v. Studd*, 310.

See Corporations, 14-15.

QUITCLAIM DEED.

See Deeds, 7-10.

RAILROADS.

Interpretation of Charters.

1. **RAILROADS**.—Construction of Charter.—Charters of public corporations are construed strictly against the corporations and liberally in favor of the public. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

Unguarded Turntables.

2. **RAILROADS**.—Turntables—Injury to Children.—If a railroad company erects a turntable in its own yard in a populous part of a city and leaves it unlocked when not in use, it owes the duty to a trespassing child attracted thereto through an open gateway not to injure him intentionally, but it is under no active duty to take care of him, either by keeping him out of the yard, or by protecting him from injury after he has entered it from his own acts, or the acts of others, who, like himself, have entered without permission. (Pa.) *Thompson v. Baltimore etc. B. R. Co.*, 897.

Construction of Crossings.

3. RAILROADS—Statutes Requiring Construction of Crossings.—In the exercise of the police power, a state may compel a railroad company to construct and maintain, at its own expense, suitable crossings at street and highway intersections, whether the highway is laid out before or after the construction of the railway, and whether the crossing is at grade, or below or above the tracks. (Minn.) *State v. St. Paul Ry. Co.*, 581.

4. RAILROADS—Construction of Statute Providing for Crossings.—A provision in the charter of a railway company that the said company shall have the right and authority to construct their said railroad and branches upon and along, across, under or over, any public or private highway, road, street, plank road, or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank road, or railroad, in such condition and state of repair as not to impair or interfere with its free and proper use," applies to streets and highways laid out subsequently to the construction of the railroad. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

5. RAILROADS—Duty to Construct Crossings.—The right of the state to lay out and open new streets is a condition attached by implication of law to the charter and franchise of a railway company, and the obligation of the company to maintain crossings in good condition at street intersections is a continuing one, follows the franchise, and applies to new streets or highways as they come into existence. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

6. RAILROADS—Safe Crossings—Police Power.—A bridge over railroad tracks at their intersection of a public street is, when necessary to make the crossing safe for use, a "safety device" which the state may, in the exercise of its police power, require the railway company to construct and maintain at its own expense (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

7. RAILROADS—Safe Crossings.—The Right of the State to require a railroad company to construct bridges at crossings where the public safety requires them is a part of the police power, which can neither be contracted away nor lost by inaction on the part of the public authorities. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

Liability for Killing Livestock.

8. RAILROADS—Liability for Killing Stock—Farm Crossings.—A railroad company is not liable, unless negligent, for injury to or the killing of animals that enter upon its tracks by a gate of a private farm crossing. (Ind.) *Chicago etc. Ry. Co. v. Ramsey*, 379.

9. RAILROADS—Liability for Killing Stock—Entries upon Right of Way.—A railroad company is not liable, unless negligent, for killing stock which first entered upon its unfenced right of way, but afterward crossed the land of others and again entered upon such right of way through a gate at a private farm crossing. (Ind.) *Chicago etc. Ry. Co. v. Ramsey*, 379.

10. RAILROADS—Duty as to Stock Wrongfully on Track.—A railroad company owes no duty to be on the lookout for cattle, wrongfully and unexpectedly, on its right of way. (Ind.) *Chicago etc. Ry. Co. v. Ramsey*, 379.

11. RAILROADS—Liability for Killing Stock—Negligence when Question of Fact.—If an engineer in charge of a locomotive actually saw cattle on the track, and could have stopped the train with reasonable effort and safety and thus have avoided killing them, the question whether his failure to do so, under the circumstances, constituted negli-

gence, is a question of fact. (Ind.) Chicago etc. Ry. Co. v. Ramsey, 379.

12. RAILROADS—Killing of Stock—Contributory Negligence.—In an action against a railroad company for killing horses, the question whether their owner was guilty of contributory negligence in turning them out to graze upon uninclosed land near the depot is for the jury. (Or.) Wilmot v. Oregon R. R. Co., 840.

Fencing Track and Station Grounds.

13. RAILROADS—Duty to Fence Track—Station Grounds.—The statutory duty of a railroad company to fence its tracks does not extend to depot grounds, because the purposes for which they are used and the public convenience are inconsistent with the obligation to fence at that point. (Or.) Wilmot v. Oregon R. R. Co., 840.

14. RAILROADS—Duty to Fence Depot Grounds.—Whether it is the duty of a railway company to fence its right of way at its depot grounds is a question of law for the court. (Or.) Wilmot v. Oregon R. R. Co., 840.

15. RAILROADS—Unfenced Depot—Killing of Stock.—Where the law requires railroad companies to fence their tracks except at depot grounds, the question whether unfenced land where animals killed by a moving train entered the right of way is a part of such grounds is for the jury, when the evidence is conflicting and such that different inferences may be drawn therefrom. (Or.) Wilmot v. Oregon R. R. Co., 840.

16. RAILROAD—Depot Grounds Defined.—The depot or station grounds of a railway company is the place where passengers get on and off the trains and freight is loaded and unloaded, including all grounds reasonably necessary or convenient to that purpose, together with necessary tracks, switches, and turnouts for handling and making up trains, storing cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station. (Or.) Wilmot v. Oregon R. R. Co., 840.

17. RAILROADS—Station Grounds—Evidence of What are.—Where grounds have been appropriated, surveyed and set apart by a railway company for station or depot purposes, it affords strong, if not conclusive, evidence that their boundaries and extent are such as and no more than are necessary and proper, and their limits should not be curtailed or extended by the court or jury unless in a very clear case. (Or.) Wilmot v. Oregon R. R. Co., 840.

See Carriers.

RECEIPT.

See Evidence, 7.

RECEIVERS.

1. RECEIVERS—Jurisdiction of Equity to Adjudicate Claims.—The jurisdiction of a court of equity, having attached by the appointment of a receiver to protect the equitable rights of creditors of a concern, will be retained to do complete justice and fully administer upon the property; and in so doing the court may, if it sees proper, adjust claims against the property, arising either out of contract or tort, and make all proper orders in respect to the time and manner of their payment. (Ill.) Shedd v. Seefeld, 269.

2. RECEIVERS—Enforcement of Claims for Torts.—A court of equity that has appointed a receiver has jurisdiction to entertain an intervening petition presenting a claim for damages occasioned by an alleged tort of the receiver, adjudicate the claim, and make a final order for its payment. (Ill.) *Shedd v. Seefeld*, 269.

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RECORDS.

NOTICE.—Recitals in Recorded Deeds not constituting links in the chain of title of a judgment debtor and to which he is not a party, purporting to show equities in third persons, are not notice to him thereof. (Fla.) *Mansfield v. Johnson*, 159.

See Attachment, 4-5; Mortgages, 6-9.

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REFORMATION OF DEEDS.

DEEDS—Reformation as Against Minors.—Where real estate is bought for its full value, and the grantors understand that they are selling and the grantees understand that they are purchasing a fee title, but by mistake words creep into the deed which defeat such intention, it is not inequitable or unjust to correct the deed by striking out those words. (Ill.) *Teel v. Dunnihoe*, 319.

RES JUDICATA.

See Judgments, 5-14.

ROBBERY.

1. **ROBBERY, Force and Fear Essential to.**—Whenever the elements of force and being put in fear enter into the taking and are the cause inducing the owner of personal property to part with it, the taking is robbery, no matter how slight the act of force, or the cause creating the fear may be, nor by what other circumstances the taking may be accomplished. (Wash.) *State v. Parsons*, 1003.

2. **ROBBERY—Obtaining Money by Impersonating Policeman and Threatening an Arrest.**—If two persons, finding a third in an intoxicated condition, announce themselves as policemen, threaten him with arrest for drunkenness, tell him he must go to jail and that they must search him, and thereupon go through his pockets and take money from him, he not resisting because he believes them to be policemen and that they will inflict personal injury on him unless he keeps still, they may be convicted of robbery. (Wash.) *State v. Parsons*, 1003.

3. **ROBBERY—Force, Instruction Concerning.**—It is not error to charge the jury in a prosecution for robbery that the degree of force used is immaterial as long as it was sufficient to compel the prosecuting witness to part with his property. (Wash.) *State v. Parsons*, 1003.

RUNAWAY TEAM.

See Highways.

SALES.

1. **SALES FOR CASH—Delivery—Passing of Title.**—If a contract of sale provides for payment of the purchase price on delivery of the articles sold, and the seller delivers the goods but the buyer fails to pay, the right of property does not pass to the buyer, but remains with the seller, who may, at his option, reclaim the goods. He must exercise such option as promptly as the situation of the parties will allow. Otherwise he must be held to have waived his right, and can only thereafter look to the buyer for the price. (Pa.) *Frech v. Lewis*, 864.

2. **SALES FOR CASH—Delivery Without Payment—Subsequent Promise to Pay.**—In a case of a sale for cash where delivery is made without payment, reliance upon a subsequent promise to pay that leads the seller to refrain from asserting his right to retake the property, is, in itself, a waiver of the right, and makes absolute a delivery which in the first instance was conditional. He cannot thereafter retake the goods, and can look to the buyer only for their price. (Pa.) *Frech v. Lewis*, 864.

3. **SALES FOR CASH—Delivery Without Payment—Fraud and Artifice** practiced by a buyer in a sale for cash, where delivery is made without payment, may excuse delay in attempting to retake the property after delivery, but will not excuse mistaken confidence reposed in the buyer's promises to pay. (Pa.) *Frech v. Lewis*, 864.

4. **SALES—Future Delivery Consideration—Option.**—A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties. (Ind.) *Fowler Utilities Co. v. Gray*, 344.

5. **SALE—Time for Delivery.**—If there is no Agreement fixing the time for the delivery of goods, the law will presume delivery to be made on demand, or at least within a reasonable time. (Ill.) *McKinnie v. Lane*, 338.

Note.

Sales of personalty, delivery absolute and unconditional without exacting payment, 870.

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of personalty, payment, delay in demanding return of goods, when does not waive, 879.

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of personalty, payment, when not necessary to pass title, 869.

of personalty to be paid for on delivery, when does not pass title until payment, 869.

of personalty, waiver of conditions requiring payment, when inferable, 870.

on conditions to be performed immediately, title does not pass by delivery, 869.

SHEEP INSPECTORS.

See Constitutional Law, 10-13.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE—Contract to Deliver Stock.**—Specific performance may be had of a contract to deliver stock, the pecuniary value of which is not provable. (Mo.) *Baumhoff v. St. Louis etc. Ry. B. Co.*, 745.

2. **SPECIFIC PERFORMANCE—Revocable Contracts.**—A court of equity will not interfere to decree the specific performance of a contract where the power of revocation exists. (Ind.) *Fowler Utilities Co. v. Gray*, 344.

3. **CONTRACTS—Determinable at Will—Specific Performance—Injunction.**—A contract which can be terminated at the will of one of the parties without liability for damages, so far as it remains executory, is not binding for want of mutuality and its performance cannot be enforced in equity, either by way of specific performance or injunction. (Ind.) *Fowler Utilities Co. v. Gray*, 344.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Title of Act.

1. **CONSTITUTIONAL LAW—Title of Acts—Subject Matter.**—The effect of a constitutional requirement that "each law enacted

in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title," is to render inoperative any provisions contained in the body of an act that is not fairly included in the subject expressed in the title, or not matter germane to, or properly connected with, that subject. (Fla.) *Ex parte Knight*, 191.

2. CONSTITUTIONAL LAW—Title to Acts—Subject Matter.—Under a constitutional requirement that the subject matter of a statute must be briefly expressed in the title, only such provisions can validly be incorporated in the body of an act as are fairly included in one subject and matter properly connected therewith, which subject is the one that is expressed in the title of the act, and may be as restrictive as the legislature desires to make it. (Fla.) *Ex parte Knight*, 191.

3. CONSTITUTIONAL LAW—Restricted Title to Act—Subject Matter.—When the subject expressed in the title to a legislative act is restricted, only those provisions that are fairly included in such restricted subject and matter properly connected therewith can legally be incorporated in the body of the act, even though other provisions besides those contained in the act could have been included in one act having a single broader subject expressed in its title. (Fla.) *Ex parte Knight*, 191.

4. CONSTITUTIONAL LAW—Title and Subject Matter of Statutes—Interpretation.—In determining whether provisions in an act are embraced in one subject and matter properly connected therewith, the subject to be considered is the one expressed in the title of the act, and every fair intendment and reasonable doubt should be yielded in favor of the validity of the act, but when it contains provisions which, after yielding all fair intendments and reasonable doubts, are clearly not embraced in the subject matter of the act, as expressed in the title or in matter properly connected with that subject, such provisions are inoperative and without effect. (Fla.) *Ex parte Knight*, 191.

5. CONSTITUTIONAL LAW—Title and Subject Matter of Statutes.—If the subject of a legislative act as expressed in its title is restricted to the subject of preventing "the cutting or moving of any timber" from certain lands, a provision in such act to prevent "the gathering or removing any turpentine extracted from the pine timber so cut or boxed" on such lands cannot be said to be fairly included in the subject of the act as expressed in its title and matter properly connected therewith, and it is inoperative and void. (Fla.) *Ex parte Knight*, 191.

6. STATUTES—Title of Act.—"An Act Relating to the preservation, propagation, and protection of game animals" is sufficiently broad to embrace all kinds of deer, whether wild or tame. (Mo.) *State v. Weber*, 715.

Construction of Statutes.

7. STATUTES—Construction—The Operation of Statutes is often extended, by construction, to matters of subsequent creation, and applied to conditions that accrue after their passage, as well as to those that existed before. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

8. STATUTES—Construction—Courts may Carry a Statute beyond the natural import of its words when essential to answer the purpose of the legislature. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

9. STATUTES—Construction—The Intention of a Remedial Statute will always prevail over the literal sense of its terms. Therefore,

when the expression is special or particular, but the reason is general, the expression is deemed general. (Minn.) *State v. St. Paul etc. Ry. Co.*, 581.

STREET RAILWAYS.

See Carriers.

SUBROGATION.

1. **SUBROGATION to the Rights of a Mortgagee.**—A purchaser of real property whose money is used to discharge a valid lien thereon is, upon the failure of his title, subrogated to the lien so discharged. (Ark.) *Neff v. Elder*, 67.

2. **LIMITATIONS OF ACTIONS—Subrogation.**—When one becomes entitled to be subrogated to a mortgage, his suit to enforce the right of subrogation need not be brought within the time originally allowable to foreclose a mortgage. A person entitled to subrogation may bring his suit within a reasonable time after notice of the defect in his title, though the time within which the original mortgagee might have maintained such suit to foreclose his mortgage has passed. (Ark.) *Neff v. Elder*, 67.

TAXATION.

Exemption of Public Property.

1. **MUNICIPAL CORPORATIONS—Assessments for Public Improvements, Liability of School Property for.**—Assessments made for the purpose of laying out, widening and extending a public street are enforceable against real property owned by a public school district and used solely for school purposes, where the assessment is by statute to be apportioned on the several lots, blocks, tracts, and parcels of land found to be benefited thereby. (Wash.) *In re Howard Avenue North*, 973.

2. **ASSESSMENT, Exemption from not Implied from Exemption from Taxes.**—The provision of the state constitution exempting school districts from taxation does not exempt their property from special assessments made to pay for street improvements. (Wash.) *In re Howard Avenue North*, 973.

Tax of License—Nonresident Sheep Owners.

3. **TAXATION—Distinction Between Tax and License.**—The distinction between a tax upon a business or property and a license is that the former is exacted by reason of the fact that the business is carried on or the property is within the jurisdiction of the taxing power, while the latter is required as a condition precedent to the right to carry on such business or have such property within the jurisdiction. (Or.) *Reser v. Umatilla Co.*, 815.

4. **TAXATION of Sheep of Nonresident Owners.**—A statute imposing a tax of a certain sum upon each sheep brought into the state by nonresident owners, which does not confer any special privilege on such owners nor make the payment of the tax a condition precedent to the right to bring sheep into the state, is essentially a revenue law, and unconstitutional because not uniform and equal in its operation. (Or.) *Reser v. Umatilla Co.*, 815.

See Counties, 5-14.

TENANCY IN COMMON.

1. **TENANTS IN COMMON in the Purchase of Real Property—Forfeiture.**—Where two persons have made a purchase of real prop-

erty as tenants in common, and paid part only of the purchase price, one cannot, by notifying the other of the time when the balance must be paid, and that unless he furnishes his share at that time, his interest in the property will be forfeited, acquire the right, on such share not being furnished, to pay the whole, and then claim all the property on receiving a conveyance thereof from the vendor. The one making the whole payment is, however, entitled to hold the interest of the other as security for the repayment of the sum so advanced from him. (Wash.) *Anderson v. Snowden*, 998.

2. **TENANT IN COMMON in Purchase of Real Property, Rights of Where He has not Paid His Share of the Purchase Price.**—If two persons purchase, as tenants in common, real property, and one not advancing his share of the unpaid purchase price, the other pays the whole, the former is not entitled to a decree quieting his title to the undivided one-half of the property, he not having paid his share of the purchase price, but the court, in a suit between them to quiet title, may ascertain the amount due from the one cotenant to the other and declare that if the payment is made within a time specified, the party paying shall be the owner of the undivided one-half of the property, and if he fails to make such payment, then a decree may be entered against him quieting title in favor of the one who has made payment of more than his share. (Wash.) *Anderson v. Snowden*, 998.

3. **TENANTS IN COMMON—Notice to One of Several.**—When persons are jointly pursuing a common purpose of acquiring title to land by purchase as tenants in common, notice to one concerning the condition of the title is notice to all. (Ark.) *Neff v. Elder*, 67.

4. **COTENANCY—Trespass Quare Clausum.**—If the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his cotenant therein, the injured owner has a right of action trespass quare clausum. (Me.) *Davis v. Poland*, 480.

5. **COTENANCY—Trespass Quare Clausum.**—If a cotenant is in possession of the premises, the removal of doors and windows from the residence thereon by his cotenant, without his consent, for the purpose of rendering such residence uninhabitable, and not in good faith, as for the making of repairs, constitutes such a destruction of the common property, as makes such cotenant a trespasser, and liable in damages. (Me.) *Davis v. Poland*, 480.

6. **COTENANCY—Damages for Trespass.**—If one cotenant is in the possession of the premises, the removal of the doors and windows from the residence thereon, by his cotenant, without his consent, for the purpose of rendering such residence uninhabitable, renders the trespassing cotenant liable in actual damages, but the injured cotenant cannot recover for actual suffering endured by voluntarily assuming the discomfort of living in the house for several weeks before attempting to make the necessary repairs. (Me.) *Davis v. Poland*, 480.

Note.

Tenants at Sufferance, whether entitled to notice to quit, 42.

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TITLE OF STATUTES.

See Statutes.

TORTS.

See Abatement and Revival.

TRADE NAMES.

TRADE NAMES, Right to Exclusive Use of, When not Acquired.—If, when the defendant adopted a trade name, the plaintiff had not acquired any right in his trade name, and it had not become identified with the plaintiff among dealers and the general public, and the defendant adopted his name in good faith, without any intention to wrong plaintiff or acquire his business, then neither acquired any better right to the use of his trade name than the other to the use of his. (Mass.) *Giragorian v. Chutjian*, 570.

TRADE UNIONS.

See Conspiracy.

TRESPASSERS.

See Negligence, 21; Tenancy in Common.

TRIAL.*Instructions.*

1. **TRIAL—Erroneous Instructions—Assuming Verdict.**—An instruction assuming that the jury is going to find for the plaintiff, and assess the value of the services in question, and which is limited alone to directions as to what the jury should take into account in making the assessment is erroneous. (Mo.) *Morrell v. Lawrence*, 660.

2. **APPEAL AND ERROR—Jury Trial.**—If the court gives only general instructions when special should also have been given, this is not a ground for reversal at the instance of a party, who did not object to the action of the court when taken, nor make a request for additional instructions. (Ark.) *St. Louis etc. Ry. Co. v. Dupree*, 74.

3. **TRIAL—Instructions.**—Remarks of the court to the jury during the progress of the trial calling attention to the purpose for which certain evidence is admitted are not instructions. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

4. **TRIAL.—Oral Exceptions to Instructions to be effective** must be entered upon the record. (Ind.) *Providence Washington Ins. Co. v. Wolf*, 395.

5. **TRIAL—Findings—Presumption.**—If a finding is silent upon a material fact, it will be presumed not to exist, as against the party having the burden of proof. (Ind.) *Chicago etc. Ry. Co. v. Ramsey*, 379.

6. **TRIAL—Instructions.**—If the jury has been fully instructed, it is not error to refuse to give further and additional instructions. (Ind.) *Broadstreet v. Hall*, 356.

7. **TRIAL—Instructions.**—An instruction stating to the jury that in determining the disputed question, it should consider all the evidence upon that question in the case, together with all the facts and circumstances shown to exist in the case which have any bearing thereon, is not open to the criticism that it permits the jury to consider evidence which is not pertinent or relevant to the issue. (Ind.) *Broadstreet v. Hall*, 356.

8. **INSTRUCTIONS.**—A Party cannot Complain of an instruction given on behalf of his adversary like one given at his own request. (Ill.) *McKinnie v. Lane*, 338.

Excessive Verdict.

9. **TRIAL—Excessive Verdict.**—It is peculiarly within the province of the trial court to set aside a verdict as excessive. (Mo.) *Morrell v. Lawrence*, 660.

See Criminal Law, 4-6.

TROVER AND CONVERSION.

1. **TROVER—Sufficiency of Complaint.**—In an action of trover it is sufficient to allege the conversion as a fact without stating the particular acts constituting the unauthorized assumption and exercise of the right of ownership. (Or.) *Austin v. Vanderbilt*, 800.

2. **TROVER—Tender by Pledgor Before Suit.**—Where property has been converted by the pledgee thereof, no tender of the debt by the pledgor is necessary before bringing an action for the conversion. (Or.) *Austin v. Vanderbilt*, 800.

3. **TROVER—Measure of Damages—Evidence of Value.**—The value of property at the time of its conversion is generally the measure of damages in an action of trover; but to ascertain that value, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible. (Or.) *Austin v. Vanderbilt*, 800.

TRUST DEEDS.

1. **TRUST DEEDS—Foreclosure—Rights of Purchaser—Jurisdiction of Equity.**—A person holding a trust deed cannot, by a decree of a court of equity, be compelled to pay a sum fixed by the court as the value of the land at the time of the trustee's sale, for the purpose of purchasing it. (Mo.) *Hewitt v. Price*, 681.

2. **TRUST DEEDS—Foreclosure—Rights of Purchaser.**—The purchase of land at trustee's sale under a deed of trust must be entirely voluntary, and if the sale is valid the purchaser is entitled to hold the land; if it is invalid by reason of any informality in conducting the sale or by any fraud perpetrated by the purchaser, it must be set aside. (Mo.) *Hewitt v. Price*, 681.

3. **TRUST DEEDS—Foreclosure—Fraud—Burden of Proof.**—If it is sought to set aside a trustee's sale under a deed of trust upon the ground of misrepresentation or fraud, the burden of proof is upon the person charging such fraud or misrepresentation. (Mo.) *Hewitt v. Price*, 681.

4. **TRUST DEEDS—Foreclosure—Fraudulent Sale—Remedy.**—If a trustee's sale under a deed of trust is unfair and surrounded by a state of facts which shows to the reasonable satisfaction of the chancellor that to permit it to stand would work a fraud upon the rights of the mortgagors, then such sale should be set aside and the parties placed in the position they occupied before any sale took place, or, at the election of the mortgagors, the sale may be set aside upon the condition that the amount of the mortgage debt, together with interest, be fully paid and satisfied. (Mo.) *Hewitt v. Price*, 681.

ULTRA VIRES.

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VENDOR AND VENDEE.

1. **VENDOR AND VENDEE—Forfeiture of Vendee's Rights.**—Where a bond for a deed provides that in case of default in payments the vendor may declare the bond void and repossess himself of the premises, the mere default of the vendees does not work a forfeiture of their rights unless the vendor elects to insist on a strict performance, in which case he is required to give timely notice of his intention to cancel the contract. (Or.) *Higinbotham v. Frock*, 796.

2. **VENDOR AND VENDEE—Forfeiture of Vendee's Rights.**—A vendor cannot, because of a default in payments, forfeit the rights of the vendees when he himself is not in a position to perform the contract of sale. (Or.) *Higinbotham v. Frock*, 796.

3. **VENDOR AND VENDEE—Forfeitures.**—A Court of Equity will not declare a forfeiture against a vendee, but will leave the vendor to his legal remedy. (Or.) *Higinbotham v. Frock*, 796.

4. **VENDOR AND VENDEE.**—A Bond for a Deed Transfers to the Vendee an equitable title. (Or.) *Higinbotham v. Frock*, 796.

5. **VENDOR AND VENDEE—Foreclosure of Vendee's Interest.**—An application for strict foreclosure against a vendee under a bond for title is addressed to the discretion of the court, and will not be granted without giving him a reasonable time to comply with his contract. (Or.) *Higinbotham v. Frock*, 796.

6. **A VENDOR'S LIEN not Expressed in the Conveyance** is not enforceable against subsequent purchasers without notice. (Ark.) *Neff v. Elder*, 67.

VENUE.

See Ejectment, 2.

VERDICT.

See Trial, 9.

WATERS AND WATERCOURSES.*Channel of Stream.*

1. **WATERCOURSE.**—The "Channel" of a Stream is the passage-way between the banks through which the water flows; it may include the flow of water between an island and a bank of the stream. (Or.) *Morton v. Oregon Short Line Ry. Co.*, 827.

Water Company—Construction of Ditches and Supply of Water.

2. **WATERS, Finding as to Use of, When Too Indefinite.**—In a suit respecting the use of water it is not sufficient to find that the plaintiff had not the water every ten or twelve days from a specified ditch, but the court should find as to the manner in which the plaintiff had and was entitled to the use of the water, and what rights with respect thereto had been acquired by him. (Utah) *Bartholomew v. Fayette Irrigation Co.*, 912.

3. **WATERS, Corporation Owning a Majority Interest in, Rights and Powers of.**—When a majority of the persons owning a water right which had been used and which they are entitled to use on their lands form a corporation and transfer their interests to it, the corporation acquires no greater or different rights than were held by the several persons so conveying to it, and hence it has not the right to deny to a minority owner not joining in the corporation the

same right to the use of the water which he had before the corporation was formed. It cannot, as a majority owner, exercise an absolute power over the water, and if it undertakes to do so, the court will interpose to compel it to permit the use by the minority owner of the water to which he is entitled. To the extent of his interest the minority owner has an equal right with the corporation to a voice in the proceedings to determine matters of regulation and distribution of the water in which he is interested. (Utah) *Bartholomew v. Fayette Irrigation Co.*, 912.

4. **PUBLIC LANDS, Right to Construct Water Ditches as Against Persons Initiating Homestead Rights.**—After the initiation of a homestead claim, though before the issuing of a patent thereto, no one has the right against the claimant to enter upon the land and construct and maintain a water ditch without making compensation therefor, and the title of the claimant, on his receipt of a patent, relates to such initiation and enables him to maintain a suit to enjoin the maintenance of such ditch until compensation is made. (Wash.) *Atkinson v. Washington Irr. Co.*, 978.

5. **ESTOPPEL BY DELAY to Object to the Digging of a Canal.**—A homestead claimant, by failing to object to the digging of an irrigation ditch on the lands claimed, is not, on the receipt of his patent, estopped from maintaining a proceeding to enjoin the continuance of such ditch until compensation is made. (Wash.) *Atkinson v. Washington Irr. Co.*, 978.

Liability of Water Company for Fires.

6. **CORPORATIONS—Waterworks Company—Liability of for Damages Caused by Fire.**—If a waterworks company enters into a contract with a city under which it enjoys extensive franchises and privileges, such as the exclusive right to furnish water to the city and its inhabitants for a long period, the right to have special taxes levied on the property of the citizens for its benefit, the right to use the streets with its mains and hydrants, and the right to charge tolls and regulate the use of water, it thereby assumes the public duty of furnishing water for extinguishing fires, and for negligence in the discharge of this duty, whereby a fire department, adequately equipped and prepared, is not furnished with water, and property is, on account of such negligence, destroyed by fire, such water company is liable in an action of tort to the property owner for the damages thus suffered by him. (Fla.) *Mugge v. Tampa Waterworks Co.*, 807.

Right of Riparian Owner to Defend Against Stream.

7. **WATERCOURSE—Defense Against Swollen Stream.**—The swollen current of a river during floods is a part of the stream, and not surface water against which a land proprietor may combat as he would oppose a common enemy to the injury of other proprietors. (Or.) *Morton v. Oregon Short Line Ry. Co.*, 827.

8. **WATERCOURSE—The Terms "Dam," "Jetty," "Dike," and "Embankment" Defined and Distinguished.**—An embankment or dike is a structure of earth or other material usually placed upon the bank of a stream or near the shore of a lake or bay and extending across low land to higher ground, forming a continuous bulwark or obstruction to water, and designed to keep it without the inclosure thus formed. A dam is a structure erected in and usually extending across the entire channel at right angles to a stream, and intended to retard the flow of water. A jetty is a kind of dam

intended to deflect the current, so as to deepen the channel or to form an eddy below the obstruction in which sediment may be deposited thereby extending and protecting the bank. (Or.) *Morton v. Oregon Short Line Ry. Co.*, 827.

9. **WATERCOURSE.**—Courts Take Judicial Notice of the laws of nature governing the effect on riparian lands of deflecting the waters of a swollen stream by the construction of a jetty. (Or.) *Morton v. Oregon Short Line Ry. Co.*, 827.

10. **WATERCOURSE.**—The construction of a jetty in a river by a railroad company to protect its property in times of high water, which jetty, by deflecting the current of the stream or shoaling its waters, injures a lower proprietor, is unlawful and will be enjoined. (Or.) *Morton v. Oregon Short Line Ry. Co.*, 827.

WILLS.

In General.

1. **WILLS**—Clause Dispensing with Administration.—A provision in a will directing the executor to administer the estate "without going into court or taking letters testamentary" is void. (Mo.) *Sevier v. Woodson*, 728.

2. **WILLS**—Interpretation of Valid and Invalid Portions.—A will may be valid in part and invalid in part, but in determining what was the real scheme of disposition in the mind of the testator, the valid and invalid portions must be alike considered, since it is presumed that in formulating his scheme he supposed all portions legal and valid. (Mo.) *Sevier v. Woodson*, 728.

3. **WILLS**—Elimination of Invalid Clauses.—Invalid provisions in a will may be rejected and the valid provisions given effect, if the general scheme of disposition entertained by the testator is not thereby changed. (Mo.) *Sevier v. Woodson*, 728.

4. **WILLS**—Trusts—Repugnant Clauses.—Where one clause of a will appoints the two sons of the testator trustees of the property devised for their own use and benefit during their natural lives, the effect of the devise, without an intervening trustee, is to vest in the sons a life estate, and a subsequent clause depriving them of the power of alienation is repugnant to the estate devised and therefore void. (Ill.) *Streit v. Fay*, 304.

Agreement to Make Will.

5. **WILLS**—Agreement to Make—Consideration.—The privilege of naming a child given to a testator by its parents is a sufficient consideration to support a contract to bequeath property to such child. (Wis.) *Freeman v. Morris*, 1038.

6. **WILLS**—Agreement to Make Indefiniteness.—A contract to bequeath something to a person named without specifying any certain property or sum of money is void for indefiniteness and uncertainty, and it is not rendered valid by statements made to third persons by the testator that he was going to bequeath to the person named a certain sum of money, nor by wills executed by him bequeathing such sum, if such wills are revoked by a later will wholly omitting such bequest. (Wis.) *Freeman v. Morris*, 1038.

Estate Created by Devise.

7. **WILLS**—Cutting Down Gift by Subsequent Clause.—An estate granted in plain and unequivocal language in one clause of a will cannot be lessened or cut down by a subsequent clause, unless the

language therein is as clear, plain and unequivocal as that in the first grant. (Mo.) *Sevier v. Woodson*, 728.

8. WILLS—Creation of Life Estate and Remainder.—A devise to the wife of the testator for and during her natural life, and at her death to the daughter of the testator and her two children, creates in the latter a vested remainder, subject only to a life estate in the widow. (Ill.) *Deadman v. Yantis*, 291.

9. WILLS—Creation of Tenancy in Common.—A devise to the testator's two daughters "jointly" creates, under the Missouri statutes, an estate in common and not in joint tenancy. (Mo.) *Cohen v. Herbert*, 772.

Contest of Will.

10. WILL CONTEST—Testamentary Capacity—Former Adjudication.—On the contest of a will by the heirs of the testatrix, the pleadings and decree in a suit by her guardian against the proponent canceling certain of her contracts made about the time of the execution of the will, on the ground of unsoundness of mind, are admissible on the issue of testamentary capacity. (Iowa) *In re Estate of Hendershott*, 438.

11. WILL CONTEST.—The Order of Introduction of Evidence in a will contest is largely in the discretion of the court. (Iowa) *In re Estate of Hendershott*, 438.

12. WILL CONTEST.—The Costs of a Will Contest between the proponent who claims the estate of the decedent under the will and the contestants who claim as heirs at law are properly charged to the unsuccessful party. (Iowa) *In re Estate of Hendershott*, 438.

Conclusiveness of Probate.

13. WILLS—Conclusiveness of Probate.—When a will has been admitted to probate the judgment of probate is a judicial act binding upon all the world until set aside in the mode and within the time allowed by law. (Mo.) *Cohen v. Herbert*, 772.

14. WILLS—Conclusiveness of Foreign Probate.—Where a will was executed and probated in New York in conformity with the statutes of Missouri, and an authenticated copy thereof was recorded in Missouri, in a county where some of the devised land is situated, the heirs cannot, after the expiration of five years without any contest, collaterally attack the probate decree in ejectment to recover the land on the ground that the will had been revoked, under the laws of both states, by the marriage of the testatrix after its execution. (Mo.) *Cohen v. Herbert*, 772.

Note.

Wills, intent of the testator governs, 739.

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uncertainty in one part, when does not render the whole void, 741.

WITNESSES.

WITNESS, Wife Against Husband on a Prosecution for Bigamy. The first wife is not competent as a witness against her husband on a prosecution for bigamy. (Wash.) State v. Kniffen, 1000.

WORDS AND PHRASES.

WORDS AND PHRASES.—The Word "Shoot" is synonymous with "kill," and is frequently, perhaps usually, employed in that sense. (Minn.) Bader v. New Amsterdam Cas. Co., 613.





